Registry's translation,
the French text alone being authoritative.

104th Session **Judgment No. 2714**

The Administrative Tribunal,

Considering the second complaint filed by Ms C.M.J.M P. against the European Patent Organisation (EPO) on 14 September 2006 and corrected on 12 October 2006, the Organisation's reply of 18 January 2007, the complainant's rejoinder of 28 June and the EPO's surrejoinder of 5 October 2007;

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 this dispute are given in Judgment 2432, delivered on 6 July 2005, concerning the complainant's first complaint. In June 2003 she was informed that her case was going to be referred to an Invalidity Committee because she had exhausted the maximum period of paid sick leave provided for in Article 62 of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO. At that time paragraph 7 of this article read as follows:

"If, at the expiry of the maximum period of [paid] sick leave […], the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee […] shall be entitled to half the basic salary received at the expiry of the maximum period of [paid] sick leave […]. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of this basic salary."

As the complainant was suffering from both gynaecological and orthopaedic disorders, the Invalidity Committee comprised: one gynaecologist chosen by the complainant – Dr H., her own regular practitioner – and two orthopaedists, namely the Office's medical adviser, who was appointed by the President of the Office, and Dr O., a practitioner chosen by agreement between the first two. In January 2004, after examining the complainant, the three doctors filled in a form serving as a report; this report indicated that they were of the unanimous opinion that "[i]t [was] not a case of an illness/disability comparable in seriousness to cancer, tuberculosis, heart disease, poliomyelitis or neurological or mental illnesses". It was also specified that the Committee had not held any meeting. The complainant asked the Tribunal to order that her case be referred back to the Invalidity Committee. The Tribunal considered that, in view of the uncertainty and differences of opinion obtaining in certain respects, that body should have met before issuing its final decision. Consequently, it set aside the impugned decision and sent the case back to the Organisation "for reconsideration of the question of whether the complainant's incapacity to perform her duties during the period in question was the result of a serious illness in the meaning of Article 62(7) of the Service Regulations in its version in force prior to 1 January 2004".

Pursuant to that judgment the Invalidity Committee met on 20 January 2006 to ascertain whether the health problems giving rise to the complainant's incapacity for work between 11 February and 22 September 2003 constituted a serious illness within the meaning of the above-mentioned paragraph 7. In its report the majority of its members (i.e. the Office's medical adviser and Dr O.) concluded that:

"The orthopaedic disorder does not constitute a disease comparable in seriousness to the serious illnesses mentioned in Article 62(7), nor is it the result of an accident.

[T]he disorder which led to incapacity during the period in question was gynaecological in nature.

It must be noted here that while this was certainly a serious disorder, it did not endanger the patient's life and was ultimately curable. Despite its seriousness it is not comparable to a growing metastasising cancer, to an incurable form of tuberculosis or to heart disease leading to a lasting reduction in capacity for work."

Dr H. refused to sign the report and on 20 February he set out his opinion in a letter which was appended to the report. In his opinion the disorder in question was comparable in seriousness to cancer, tuberculosis, heart disease, poliomyelitis or a neurological disorder.

On 10 March the secretary of the Invalidity Committee forwarded to the Personnel Administration Department a copy of the report in which the medical details had been blue-pencilled, but she did not attach a copy of Dr H.'s opinion which contained abundant medical information. On 22 May the complainant wrote to the President of the Office to explain that, in her opinion, the Invalidity Committee had concluded that her incapacity for work during the period of extended sick leave was the result of a serious illness; relying on Article 62(7), she therefore considered that she was entitled to her full salary throughout that period, and she claimed reimbursement, with interest, of the amounts deducted from her salary as well as compensation for moral injury. By a letter of 19 June 2006, which constitutes the impugned decision, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to endorse the majority opinion of the Committee. Since this opinion corroborated that contained in the Committee's first report, the President considered that the deductions from the complainant's salary since February 2004 were justified.

On 14 July the complainant requested that her illness be recognised as a serious illness and that she be reimbursed for all the deductions from her salary. On 23 August 2006 she received the reply that, as the provisions governing internal appeals did not apply to decisions taken after consultation of the Invalidity Committee, she could refer the matter directly to the Tribunal.

B. The complainant states that between 31 March 2003 and 31 December 2005 half of her salary was withheld on the grounds that it had not been recognised that her incapacity for work resulted from a serious illness. She submits that the conclusion reached by the medical adviser and Dr O. – namely that the illness from which she was suffering was serious, but not comparable in seriousness to a growing metastasising cancer or an incurable form of tuberculosis, inter alia – is irrelevant in that it does not refer to the criteria set out in Article 62(7). Since Dr H. was the only gynaecologist on the Committee, his opinion does not constitute a dissenting opinion but, on the contrary, supplements that of his two colleagues. The overall conclusion to be drawn from these opinions is that she was suffering from an illness comparable in seriousness to cancer or tuberculosis within the meaning of the above-mentioned paragraph 7. Consequently, the complainant believes that the refusal to reimburse her for the amounts deducted from her salary is unfounded.

