Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

L. (No. 3)

v.

EPO

127th Session **Judgment No. 4117**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr C. L. against the European Patent Organisation (EPO) on 5 April 2013, the EPO's reply of 19 August, the complainant's rejoinder of 30 October 2013, the EPO's surrejoinder of 11 March 2014, the complainant's additional submissions of 24 March 2015 and the EPO's final comments thereon of 18 August 2015;

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 oral proceedings;

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

The complainant challenges the finding that his invalidity was not caused by an occupational disease.

Further to the Medical Committee's opinion of 21 June 2011 establishing that he was suffering from invalidity, the complainant was placed on non-active status on 1 July 2011 and started receiving an invalidity allowance. As a majority of the Committee members, specifically Dr B., the complainant's appointee, and Dr S., the member appointed by agreement of the other two practitioners, suspected that the complainant's invalidity had been caused by an occupational

disease, the Committee decided, pursuant to the applicable rules, to consult an expert on whether there was a causal connection between the invalidity and the conditions prevailing at the complainant's work place. Dr K., the EPO's Medical Officer and EPO's appointee on the Committee, however, disagreed with the decision to consult an expert, as he considered that the reasons for the complainant's invalidity were not work-related.

The two experts who were engaged, an occupational physician and a psychologist, concluded in their final report dated 12 September 2012 that the complainant's invalidity had been caused by an occupational disease.

The Medical Committee met again and concluded in an opinion of 20 December 2012 that the complainant's invalidity was not caused by an occupational disease. That conclusion was reached by a majority: having changed his view since the Committee's last meeting, Dr S. concurred with Dr K., who maintained his initial opinion. Dr B., on the other hand, remained of the opinion that the complainant's invalidity was caused by an occupational disease. The Medical Committee's opinion was sent to the complainant and the President of the Office, respectively, under cover of a letter dated 2 January 2013.

By a letter of 7 January 2013, the Administration informed the complainant that the Medical Committee had concluded by a majority that his invalidity had not been caused by an occupational disease. On 16 January 2013, the complainant lodged a request for review challenging that conclusion.

By a letter of 13 February 2013, the complainant was informed that, further to the Medical Committee's opinion and pursuant to the Service Regulations, his contributions to the pension scheme would henceforth be withheld from his invalidity allowance and the contributions due since the date of his invalidity (1 July 2011) would be deducted in monthly instalments from his allowance over a period of 24 months. On 20 February 2013 he filed a second request for review, this time against the 13 February 2013 decision.

By a letter of 13 March 2013 the Administration rejected both requests for review. On 5 April 2013 the complainant lodged an internal appeal. That same day, he filed the present complaint with the Tribunal, impugning the "decision" conveyed to him in the above-mentioned letter of 7 January 2013. His internal appeal was still pending when the written proceedings on the present complaint were closed.

The complainant asks the Tribunal to set aside the decisions of 7 January, 13 February and 13 March 2013, as well as the Medical Committee's decision to overrule the experts' opinion, communicated to him by a letter of 2 January 2013. He claims damages, costs and such further relief as the Tribunal deems appropriate.

The EPO asks the Tribunal to dismiss the complaint as irreceivable or, to the extent that it is receivable, as unfounded.

CONSIDERATIONS

1. On 5 April 2013 the complainant filed the present complaint with the Tribunal seeking to impugn what is described in his bundle of documentary exhibits as "conclusions of the Medical Committee". The complainant was, at material times, a member of staff of the EPO. In these proceedings the EPO challenges the receivability of the complaint. It is convenient to deal with that issue at the outset as it is a threshold question.

2. The complainant commenced service with the EPO in April 1990. Effective 1 July 2011, he was assigned to non-active status and started receiving an invalidity allowance because he was found to fulfil the conditions of invalidity (that is to say and somewhat simplified, he suffered from a medical condition incapacitating him to an extent that prevented him from discharging his duties) by a Medical Committee constituted under the Service Regulations. Steps were taken thereafter to assess whether his invalidity was caused by an occupational disease, that is, whether there was a causal connection between the complainant's medical condition and the performance of his duties. Some of the detail of what occurred will be discussed shortly. Suffice it to say that, while

