106th Session **Judgment No. 2789**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr W. A. against the European Patent Organisation (EPO) on 20 December 2007, the Organisation's reply of 17 April 2008, the complainant's rejoinder of 3 June and the EPO's surrejoinder of 18 September 2008;

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. The complainant is a German national, born in 1950, who joined the European Patent Office – the EPO's secretariat – in March 1991 having been granted leave of absence from the German civil service, to which he still belongs. He is employed as a patent examiner, based in Munich, and currently holds grade A4.

The Head of the Personnel Administration Department informed him, by a letter of 13 August 2007, that he had exhausted his entitlement to sick leave on full pay and that, consequently, a Medical Committee was being convened to consider what course of action

should be taken. The Committee, which comprised two medical practitioners, one appointed by the President of the Office, the other by the complainant, issued an opinion on 26 September in which it found that the complainant could return to work as from 1 November, albeit on a part-time basis. The opinion also indicated that the Office's appointee had examined the complainant on 13 September 2007, that the complainant's appointee, who was his treating physician, had examined him at regular intervals and that the latter had also provided a detailed medical report, dated 15 September 2007, on which the opinion was based.

By a letter of 17 October 2007 the Head of the Personnel Administration Department notified the complainant that, in accordance with the Medical Committee's opinion, he was to resume his duties at 50 per cent on 1 November, monitored by the Office's Occupational Health Service with a view to gradually increasing his working hours. The Committee would meet again in April 2008 to review the situation. He was also informed of the implications of this arrangement for his salary and benefits. On 20 December 2007, in accordance with Articles 107(2) and 109(3) of the Service Regulations for Permanent Employees of the European Patent Office, the complainant lodged a complaint with the Tribunal impugning the decision of 17 October 2007.

B. According to the complainant, the impugned decision is unjustified. He states that he is doing his best to perform his duties, but that he is having to use his annual leave at regular intervals in order to convalesce. Moreover, he is uncertain whether he will be able to continue working in that way, and he fears that he may lose the pension rights he has accumulated with the German civil service in the event of "an irregular retirement from the EPO".

The complainant submits that the opinion of the Medical Committee, on which the impugned decision is based, is incomplete and therefore defective in several respects. He points out that the

opinion does not indicate whether the members of the Committee actually met, and that the Committee's secretariat refused to provide any information in this regard. In his view, it was particularly important in this case that the Committee should meet to deliberate, because the member appointed by him did not consult him before preparing his report and therefore probably had insufficient knowledge of the duties he performs.

He also draws attention to the fact that many of the details provided in the medical report of 15 September 2007 submitted by his appointee are not mentioned in the Medical Committee's opinion and therefore cannot have been considered by the Administration when it took the decision which is now impugned. For example, his appointee's report describes in detail the limitations on his capacity to work, indicating in particular that "in most cases, the pain suffered after being seated for approximately half an hour is so intolerable that the patient must stand up and keep moving", but the Committee's opinion does not refer to any such limitations. Similarly, his appointee had stated in his report that an MRI scan could be provided for the purposes of diagnosis and that the Committee should await the results of a course of sclerotherapy that the complainant was then undergoing; yet the Committee finalised its opinion before that treatment had been completed and before the results of the scan had been obtained, so that neither element was taken into account in the impugned decision. Nor is there any indication in the Committee's opinion that the complainant's specific duties and his journey to work were taken into account.

Lastly, the complainant submits that the conclusion reached by the Medical Committee is inconsistent with the established limitations on his work capacity. He describes the tasks that he performs as an examiner and, referring again to his appointee's findings in the report of 15 September, asserts that the time required for most of these tasks exceeds the maximum sitting time of 30 minutes indicated by his physician. However, the Committee reached the general conclusion that he was able to perform 50 per cent of his duties without any further restrictions. In the complainant's view, this conclusion is inconsistent with the health problems it identified.

He asks the Tribunal to set aside both the impugned decision and the Medical Committee's opinion and to either recognise his invalidity or send the matter back to the Committee for a new opinion, taking into account the "defects" mentioned above. He seeks compensation, in the form of annual leave, in respect of the period from 1 November 2007 until the date when a new decision is taken; compensation for direct and indirect financial loss caused by the Medical Committee's opinion, including loss of salary and loss of pension entitlements with both the EPO's pension scheme and the German civil service scheme; and compensation for the additional pain suffered on days when he had to work pursuant to the impugned decision. He also claims costs.

C. In its reply the EPO recalls that, according to the case law, the Tribunal may not replace the findings of medical boards with its own, though 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 an essential fact, or plainly misread the evidence.

Referring to Judgment 2432, it submits that in the present case there was no need for the two members of the Medical Committee to meet, since they agreed on all points. In particular, the complainant's appointee did not need to hold a meeting with the other member of the Committee in order to consult him regarding the complainant's duties.

The EPO rejects the argument that the Committee's opinion was incomplete because it did not list all the limitations on the complainant's capacity for work. It points out that the President's appointee, who is the EPO's medical adviser, was entirely familiar with the physical requirements of the job of an examiner. Furthermore, in the absence of any evidence to the contrary, it may be assumed that the limitations mentioned in the medical report of 15 September, on which the Committee based its opinion, were taken into account and that the President's appointee was able to judge

whether those limitations made it impossible for the complainant to work as an examiner. Similarly, it may be assumed that the difficulties faced by the complainant in travelling to work were taken into account by the Committee. The EPO observes in this connection that, pursuant to Article 92(3) of the Service Regulations, the Committee's deliberations are secret; consequently, there was no need for the Committee to record its discussions on these points in any document.