Moreover, the complainant comments that, when drawing up their report, the three doctors filled in only part of the form which should normally be filled in at the end of proceedings before the Invalidity Committee. Relying on Judgment 2537, she submits that Dr H.'s opinion formed an integral part of the Committee's report, yet the impugned decision was taken without reference to it. Similarly, this decision was adopted on the basis of an incomplete and "misleading" version of the report, since some parts of it had been blue-pencilled.

The complainant asks the Tribunal to quash the decision of 19 June 2006, to order the EPO to reimburse the amounts deducted from her salary together with interest at a rate of 8 per cent per annum, and to award her 3,000 euros in costs.

C. In its reply the EPO contends that Dr O., an orthopaedist, was appointed by agreement between the two other doctors and that if Dr H. had been of the opinion that the main cause of the complainant's incapacity for work was a gynaecological disorder, he ought to have objected to the third member of the Committee being an orthopaedist, whereas he expressed no reservation in that respect. The Organisation considers that it was pointless to fill out the whole of the form again in order to reply to the question of whether, during the period at issue, the illness causing incapacity for work was a serious illness. It adds that the use of such a form is not required by the Service Regulations. Furthermore, the reference to Judgment 2537 is not pertinent insofar as the composition of the Committee in question was different in the case leading to that judgment.

The EPO submits that the Personnel Administration Department is the body responsible for executing the President's decisions and that it does not need to be apprised of medical details in order to do so; in the instant case all it needed to know was whether the complainant's illness had been described as serious, because this is the question which had implications for her salary. Moreover, the forwarding of the full unexpurgated version of the Invalidity Committee's report would have breached medical secrecy. The Organisation emphasises that in any case the President's decision is taken independently of the forwarding of the Committee's conclusions to the Administration.

The EPO holds that the Invalidity Committee's opinion is clear and shows that the doctors' reasoning is based on the reference to Article 62(7) of the Service Regulations. The doctors deduced from the examples of diseases mentioned in that paragraph that a "serious illness" was one which was life-threatening or which led to a lasting reduction in the patient's capacity for work. This interpretation is both "reasonable and necessary for the application of this provision". On the basis of this interpretation the doctors found that the complainant's gynaecological disorder did not constitute a serious illness. The President of the Office – who is a medical doctor – drew the correct conclusion from this report and, consequently, the deductions from the complainant's salary were justified.

D. In her rejoinder the complainant asserts that she did express reservations about the composition of the Invalidity Committee, particularly in June 2003. In her view, Dr H. was the only specialist able to reply to the question of whether the health problems giving rise to her incapacity for work constituted a serious illness within the meaning of Article 62(7), and the only one who provided a plain answer. Since the two other doctors did not fill out the whole of the form, they did not answer the question raised by the Tribunal and did not therefore supply the President of the Office with the information he required in order to take his decision. The complainant maintains her claims but also asks the Tribunal to recognise that her health problems constituted a serious illness within the meaning of Article 62(7).

E. In its surrejoinder the Organisation maintains its position. It states that it has found no indication in the complainant's personal file that she ever objected to the composition of the Invalidity Committee.

CONSIDERATIONS

1. In her first complaint (see Judgment 2432) the complainant challenged the "decision" of the members of the Invalidity Committee responsible for giving an opinion on her state of health, who in the report which they signed in January 2004 had unanimously considered that "[i]t [was] not a case of an illness/disability comparable in seriousness to cancer, tuberculosis, heart disease, poliomyelitis or neurological or mental illnesses".

In consideration 5 of that judgment the Tribunal stated that:

"in view of the uncertainty regarding the period referred to in assessing the seriousness of the complainant's illness, of the fact that she was suffering

from afflictions requiring treatment by different medical specialists and of the differences of opinion which emerged regarding the seriousness of the illness and the incapacity it caused, the Tribunal considers that the Invalidity Committee should have met before issuing its final decision. Since no meeting took place, the procedure leading up to the impugned decision is flawed even though the practitioner appointed by the complainant did not raise any objection. The decision must therefore be set aside and the case sent back to the Organisation for reconsideration of the question of whether the complainant's incapacity to perform her duties during the period in question was the result of a serious illness in the meaning of Article 62(7) of the Service Regulations in its version in force prior to 1 January 2004."

2. On 31 August 2005 the EPO informed the complainant that the Invalidity Committee would meet as required by the Tribunal in order to give its opinion on the cause of her incapacity.

3. The Invalidity Committee comprising the same members who had already issued an opinion met on 20 January 2006. The majority of its members concluded that the complainant's incapacity for work had been caused by a gynaecological disorder which, while it was "a serious disorder, […] did not endanger the patient's life and was ultimately curable", and that despite its serious nature this disorder was "not comparable to a growing metastasising cancer, to an incurable form of tuberculosis or to heart disease leading to a lasting reduction in capacity for work". However, the doctor appointed by the complainant considered that it was a "serious illness" and that the patient had "such acute symptoms that she was completely unable to perform her duties"; his opinion was recorded in a separate document appended to the report drawn up by his two colleagues.

