

NINETY-SEVENTH SESSION

Judgment No. 2361

The Administrative Tribunal,

Considering the second complaint filed by Mrs A. T. against the European Patent Organisation (EPO) on 13 October 2003, the EPO's reply of 16 January 2004, the complainant's rejoinder of 17 February, the Organisation's letter of 31 March to the Registrar of the Tribunal saying that it did not wish to enter a surrejoinder, the complainant's letter of 28 April to the Registrar, and the Organisation's observations thereon of 5 May 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to the present case are to be found in Judgment 2145, delivered on 15 July 2002, on the complainant's first case. As explained in that judgment, on 28 November 1993 the complainant reached the maximum period of sick leave on full pay, allowed pursuant to Article 62(6) of the Service Regulations for permanent employees of the European Patent Office – the EPO's secretariat. An invalidity procedure ensued.

Following recommendations made by the Invalidity Committee, in late 2002 and early 2003 the complainant underwent examinations in two different clinics. The Committee met on 2 April 2003 and finalised a report on her case on 16 June 2003. In that report the Committee indicated that the complainant's working hours should be reduced by 40 per cent. It also said that her continued employment in her former place of work made no sense "from a therapeutic point of view", adding that: "Unless it is possible to employ her elsewhere, it appears best to terminate the contractual relationship by mutual agreement". The Committee indicated that it would meet again in January 2004. The report was signed by two of the three members of the Committee. The doctor appointed by the complainant did not sign it. He had set out his reasons for not doing so in a letter of 28 May 2003, where he concluded that the complainant should be accorded invalid status. The complainant's counsel wrote to the Head of Personnel Administration on 7 July, raising objections to the Invalidity Committee's report; he enclosed a copy of the comments issued by the complainant's appointee.

By a letter of 18 July 2003 the Head of Personnel Administration informed the complainant that the Committee had found that she was not suffering from total invalidity and that a position meeting the criteria specified in the Invalidity Committee's report would become available for her from 1 August. It was in the mailroom in a different building from the one she had previously worked in; the reduction in working hours of 40 per cent would apply, and her extended sick leave would end on 31 July 2003. That is the decision the complainant impugns. On 31 July the complainant submitted a "certificate of unfitness for work", for the period up to 28 August 2003. She underwent another medical examination in early September.

Following queries made by the complainant, on 1 August 2003 the Office confirmed that the impugned decision was taken on the basis of the opinion of the Invalidity Committee and was unappealable before the Appeals Committee.

The complainant was later assigned invalidity status from 1 April 2004.

B. The complainant contends that the decision of 18 July should be revoked on the grounds that it was not taken on the basis of an opinion of the Invalidity Committee; rather, it rested on the observations of two out of the three members of the Committee, and the report consisted of no more than a pre-printed form they had filled in. Furthermore, the medical practitioner appointed by her did not sign the report and raised a significant number of

objections to it in his letter of 28 May 2003. The complainant objects to the report principally because it was based on medical examinations that took place some years previously and could not provide an objective assessment of her current symptoms. She adds that when she attended the university clinic at the end of 2002 it was expressly recommended that an opinion of an environmental medical expert should be obtained, but that did not happen. The Committee ignored existing diagnoses of her case made by experts in environmental medicine and other specialists. She considers that the assessment in the Invalidity Committee's report is arbitrary and flawed.

Her own appointee on the Committee held the opinion that she was suffering from a 50 per cent degree of disablement, which, she argues, demonstrated she was seriously ill and should be granted invalidity status. She says it is evident from Article 62(7) of the Service Regulations that mental illness counts as a serious illness and can lead to total invalidity. She does not share the EPO's interpretation of the observations in the Invalidity Committee's report regarding the non-advisability of her continued employment "in her former place of work". To her the Committee's comment in the report could only be understood to mean that she could no longer be employed at the EPO; it does not mean that she should just change buildings within the EPO. She takes issue with what she terms the EPO's "unlawful conduct", given that it took damaging decisions against her at a time when she was seriously ill, and caused wilful damage to her health.

The complainant seeks the quashing of the impugned decision, as well as moral damages, and costs.

