NINETY-EIGHTH SESSION

Judgment No. 2386

The Administrative Tribunal,

Considering the complaint filed by Mrs H. M. against the European Patent Organisation (EPO) on 9 October 2003 and corrected on 23 October 2003, the Organisation's reply of 2 February 2004, the complainant's rejoinder of 7 May, the EPO's surrejoinder of 20 August, the complainant's further submissions of 5 October and the Organisation's comments thereon dated 12 October 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant was born in 1947 and has British nationality. Having joined the European Patent Office – the EPO's secretariat – in 1979 at grade B2, she was promoted to grade B3 in September 1980 and to grade B4 in August 1989. Her last post at the EPO was that of Formalities Officer at the Office's headquarters in Munich. When she retired she was awarded an invalidity pension with effect from 1 July 2000.

In August 1998 an Invalidity Committee was convened to examine the complainant's case because, following a prolonged period of illness, she had reached the end of the maximum period of entitlement to sick leave. In accordance with Article 89 of the Service Regulations for Permanent Employees of the European Patent Office, the Committee comprised three medical practitioners, the first being appointed by the President of the Office, the second by the complainant and the third by mutual agreement between the first two.

On 19 May 2000, the Invalidity Committee having not yet issued an opinion, the complainant lodged an appeal asking the Office to urge the medical practitioner whom it had appointed to complete the report form and forward it to the other two Committee members for signing, and to provide her with a medical report on his examination of her, which had been performed on 22 September 1999. She also claimed costs.

In the event, it was the third medical practitioner and the complainant's appointee who signed the Invalidity Committee's report first, on 27 and 29 May 2000, respectively. Both concluded that the complainant had a severe illness, that she was suffering from total invalidity and that she was permanently unfit for work. They considered that her illness was an occupational disease within the meaning of Article 14(2) of the Pension Scheme Regulations. By a letter of 19 June 2000 they declared the proceedings before the Committee closed, stating that the Office's appointee had had enough time to provide his opinion. The Office's appointee signed the report on 27 June 2000, indicating in an opinion appended to the report that he did not agree with the findings of the other two Committee members, which he considered to be insufficiently substantiated, particularly with regard to their conclusion that the complainant was suffering from an occupational disease.

By a letter of 8 August 2000 the Vice-President of Directorate-General 4 asked the third medical practitioner and the complainant's appointee to comment on the dissenting opinion of the Office's appointee and to provide detailed grounds for their finding that the complainant was suffering from an occupational disease. They replied on 7 and 9 November 2000, respectively. Meanwhile, the complainant's counsel had written to the Office on 16 August 2000 asking it to confirm the closure of the invalidity proceedings and the start of the complainant's early retirement on the basis of the majority decision by the Invalidity Committee. Having reiterated this request in a letter of 7 December 2000, counsel for the complainant lodged a second appeal on 15 March 2001, again seeking confirmation of the closure of the invalidity proceedings on the basis of the Invalidity Committee's report and requesting that the resulting measures for the complainant's early retirement be initiated immediately. A claim for costs was also submitted.

By a letter of 24 April 2001 the Employment Law department informed the complainant's counsel that in the absence of a valid opinion from the Invalidity Committee, the invalidity proceedings had not been completed and the request for early retirement could not be granted. The following explanation was given:

"According to established case law of the competent international administrative courts, and in particular the Court of First Instance of the European Communities (see judgment of 18 January 2001 in case T-65/00, paragraphs 23 and 46 of the grounds), a medical opinion must provide a plausible link between the medical findings and the resulting conclusion drawn.

In the opinion of the President, the opinions of neither [the complainant's appointee] nor [the third medical practitioner] meet this requirement."

At the request of the complainant's counsel, the same department sent her a copy of the cited judgment under cover of a letter of 25 May 2001, providing a few explanatory notes. The complainant challenged the "decision" contained in that letter by lodging a third appeal, on 30 July 2001, in which she claimed the same redress as in her previous appeal.

The Appeals Committee issued an opinion on all three appeals on 15 January 2003. It considered that it was competent to review all non-medical aspects of the Invalidity Committee's decision. Having noted that, as far as the question of permanent disability is concerned, a majority opinion by the Invalidity Committee "has the same legal effects as a unanimous decision", the Appeals Committee saw no reason to doubt the majority's findings that the complainant was suffering from a serious illness and that she was permanently and totally unable to perform her duties. However, it considered that the finding that she was suffering from an occupational disease was not plausibly substantiated. It upheld her claim for costs and unanimously recommended that the appeals be allowed "to the extent set out in [its] opinion".

By a letter of 17 March 2003 the Principal Director of Personnel informed the complainant that the President of the Office had decided to follow the recommendation of the Appeals Committee and that she would therefore receive an invalidity pension, a lump-sum payment for serious illness and reimbursement of her legal costs. He added that the other details of the President's decision would follow shortly.