4. On 10 March the secretariat of the Invalidity Committee forwarded a copy of the Committee's report to the Administration without appending the opinion of the doctor whom the complainant had appointed.

5. In a letter of 22 May 2006 addressed to the President of the Office, the complainant asserted that, in her opinion, the Invalidity Committee had arrived at the conclusion that her inability to perform her duties during the period of extended sick leave was due to a serious illness and that consequently she was entitled to full pay throughout that period pursuant to Article 62(7) of the Service Regulations. She claimed reimbursement, with interest, of the sums deducted from her salary.

6. On 19 June 2006 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to endorse the majority opinion of the Invalidity Committee and considered that the deductions from her salary from February 2004 onwards were justified. That is the decision which has been referred to the Tribunal.

7. The complainant asserts that the refusal to reimburse her for the amounts deducted from her salary is unfounded.

She points out that when the members of the Invalidity Committee delivered their opinion they did not fill out the usual multiple-choice questionnaire. In her view, the doctor she had appointed was alone competent to reply to the question asked, because he was the only gynaecologist on the Committee. Relying on Judgment 2537 she submits that this doctor's opinion formed an integral part of the Committee's report and that the impugned decision was taken without reference to that part of the report.

She contends that the two doctors who issued the majority opinion concluded that the gynaecological disorder causing her incapacity for work was a serious illness, although not comparable to a growing metastasising cancer, incurable tuberculosis or heart disease leading to a permanent reduction in capacity for work. She submits that while the latter finding is indisputable because it is self-evident, it is nonetheless irrelevant in that it refers neither to Article 62(7), nor to the criteria defined by that provision, which do not require that the illness be terminal or incurable, or that it must lead to a permanent reduction in capacity for work.

8. The EPO argues that the complaint should be dismissed as unfounded. It asserts that the interpretation given to Article 62(7) by the doctors who issued the majority opinion was "reasonable and necessary". On the basis of that interpretation the doctors concluded that the complainant's gynaecological disorder did not constitute a serious illness.

9. The Tribunal draws attention to the fact that the sole question which the Invalidity Committee had to answer, as indicated in Judgment 2432, was whether the complainant's incapacity for performing her duties during the period at issue was the result of a serious illness within the meaning of Article 62(7) of the Service Regulations which, in the version in force prior to 1 January 2004, read as follows in pertinent part:

"However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of [his or her] basic salary."

10. The Tribunal will not rule on the submissions regarding the composition of the Invalidity Committee or on those concerning the use of the form, because the complainant has not entered any specific claim in that respect.

As for the reference to Judgment 2537, the Tribunal, like the EPO, considers that it is not pertinent.

11. On the remaining points, it is well settled that the Tribunal 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 for example Judgments 1284, under 4, and 2361, under 9).

12. In the present case, the Tribunal notes that the doctors delivering the majority opinion, having stated that the disorder leading to incapacity during the period in question was gynaecological in nature and that it was serious, then felt that they should add that this disorder did not threaten the patient's life and was ultimately curable and that, despite its seriousness, it was not comparable to a growing metastasising cancer, an incurable form of tuberculosis or heart disease leading to a lasting reduction in capacity for work. Yet under Article 62(7) of the Service Regulations they were simply asked to say whether the disease in question was a serious illness comparable to cancer, tuberculosis, poliomyelitis, mental illness or heart disease, without any additional clarification regarding the form or stage of such diseases or their potential sequelae.

While they implicitly recognised that the disorder suffered by the complainant constituted a serious illness comparable to those mentioned in Article 62(7), the doctors delivering the majority opinion added further considerations which in effect restrict the scope of paragraph 7. The Tribunal holds that these doctors gave the text an interpretation which cannot be accepted.

13. In view of the foregoing, the decision taken by the President of the Office on the basis of a majority opinion expressed by doctors who misinterpreted the provisions of Article 62(7) must be quashed.

14. In the light of the opinion of the doctor appointed by the complainant – who was the only gynaecologist on the Invalidity Committee – and of the fact that, as stated above, the doctors who delivered the majority opinion implicitly recognised that the disorder constituted a serious illness comparable to those listed in Article 62(7) of the Service Regulations, the Tribunal concludes that the provisions of that paragraph must be applied to the complainant, who is therefore entitled to her full basic salary throughout the period in question. The sums which were unduly deducted must therefore be reimbursed together with interest at a rate of 8 per cent per annum.

15. The complainant is entitled to costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is quashed.

2. The EPO shall reimburse the complainant the sums deducted from her salary together with interest at a rate of 8 per cent per annum, as stated above in consideration 14.

3. It shall pay her 2,000 euros in costs.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.