C. In its reply the EPO claims that the complaint is unfounded. The Service Regulations do not provide that opinions by the Invalidity Committee have to be unanimous, and the way the Committee is constituted clearly provides for a two thirds majority. The Committee's report finalised on 16 June 2003 was therefore lawfully drafted and adopted by a majority. The fact that the complainant's appointee expressed a dissenting opinion and did not sign the report does not take away its validity. The defendant does not accept her argument that existing diagnoses of her case were not taken into consideration.

It was, moreover, on the basis of the Committee's findings in the report that the Office offered the complainant the chance to resume work at the EPO albeit in a different building but with similar duties. Although the Committee raised the possibility of terminating the contractual relationship with the complainant, it also allowed for the eventuality of reassigning her, as is clear from the relevant sentence in the report which began: "Unless it is possible to employ her elsewhere [...]".

The Organisation rebuts the complainant's claims to damages. It adds that a new report by the Invalidity Committee is due and a majority of the Committee now agrees that the complainant is "permanently incapable of performing [her] duties".

D. In her rejoinder the complainant presses her claims to damages and costs. She contends that it is through no fault of her own that the Invalidity Committee has so far failed to produce a final opinion. She submits that problems have arisen because of the inadequate provision in the Service Regulations regarding the functioning of invalidity committees, and regrets the lack of implementing rules.

E. By a letter of 28 April 2004 the complainant informed the Tribunal that since the EPO now considers she has a 100 per cent degree of disablement her complaint is "mainly done". She nevertheless presses her claim for moral damages and costs.

F. In its observations on that letter the Organisation states that the situation regarding the complainant's invalidity status has now been clarified. It also reiterates its opinion that her claims for damages and costs should be dismissed.

CONSIDERATIONS

1. As indicated in Judgment 2145, the case of the complainant, who was frequently away on sick leave and had not returned to the Office since July 1994, was referred to the Invalidity Committee. In its report of 17 October 1997, the Committee recommended that she undergo an inpatient examination at a clinic, adding that "[u]ntil she has undergone this inpatient assessment she must be regarded as unfit for work".

2. The complainant underwent the prescribed medical examinations only in November 2002 and January 2003, following which the Invalidity Committee met on 2 April 2003. It was made up of three members: the doctor

appointed by the President of the Office, the doctor appointed by the complainant and Dr H. designated by the first two. In its report, the Committee concluded, by a majority verdict, that the mental illness diagnosed in the complainant did not amount to a severe illness but required a reduction of 40 per cent in her working time. The Committee added that her continued employment in her former place of work made no sense from a therapeutic point of view and that, unless it was possible to employ her elsewhere, it appeared best to terminate the contractual relationship with the Office by mutual agreement. The doctor appointed by the President of the Office signed this report on 25 April 2003 and Dr H. signed it on 16 June 2003, but the doctor appointed by the complainant refused to sign. In a letter dated 28 May 2003, he explained that the Committee's report was based on medical examinations conducted a long time ago, that the complainant should have been recognised as being no longer able to perform any job at the EPO and that she should thus be granted invalid status.

3. The Head of Personnel Administration sent the complainant a copy of the Invalidity Committee's report on 1 July 2003. Despite objections raised in a letter of 7 July by the complainant's counsel, on 18 July he again wrote to the complainant informing her that a post other than that which she had occupied previously was being made available to her, that her working hours would be reduced by 40 per cent and that she should therefore report for duty on 1 August 2003, on the understanding that her extended sick leave would end on 31 July 2003.

4. The complainant contested that decision on 22 July; she did not take up her new position but, on 31 July, sent the Office a medical certificate, dated 29 July, certifying that she was unfit for work up to and including 28 August. On 1 August 2003 the Head of Personnel Administration confirmed the decision taken in accordance with the opinion of the Invalidity Committee, adding that the Office reserved the right to have the complainant undergo a medical check-up by a medical adviser. On 4 September 2003 she was examined by Dr H., who concluded, in a report of 30 October, that in the light of his examination of the complainant and of numerous medical certificates she had submitted, she was indeed unfit for service for the time being on the grounds of illness, that it was not possible to tell whether, in the foreseeable future, she would be fit for service again and that it was not reasonable to expect of her that she resume her duties at the EPO. Meanwhile, the complainant had appealed to the Tribunal against the decision of 18 July 2003 instructing her to resume work on a part-time basis as from 1 August 2003.