In a letter to the President dated 4 April 2003, the complainant's counsel stated that no payments had been made to the complainant and that they had received no information on how he wished to treat "the occupational illness of [her] client which was ascertained by the invalidity committee".

The details of the sums due to the complainant pursuant to the President's decision of 17 March 2003 were sent to her in a letter dated 21 August 2003, in which it was also pointed out that, for the reasons stated in the Appeals Committee's opinion and those communicated in the letter of 17 March, the Office considered the cause of invalidity to be a serious illness, within the meaning of Article 62(7) of the Service Regulations, but not an occupational disease. The complainant challenges that decision of 21 August 2003.

B. The complainant contests the Appeals Committee's finding that the plausibility of an occupational disease was not established by the majority of the Invalidity Committee. She asserts, in particular, that the medical practitioners were neither obliged nor entitled to substantiate the existence of the occupational disease in their report, given that diagnoses and other details of illnesses suffered by staff members are confidential and cannot be disclosed to their employer. She invites the Tribunal to determine whether the medical practitioners' findings contain material errors or inconsistencies and to that end provides a detailed account of her occupational activities and medical history.

She also contends that the letter of 17 March 2003 contained no mention of the issue of occupational illness, and she disputes the calculations of the various sums to which the Office informed her that she was entitled in its letter of 21 August 2003.

The complainant asks the Tribunal to find that her permanent disability is attributable to an occupational disease. She claims 2,999.78 euros plus interest in salary arrears, 2,000.51 euros plus interest for untaken leave, 7,901.27 euros for damage caused by default, interest on two amounts representing legal costs reimbursed by the Office, at least 2,000 euros in moral damages, 25 euros representing the cost of a request for payment and a further award to cover her legal costs as well as translation costs not covered by her other claims. She also claims 175,099.58 euros – with interest on part of that amount – representing the lump sum due under Article 84(1)(b) of the Service Regulations, which had been paid in September 2003 but was returned to the Office by the complainant on the grounds that the Office had allegedly not transferred it to the bank account she had designated. In addition, she asks the Tribunal to order the EPO to ensure, firstly, that its appointed medical practitioner provides her with

copies of the test results from the medical examination of 22 September 1999 and, secondly, that in all cases such information is routinely provided to the staff members concerned, even in invalidity proceedings. Lastly, she asks the Tribunal to order the Organisation to compensate her for any future damage attributable to its delay in paying her pension.

C. In its reply the EPO submits that the complainant's first claim is irreceivable because the President's decision of 17 March 2003, by which he endorsed the recommendation of the Appeals Committee and hence rejected the finding that the complainant's illness was an occupational disease, was communicated to her on 19 March 2003 and should have been challenged within 90 days of that date, in accordance with Article VII(2) of the Tribunal's Statute. It considers that her claim for moral damages is irreceivable because it was not submitted in her internal appeal, and that her remaining claims are irreceivable for failure to exhaust internal remedies, because they relate to the decision of 21 August 2003, against which she has not lodged an internal appeal.

In subsidiary arguments on the merits, the Organisation submits that the President's decision to follow the Appeals Committee's recommendation that the complainant be awarded an invalidity pension, but not on account of occupational disease, fully complied with the applicable provisions of the Service Regulations and with the Tribunal's case law. It explains in detail the disputed calculations contained in the letter of 21 August 2003 and asserts that the complainant's claims in this regard are unfounded.

D. In her rejoinder the complainant presses her pleas. She asserts that the letter of 17 March 2003 contained no mention of the issue of occupational disease, nor any reason for rejecting the finding of the Invalidity Committee on that issue, and that it does not refer expressly to her right of appeal. In view of the fact that certain sums have been paid to her by the Office since the filing of her complaint, some of her claims are amended or withdrawn.

E. In its surrejoinder the Organisation submits that the complainant's rejoinder contains no argument liable to make it alter its position.

F. In her further submissions the complainant again amends some of her claims to take into account the fact that further payments have been made by the Office.

G. In its final comments the EPO submits that it has explained the procedure governing the reimbursement of costs to the complainant's counsel. It indicates that a further payment corresponding to interest is to be made as soon as possible and refers, with regard to the remaining claims, to the arguments set forth in its reply.

CONSIDERATIONS

1. Following a long period of sick leave, the complainant, a former employee of the EPO, had her case referred to an Invalidity Committee pursuant to the Service Regulations. In its report the Committee found that the complainant was suffering from a serious illness and that she was permanently unable to perform her duties. Those findings triggered the complainant's right to retirement with an invalidity pension and to receive a lump-sum award. Two of the three doctors on the Committee also considered that she was suffering from an occupational disease, a finding which if upheld would augment the amounts due to her on retirement. The third doctor expressly rejected that finding and the EPO did not give immediate effect to it, instead seeking clarification from the members of the Committee.