there was unanimity amongst the two experts retained by the Medical Committee to assess the cause of the complainant's invalidity that there was a causal connection between the complainant's medical condition and the performance of his duties, the members of the Medical Committee did not have a unanimous opinion about the existence of that causal connection. Indeed, prior to seeking an expert opinion, a majority of the Committee's members, namely Dr B., the complainant's appointee, and Dr S., the member appointed by agreement of the other two members, were of the opinion that there was a causal connection. However, after the expert opinion was issued, Dr S. changed his mind, as a result of which it was only Dr B. who maintained that there was a causal connection. By a letter dated 7 January 2013, the complainant was informed that the Medical Committee, in a report of 20 December 2012, had found by a majority that he was "not suffering from an occupational disease which ha[d] led to the invalidity". This is the decision the complainant impugns in these proceedings. However, the Tribunal notes that within a short period after the letter of 7 January 2013, the complainant was informed, by a letter dated 13 February 2013, that on the basis of the Medical Committee's conclusions "[his] contributions to the pension scheme [would], henceforth, be withheld from [his] invalidity allowance. This [would] be reflected from [his] February 2013 payslip onwards", and also that the total amount of contributions not withheld from his invalidity allowance as from 1 July 2011, the date from which he started receiving said allowance, "[would] be deducted from [his] invalidity allowance in 24 monthly instalments of 497,25 [euros] commencing [in] February 2013". Plainly, this correspondence involved an administrative decision or decisions producing a legal effect in relation to payments into the complainant's pension scheme based on the 20 December 2012 majority opinion of the Medical Committee.

3. In these proceedings the EPO challenges the receivability of the complaint. Whether the complaint is receivable raises several questions of some complexity, including the status of an opinion of the Medical Committee for the purposes of the internal appeal provisions of the Service Regulations, whether such an opinion constitutes a final

decision within the meaning of Article VII, paragraph 1, of the Tribunal's Statute, and whether any or all the arguments advanced by the complainant are in furtherance of a cause of action. The complainant relies on Articles 109(3)(a) and 110(2)(a) of the Service Regulations. His argument is that by operation of those provisions, no internal appeal is necessary and the "decision" of the Medical Committee can be treated as a final decision. However, those provisions focus on "decisions taken after consultation of the Medical Committee".

4. As noted by the Tribunal in Judgment 4046, consideration 5, in some circumstances, the Tribunal has treated a challenge to what has been identified in the complaint as a decision but, in fact, was an anterior step to the challengeable final administrative decision, as a challenge to the final administrative decision itself. An example is found in Judgment 2715, consideration 4. In that case the Organization concerned objected to receivability, inter alia, because the complaint was mistakenly directed against the Administration Committee's preliminary opinion, rather than the Secretary General's final decision. The Tribunal sought to identify what the complainant intended by the complaint and treated the complaint as a manifestation of an intention to challenge the final administrative decision. While, explicitly, the complainant had challenged and sought to set aside the "decision" of the Administration Committee, the Tribunal treated the complaint as being directed against the final administrative decision of the Secretary General. This course is open to the Tribunal in the present case. In the result, this complaint will be treated as a challenge to the decisions of 7 January and 13 February 2013, which were based on the 20 December 2012 majority opinion of the Medical Committee.

5. Before proceeding to consider the merits of the complaint, one further preliminary issue concerning receivability should be mentioned. There is one judgment of the Tribunal, Judgment 2787, which, in consideration 3, draws a distinction between procedural and medical aspects of a Medical Committee's opinion and affirms that, by implication and because of Articles 107(1) and (2) and 109(3) of the Service Regulations as applicable at the material time, the latter

(the medical aspects) could be challenged before the Tribunal without the prior filing of an internal appeal to the Appeals Committee. Even if the distinction created by this judgment should continue to be applied by the Tribunal (which may be doubted), there is no bright line between an opinion of a Medical Committee on procedural aspects and an opinion on medical aspects. The present case illustrates that an opinion of the Medical Committee may have both procedural and medical characteristics. In the present case, the Tribunal is satisfied that the decisions of 7 January and 13 February 2013 were decisions "taken after consultation of the Medical Committee" for the purposes of Articles 109(3)(a) and 110(2)(a) of the Service Regulations. Accordingly, the complainant was entitled to bring his complaint directly to the Tribunal on the basis that the 7 January and 13 February 2013 decisions were excluded from the internal appeal procedure and the latter was a final decision.

6. In his brief the complainant does not provide individual headings for his legal arguments, though the EPO does so in its reply, endeavouring to capture each of the elements of the arguments advanced by the complainant. In the complainant's rejoinder headings are used and in its surrejoinder the EPO repeats some of the headings used in its reply. It is convenient to identify the legal issues by reference to the EPO's headings. The first argument is that the Medical Committee's opinion was not issued pursuant to Article 90(3) of the Service Regulations. The second argument is that the Office unlawfully interfered in the preparation of the Medical Committee's report. The third argument is that the Medical Committee was bound by the experts' opinion contained in their final report issued on 12 September 2012. The fourth argument is that the Medical Committee's assessment of the occupational character of the complainant's invalidity was flawed and, in particular, the reasoning of one of the members of the Committee (Dr S.) was deficient. The fifth argument is that there was no expert report attached to the Medical Committee's opinion. The sixth and final argument is that the 7 January 2013 decision was taken without proper authority.

