Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

N. (No. 5)

v.

EPO

127th Session **Judgment No. 4118**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr G. L. N. N. against the European Patent Organisation (EPO) on 9 October 2015 and corrected on 18 November 2015, the EPO's reply of 4 May 2016, the complainant's rejoinder of 1 September and the EPO's surrejoinder of 23 November 2016;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the findings of the Medical Committee according to which his invalidity is not of occupational origin.

By a decision of 3 December 2004, the President of the European Patent Office, the secretariat of the EPO, after consulting the Medical Committee, decided to grant the complainant, whose health had progressively deteriorated since 2001, an invalidity pension as from 1 December 2004. On 9 December the complainant was informed of the amount of the pension. It corresponded to invalidity of non-occupational origin. In his second complaint, in which he impugned the decision of 3 December 2004, the complainant asked the Tribunal to set aside that

decision insofar as it did not recognize his invalidity as being of occupational origin.

In Judgment 2537, delivered in public on 12 July 2006, the Tribunal set aside the decision of 3 December 2004 and decided to remit the case to the EPO to convene a new Medical Committee to examine the question of whether or not the complainant's invalidity was of occupational origin. The new Medical Committee – consisting of Dr K. and Dr S., respectively appointed by the Office and by the complainant, and of Dr V., chosen by agreement between the first two doctors – issued its opinion on 21 June 2007. On 12 July 2007 the complainant was informed that the President of the Office had decided to follow the Committee's majority opinion according to which his invalidity was not of occupational origin.

In a letter that he sent to the President of the Office on 30 April 2015, the complainant explained that the copy of a letter dated 18 November 2009 which the Administration had produced in the context of his internal appeal against the measures taken pursuant to Judgment 2846 on his third complaint – in which Dr V. stated that he could not provide him with the "expert report" that he had prepared – constituted a new fact. It was written proof of the "obvious connivance"* of Dr K. and Dr V. during the proceedings of the Medical Committee, which had prevented him from gaining access to the report written by Dr V. and hence from challenging the "decision" of the Committee of 21 June 2007. He therefore asked for that decision to be set aside, for a new Medical Committee to be established, and for access to the "files of the Medical Committee that concern [him], including medical records, and in particular the report of [Dr] V[.]"*.

Having received no reply, on 9 October 2015 the complainant filed his fifth complaint, impugning the implied decision to reject his request of 30 April 2015, of which the EPO was allegedly notified on 12 May 2015. He asks the Tribunal to declare that the implied rejection of his request of 30 April 2015 is unlawful and to order the EPO to provide the documents that he asked for at the time. Regarding his claim to set

* Registry's translation.

aside the "decision" of the Medical Committee, he asks the Tribunal principally to convene a new Medical Committee, and subsidiarily, to adjourn its ruling until the EPO has provided the documents sought. In any event, he claims damages in the amount of 20,000 euros for the injury he considers he has suffered, and 5,000 euros in costs.

The EPO points out that the complainant has not produced evidence showing that it was notified on 12 May 2015 of the 30 April 2015 letter, and that he might therefore not have filed his complaint within the period provided for in Article VII, paragraph 3, of the Statute of the Tribunal. Furthermore, it submits that the complaint is irreceivable because the complainant, insofar as he challenges the opinion of the Medical Committee of 21 June 2007, is not challenging a final decision; because he has not exhausted the internal means of redress; and because his request of 30 April 2015 was time-barred. Subsidiarily, the EPO contends that the complaint is unfounded.

In his rejoinder, the complainant produces the advice of delivery – dated 12 May 2015 – pertaining to his request of 30 April 2015.

In its surrejoinder, the EPO takes note of the advice of delivery produced by the complainant and otherwise maintains its position.

CONSIDERATIONS

1. The complainant impugns the implied decision to reject the request of 30 April 2015 that he submitted to the President of the Office in order to obtain, firstly, essentially the setting aside of the "decision" of the Medical Committee of 21 June 2007, in which his invalidity was not recognised as being of occupational origin, to be set aside, and, secondly, access to the records of the Committee's proceedings, including, in particular, the report of Dr V., who had served on the Committee after being co-opted by the two other members.