2. The complainant maintains that her illness was caused by exposure to toxic substances in the workplace. She filed three appeals, the first aimed at bringing the invalidity proceedings to a close, the other two aimed at implementing the findings of the Invalidity Committee. The Appeals Committee joined the three appeals.

3. The Appeals Committee's opinion issued on 15 January 2003 was generally favourable to the complainant, the Committee finding her appeals receivable and recommending that she be paid an invalidity pension and her costs. It considered, however, that the finding that she was suffering from an occupational disease was not plausibly supported by any evidence. The relevant passages from its opinion read as follows:

"46. In the opinion of the Appeals Committee, the findings of the majority of the Invalidity Committee on the invalidityof the appellant pursuant to Article 84(1)(b) [of the Service Regulations] satisfy these requirements. The report is based on numerous medical examinations and findings […]. Establishing permanent and total disablement is plausibly substantiated in point 2 of the report form referring to the long history of the illness. Simply the fact

that the doctor appointed by the Office on the Invalidity Committee assesses the findings differently does not mean that the findings of the majority of the Committee with reference to their examinations should be called into question. There is no reason to suggest inconsistent medical findings or medical findings that are implausible for other reasons and that the Appeals Committee would have been able to pursue within its examining competence.

47. The Committee also sees no reason to doubt the finding of a serious illnesswithin the meaning of Article 62(7) […]. The majority of experts give an unfavourable prognosis and rule out recovery by the appellant. […]

48. However, affirmation by the majority of the Invalidity Committee that the patient is suffering from an occupational diseasewithin the meaning of Article 14(2) [of the Pension Scheme Regulations] does not, in the opinion of the Appeals Committee, satisfy the requirements to be applied to the plausibility test. The report contains no grounds. The appellant cannot rely on the fact that the form does not provide for them. The design of the form is not decisive with respect to the question of whether the finding of an occupational disease is to be substantiated. This is a decision with far-reaching consequences in pension law. Grounds may not be necessary in undisputed cases. In disputed cases, however, they must be provided. […] there was no explanation as to the decisive question of a link between the diagnosed illnesses and the appellant's occupational activity.

The toxic pollution in the workplace claimed by the appellant also requires verifiable evidence such as the causality of these circumstances with respect to the damage to health established by the majority of the Invalidity Committee. The Office correctly points out that there are no comments on the causal link between the appellant's occupational activity and illness. It is also unclear what criteriahave been used in the Invalidity Committee's assessment of whether this is a case of occupational disease. […]

2.3 Costs

49. The [Appeals] Committee considers it reasonable for the appellant to be paid the costs she has incurred […]. Her request for enforcement of the findings of the Invalidity Committee is to be granted in respect of the matters essential to her, namely retirement, payment of a pension and lump sum payment. The Committee therefore considers the payment of all costs to be reasonable.

IV. Recommendation

For the above reasons, the […] Appeals Committee recommends unanimouslythat the appeals be allowed to the extent set out in this opinion."

4. By a letter dated 17 March 2003 the Principal Director of Personnel informed the complainant's counsel that the President had decided to follow the recommendation of the Appeals Committee. The text of that letter relevantly reads:

"Internal appeals RI/53/00, 17/01 and 51/01 […]

The President of the Office has examined the above cited cases concerning the invalidity procedure in respect of [the complainant].

I am pleased to inform you that he has decided to follow the unanimous recommendation of the […] Appeals Committee to allow the appeals. This means that your client will receive an invalidity pension under Article 54(2) of the Service Regulations and a lump sum payment […] due to serious illness (Article 62(7) of the Service Regulations). Furthermore, she is entitled to reimbursement of the legal costs in relation to the above appeals […]. Upon receipt of the relevant bills concerning the legal costs in the said proceedings, the appropriate reimbursement will be made […].

The other details of this decision will follow shortly."

5. Then, on 21 August 2003, the interim Director of Conditions of Employment and Statutory Bodies wrote to the complainant setting out in detail the calculations of the various amounts which the Office reckoned to be due to her under the terms of the Appeals Committee's opinion which the President had accepted. The first paragraphs of that letter read:

"I would like to refer to the decision of the President communicated to you by our letter dated 17.3.03, as well as to

the [report] of the Invalidity Committee on your case communicated to you on the 17.7.00 and the above letters.

As a result of the President's decision dated 17.3.03, you are entitled to invalidity pension as from 1stJuly 2000 under Article 54(2)of the [Service Regulations] and Article 17(1) of the Pension Scheme Regulations. Furthermore, you are entitled to a lump sum payment under Article 84(1)(b)of the [Service Regulations] calculated on the basis of the salary you received for June 2000. For the reasons stated in the […] Appeals Committee's opinion andthose communicated to you by our letter dated 17.3.03, the Office considers the cause of invalidity to be a 'serious illness' as defined in Article 62(7)[of the Service Regulations] and not 'occupational disease'.