5. In her complaint, filed directly with the Tribunal, which raises no problem of receivability since it concerns a decision taken after consultation of the Invalidity Committee, the complainant contends that the latter's assessment is flawed and that the Committee should have recognised her unfitness for work for the period after 1 August 2003. She submits that the faults committed by the Organisation have caused her moral injury for which she is entitled to compensation.

6. After the filing of her complaint, the Invalidity Committee, following Dr H.'s report, reconsidered its position after meeting on 14, 26 and 29 March 2004, and the EPO informed the complainant on 6 April 2004 that it recognised that she was totally unfit for duty and that she should cease her duties on 1 April 2004. The complainant forwarded this information to the Tribunal on 28 April, adding that, in the circumstances, her claims were mostly satisfied, but that she maintained her claims regarding compensation for moral injury and for the payment of costs.

7. The defendant considers that, since the complainant has been assigned invalidity status from 1 April 2004, the situation is now clarified. It presses its opinion, nevertheless, that the claims for moral damages and costs should be dismissed.

8. The claim for the quashing of the decision of the Head of Personnel Administration dated 18 July 2003 must now be considered redundant. However, the conditions in which the Invalidity Committee initially gave its opinion that the complainant was fit to resume work need to be examined in order to rule on her claim based on moral injury.

9. The question, therefore, is whether the Invalidity Committee's report drawn up after its meeting of 2 April 2003 could provide a solid basis for the impugned decision. Undoubtedly the Tribunal, in keeping with consistent precedent, may not replace the findings of medical boards with its own. But it does have full competence to say whether there was due process and whether the reports used as a basis for administrative decisions show any material mistake or inconsistency, or overlook some essential fact, or plainly misread the evidence (see Judgment 1284, under 4).

In the present case, the Tribunal notes that many of the examinations on which the Invalidity Committee had based its opinion had been performed a long time ago, as shown by its report. Whereas the doctor appointed by the

complainant monitored her condition throughout her treatment starting in 1994 and refused to sign the report, the other two physicians had not examined her directly since September 1998, for one of them, and since September 1997 for the other. It is true that the Committee also took account of two more recent reports issued by specialised clinics, but it is indicated, and not expressly denied by the defendant, that the opinion of one psychiatric expert is dated 12 November 2002. Furthermore, it is difficult to reconcile the Committee's opinion whereby the complainant remains fit for work with the view that her continued employment in her former place of work made no sense from a therapeutic point of view, and that, unless it was possible for the Office to employ her elsewhere, it appeared best to terminate the contractual relationship by mutual agreement. Lastly, it appears from the EPO's brief in reply that Dr H. examined the complainant on 4 September 2003 and considered her unfit for service "for the time being" and probably incapable of ever resuming her duties. In its brief the EPO considered that it was "highly probable" that the complainant would be assigned invalidity status and recognised that a majority of the Invalidity Committee now agreed that the complainant was permanently incapable of performing her duties.

Since there is no evidence to suggest that the complainant's disability, which has lasted for many years, grew worse between 16 June 2003, when Dr H. signed the Committee's report, and 4 September 2003, when he examined the complainant personally, it must be admitted that the Committee's conclusions, soon belied by the facts, could not serve as a legal basis for the impugned decision. The decision of 18 July 2003, instructing the complainant to resume work, was therefore based on an opinion by the Committee which could not be and was not in the event sustained.

10. The complainant bases her claim for moral damages on the attitude adopted by the EPO, both in the present case and in that leading to Judgment 2145, on the delays in the procedure and on irregularities committed in the handling of her case, which allegedly affect the operation of the Invalidity Committee in general. Contrary to her allegations, it is by no means established that the complainant's health deteriorated as a result of the Organisation's behaviour, particularly during the withholding of her salary, which had led to the earlier judgment in her favour. While the slowness of the procedure is undoubtedly regrettable, it is due in part to the fact that the complainant delayed undergoing the requested medical examinations. Lastly, there is nothing in the evidence to support the conclusion that the defendant was ever biased against the complainant. Nevertheless, the latter did suffer moral injury, as a result of the irregularity identified above in this judgment and belatedly made good. The Tribunal considers that to be fairly compensated by an award of 2,000 euros.

11. Since she succeeds, the complainant is entitled to costs, which are set at 1,500 euros.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's claim to set aside the decision of 18 July 2003 by the EPO's Head of Personnel Administration.
2. The Organisation shall pay the complainant 2,000 euros in moral damages.
3. It shall also pay her 1,500 euros in costs.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.