With regard to the results of the complainant's sclerotherapy treatment and of the MRI scan mentioned in the medical report of 15 September, the EPO points out that in that same report the complainant's appointee had already reached the conclusion that his patient could resume his duties on a 50 per cent basis as from November 2007, and he therefore clearly did not consider that those results were liable to alter his conclusion as to the complainant's capacity to work.

D. In his rejoinder the complainant presses his pleas. He argues that since the limitations on his capacity to work are identified in such clear and readily comprehensible terms in the medical report of 15 September, the Tribunal is fully competent to decide whether or not the conclusions reached in the Medical Committee's opinion were correct. He points out that his duties cannot be adapted appropriately if the Administration is not informed by the Committee that he can only remain seated for 30 minutes at a time.

E. In its surrejoinder the EPO maintains its position. It notes that the Medical Committee's follow-up meeting, which was scheduled to take place in April 2008, was held in March 2008. Since the Committee members could not reach an agreement as to the measures that should be taken, they decided to appoint a third doctor to the Committee, in accordance with Article 89(3) and (4) of the Service Regulations. After each doctor had examined the complainant, the Committee met again on 30 May and decided that he was fit to resume work on a full-time basis as from 16 June 2008.

CONSIDERATIONS

1. The complainant impugns the Office's decision that his sick leave should not be extended beyond 31 October 2007 and that he should resume his duties on a 50 per cent basis as from 1 November of that year, monitored by the Office's Occupational Health Service, with a view to gradually increasing his working hours.

2. That decision followed the recommendation of the Medical Committee, which indicated in its opinion of 26 September 2007 that its findings were based on a report of 15 September 2007 submitted by the complainant's physician, and that the Committee would meet again to examine his case in April 2008. The complainant argues, in essence, that the Committee's opinion is defective in several respects and that, consequently, the impugned decision, being based on that opinion, is invalid. His claims are set out under B, above.

3. The report of 15 September, which was prepared after extensive examination of the patient and his medical records, is well reasoned and complete, and it reveals no material mistake or inconsistency, nor does it overlook any essential fact or plainly misread the evidence.

4. As far as concerns the opinion of the Medical Committee, although it is true, as the complainant asserts, that the form on which the opinion is set out does not have all its blanks filled, this may be due to the fact that the Committee was acting entirely on the basis of the report submitted by the complainant's physician, and that another examination was scheduled for the near future. Moreover, it is quite clear from the file that his medical condition was to be monitored during his return to work, and the fact that a second examination by the Committee was scheduled for April 2008 did not preclude other evaluations of his condition, if needed because of further information about his health.

5. The complainant objects to the fact that the Medical Committee issued its opinion without awaiting the outcome of an MRI scan mentioned in the report of 15 September. However, the report produced by the radiology centre where that scan was performed on 5 October 2007 contains no medical comment about its possible impact on the complainant's condition. Thus, the fact that it is not mentioned in the impugned decision of 17 October 2007 is of no importance because, even if mentioned, it would not lead to a conclusion of invalidity.

Moreover, the complainant puts forward no argument as to why the results of the scan would have made a difference to the Committee's opinion, in view of the other commitments undertaken by the Organisation, namely, to monitor his medical condition during his return to work and to have his case reviewed by the Committee in April 2008.

6. The complainant further asserts that his own doctor acted without consulting him, that "it is highly questionable whether he had sufficient knowledge of the complainant's specific duties" and that it is unclear whether or not the Medical Committee met to discuss his case. He contends that these three "defects" likewise invalidate the Committee's opinion.

7. As for the first argument, the fact that his physician was appointed by him as a member of an independent advisory body does not at all translate into a duty on the part of the physician to consult further with his patient before acting: it may be assumed that, as the complainant's doctor, he knows his case history well and did not need to consult further with him before giving his professional opinion in an independent advisory body.

8. The complainant's second assertion that his own doctor did not have sufficient knowledge of his specific duties as an examiner at the EPO, even if it were minimally credible, which it is not, would be in any case only attributable to him, since this would imply that he

had failed to inform his physician of his work conditions prior to appointing him to the Committee.

9. As for the third argument, it is true that the Medical Committee's opinion was signed on different dates by the two doctors, but since it was entirely consistent with the complainant's physician's report, it is difficult to see what difference such a meeting would have made. As the Tribunal held in Judgment 2432, under 5, "[a] meeting may not be absolutely necessary […] if the Committee members agree on all the points of their individual reports".

In the instant case the fact that the Committee members did not meet cannot be considered to invalidate their opinion.

In general, the conduct of the complainant's physician seems to be above reproach. This is of course a private matter between patient and doctor and one on which the Tribunal does not have jurisdiction to rule, except to the extent that the complainant's allegations – that owing to the "defects" discussed above he was denied due process – have to be flatly rejected.

10. The complainant also points out a supposed contradiction between his physician's report and the opinion that the latter signed in his capacity as a member of the Medical Committee: the physician indicated in his report of 15 September that the Committee should await the outcome of a course of sclerotherapy, which was expected to be completed at the end of October 2007, yet he signed the Committee's opinion on 26 September, before those results had been obtained. However, as the defendant rightly points out, it may be inferred from the fact that the complainant's physician was able to conclude in his report of 15 September that his patient could return to work on a part-time basis as from November 2007, that he did not expect the results of the said treatment to alter his conclusion as to the complainant's capacity to work.

11. Lastly, it is to be observed that the impugned decision was temporary in nature, for it was subject to medical supervision of the complainant and dependent on the outcome of the next Medical

Committee meeting in April 2008. The Tribunal notes that in May 2008 the Committee, strengthened by the appointment of a third member, reached the conclusion that the complainant was fit to resume work on a full-time basis as from 16 June 2008. The conclusion is that the impugned decision is valid and does not bear any flaw.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Agustín Gordillo
Catherine Comtet