As a result of the above decision you wouldbe entitled to the following benefits […]."

6. By her complaint with the Tribunal the complainant seeks primarily the reversal of the decision not to consider her illness as an occupational disease. She also takes issue with the various amounts and calculations of benefits set out in the EPO's letter of 21 August 2003, which she identifies as the impugned decision.

7. The Organisation contests the receivability of the complaint. It says that the final decision on the issue of whether or not the complainant is suffering from an occupational disease is contained in the letter of 17 March 2003, by which the President allowed the complainant's appeals to the extent recommended by the Appeals Committee. The complaint filed on 9 October 2003 cannot contest that decision as it is outside the ninety-day time limit set by the Tribunal's Statute. The defendant also says that the remainder of the complainant's claims are irreceivable since they simply contest the detailed calculations for the execution of the decision of 17 March. They were conveyed to the complainant for the first time in the letter of 21 August 2003 and if the complainant wished to contest them she should first have done so through the internal appeal procedure. It concludes that since she has not exhausted the available internal means of redress that part of the complaint is also irreceivable.

8. The complainant contends that the letter of 17 March 2003 was ambiguous because it did not mention the question of occupational disease and contains a reference in the last paragraph to "other details" which would follow. She also contends that the letter contains no reasons for rejecting the finding of an occupational disease, nor any indication that it is the President's final decision and that any further appeal would have to be by recourse to a complaint before the Tribunal.

9. It is noteworthy that the complainant's counsel had written to the President of the Office on 4 April 2003 stating in part:

"In the meantime, however, nothing has happened. We have not received written account, nor have any payments been made to my client. We also have no information on how you wish to treat the occupational illness of my client which was ascertained by the invalidity committee.

[...]

I request that you make a statement as soon as possible so that progress can finally be made in this long-drawn-out matter.

If I am informed of no decision, especially in connection with occupational disease and the lump sum payment, by 16.04.03at the latest, then I will consider myself caused to bring a complaint in accordance with Art. VII (3) of the [Tribunal's Statute] in connection with Art. 109(2) [of the Service Regulations]."

10. This letter clearly indicates a regrettable misunderstanding by the complainant's counsel as to the meaning of the communication of 17 March 2003. That document refers unambiguously to the internal appeals by reference number and to the unanimous recommendation of the Appeals Committee which the President "ha[d] decided to follow". It also states in broad terms the consequences of the decision, namely an invalidity pension, a lump-sum payment and costs, in words which closely track those of the Appeals Committee's opinion at paragraph 49 (above).

11. That opinion itself leaves no room for doubt. It explains in detail why the Appeals Committee accepts the findings of invalidity and serious illness and why, rightly or wrongly, it rejects the finding of occupational disease because of the lack of any evidence of a causal link between the complainant's occupation and her disease. It concludes with a recommendation that the appeals be allowed "to the extent set out in this opinion". The latter phrase is manifestly one of limitation. It is simply impossible to read that opinion as having "ascertained" the

complainant's occupational disease as suggested in the letter of 4 April from her counsel. On the contrary, the Appeals Committee rejected that finding, and the President endorsed that rejection along with the rest of the opinion.

12. There was no requirement for the President to give any reasons in support of the decision other than to indicate that he accepted and adopted the reasons given by the Appeals Committee. There was also no requirement that, especially in a letter addressed to a legal counsel, he should set out the rules governing the possibility of an appeal to the Tribunal. In fact, as the quoted passage of the counsel's letter of 4 April demonstrates, the latter was fully aware of the provisions of the Tribunal's Statute.

13. Insofar as it deals with the issue of occupational disease, the letter of 21 August 2003 simply confirms the earlier decision of 17 March 2003. Therefore, it is not a new decision and it does not set a new time limit for the complainant. It follows that the complaint is irreceivable to the extent that it seeks to attack the decision expressed in the letter of 17 March 2003.

14. It is likewise for the remaining prayers for relief contained in the complaint, all of which relate to the manner of execution of the decision conveyed in the letter of 17 March, the "other details" mentioned at the conclusion of that letter relating to such matters as calculation of salaries and pensions, entitlement to annual and home leave, costs and the like. Most of these are mentioned in the letter of 21 August 2003 addressed to the complainant and all represent administrative decisions taken by the Organisation as to the extent and nature of its liability under that decision. As such, they cannot be put in issue before the Tribunal independently of the decision of 17 March unless the complainant first exhausts the internal means of redress available to her. She has not done so.

15. The complaint is accordingly irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr James K. Hugessen, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

James K. Hugessen

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.