7. The third argument concerns the relationship between the Medical Committee and its deliberations and the experts' report. It is important and decisive. The arguments of the parties focus on the meaning of the word "consult" in Article 90(3) of the Service Regulations, which provides that "[t]he Medical Committee **shall** consult an expert if it **considers** that the invalidity within the meaning of Article 62a **could** have been caused by an occupational disease as referred to in the Implementing Rules hereto" (emphasis added). In addition, Section I, paragraph (1), of the Implementing Rules for Article 90(3) of the Service Regulations provides that "[i]f the Medical Committee **suspects** that the invalidity was caused by an occupational disease, it **shall charge** an expert with analysing whether a causal connection exists between the invalidity and the conditions prevailing while the employee concerned was performing his duties or in connection with the performance of those duties" (emphasis added). Whatever is comprehended by the word "consult", the scheme in Article 90(3) of the Service Regulations and the Implementing Rules therefor is clear. The Medical Committee is composed of medical practitioners charged with assessing medical issues and the medical consequences of its conclusions. Its assessment and conclusions will impact on the legal rights of a staff member whose position they are considering. What the Medical Committee is directed to do is to consult an expert in specified circumstances. Plainly enough, this is to be done when the Committee is unsure about the resolution of a medical issue and perhaps, in addition, the consequences of a conclusion on that issue. So much is apparent from the use of the conditional in the phrase "considers that the invalidity [...] **could have been caused** by an occupational disease" in Article 90(3) of the Service Regulations and also the word "**suspects**" in Section I, paragraph (1), of the Implementing Rules. Thus, the Medical Committee consults an expert. It does not matter, for present purposes, whether the Committee is bound to accept the views of the expert. But what, as an absolute minimum, the Committee must do is give earnest and substantial consideration to the views of the expert or experts it has consulted, and it can reject their views only for cogent and compelling reasons.

8. In the present case, as noted earlier, the members of the Medical Committee were divided in their opinion before the experts were consulted. Dr S. and Dr B. were of the opinion that the complainant's invalidity was of an occupational origin. After the experts delivered their report, Dr S. indicated that he had changed his mind. His altered opinion was contrary to the opinion of the experts. However, in his writings before the medical opinion was acted on, and in the opinion itself, he did not refer to the experts' report. The Tribunal infers that Dr S. did not, at a minimum, give earnest and substantial consideration to the views of the experts before the issuing of the medical opinion, as he should have and, necessarily, did not provide cogent and compelling reasons for rejecting their views. In this respect, he failed to perform his duties as a member of the Medical Committee. Similarly, Dr K. did not provide cogent and compelling reasons before the medical opinion was issued, or in the opinion, for rejecting the views of the experts, in breach of his duty as a member of the Medical Committee. It is true that Dr K. and Dr S. issued on 21 March 2013 a document headed "Reasons for the majority of the Medical Committee to deviate from the opinion of the occupational experts in the case of [the complainant] in the Medical Committee held on December 20, 2012". However, this was well after the Medical Committee's opinion was issued and acted on and, in addition, the Tribunal is not prepared to infer that this document actually reflected the views of either doctor, and of Dr S. in particular, at the time the Medical Committee's report was issued. This vitiates the Medical Committee's 20 December 2012 opinion and the Administration's subsequent decisions which were based on that opinion. Accordingly, the decisions of 7 January and 13 February 2013 will be set aside. The matter must be remitted to the EPO for a differently constituted Medical Committee to consider the experts' report of 12 September 2012, and related reports, and to provide an opinion on whether the complainant's invalidity was caused by an occupational disease. In so doing, the Medical Committee should disregard the 21 March 2013 document from Dr K. and Dr S. referred to earlier.

9. Even though damages were sought by the complainant, no arguments were advanced in the pleas about the nature of the damages, the reasons for awarding them and the appropriate quantum. Accordingly, no damages will be awarded.

DECISION

For the above reasons,

1. The Medical Committee's opinion of 20 December 2012, as well as the Administration's decisions of 7 January and 13 February 2013, are set aside.

2. The matter is remitted to the EPO, in accordance with consideration 8 above, for a differently constituted Medical Committee to consider the experts' report of 12 September 2012, and related reports, and to provide an opinion on whether the complainant's invalidity was caused by an occupational disease.

3. The EPO shall pay the complainant costs assessed in the sum of 7,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 November 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