2. With respect to the claims directed against the "decision" of the Medical Committee of 21 June 2007, the Tribunal notes at the outset that they are manifestly irreceivable, inasmuch as the alleged decision is only an opinion amounting to a preparatory step which, as such,

cannot be appealed. The only act adversely affecting the complainant is the administrative decision taken in light of that opinion, namely, in this case, the decision of the President of the Office of 12 July 2007. Thus, as the complainant himself appears to admit in his rejoinder, it is that decision that he should have challenged, if he considered that he had grounds to do so, and not the opinion of the Medical Committee of 21 June 2007.

3. Even if the Tribunal were to accept to regard the claims in question as being directed against the aforementioned decision of 12 July 2007, they would still be irreceivable, since they would be time-barred. Indeed, it has been established that the complainant did not impugn the said decision before the Tribunal within the period of ninety days provided for in Article VII, paragraph 2, of the Tribunal's Statute. The decision therefore became final, and the complainant could no longer seek to challenge it in his request of 30 April 2015, almost eight years later. As a result, on this issue, the implied decision of the President of the Office to reject that request must be considered as purely confirmatory of the earlier decision of 12 July 2007. As such, it could not set off a new time limit for an appeal by the complainant (see, for example, Judgments 698, consideration 7, 1304, consideration 5, 2449, consideration 9, or 3002, consideration 12).

4. In an attempt to show that his claim is receivable, the complainant relies on the discovery, after the expiry of the time limit for appealing the decision of 12 July 2007, of a new fact which he claims to be evidence of the existence of "illicit connivance" between Dr V. and the member of the Medical Committee appointed by the Office, namely Dr K.

The Tribunal's case law does allow a staff member concerned by an administrative decision which has become final to ask internal bodies for its review if some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or if she or he is relying on facts or evidence of decisive importance of which she or he was not and could not have been aware before the decision was taken (see Judgments 676, consideration 1, 2203, consideration 7, 2722,

consideration 4, 3002, cited above, consideration 14, or 3140, consideration 4).

However, the single new fact relied on by the complainant in this case clearly does not fall within the ambit of the aforementioned case law. The fact relied on is that the Office, in the context of the proceedings relating to an internal appeal filed by the complainant concerning another case, produced a copy of a letter dated 18 November 2009 in which Dr V., who stated that he could not accede to a request made by the complainant to disclose the report that he had prepared for the Medical Committee because the Office alone was competent to do so, suggested that in order to obtain a copy of the document, the complainant should contact the medical service of the Office, and in particular Dr K. However, while the position taken by Dr V. is wrong in law, as will be explained below, it is difficult to see how the fact that the Office had a copy of that letter establishes the existence of the illicit connivance between the two doctors which the complainant suspects.

In fact, while it can indeed be inferred that Dr V. probably gave the copy to Dr K., it would actually have been quite natural for him to do so given that the purpose of the letter was precisely to send the complainant to Dr K. in order to gain access to the report mentioned above. In this regard, it should be emphasized that, contrary to what the complainant says, forwarding the letter to Dr K. involved no breach of any text or principle, particularly since the letter in question did not contain any information covered by medical secrecy, nor any confidential personal data.

In addition, for the same reasons, the complainant is likewise not justified in considering it to be abnormal that this document should later have been in the possession of the administrative services of the Office.

Finally, even if one were to accept, as the complainant contends, that Dr K. ought to have informed Dr V., upon receipt of the copy of the letter in question, that its contents were erroneous, this alleged misconduct would in any case have no bearing on the validity of the opinion given earlier by the Medical Committee.

Therefore, the alleged new fact cannot be considered in any respect as constituting a fact or evidence of decisive importance within the meaning of the case law cited above.

5. Regarding the request for disclosure of the files of the Medical Committee, the Tribunal recalls that, under its case law, the right to transparency as well as the general principle of an individual's right to access personal data concerning her or him mean that a staff member must be allowed full and unfettered access to her or his medical file and be provided with copies of the full file when requested (paying the associated costs as necessary) (see Judgments 3120, consideration 7, or 3994, consideration 10). According to the same case law, the only situation in which this rule does not apply is where specific circumstances temporarily prevent such access, which the defendant Organisation does not allege in this case.

Given that the documents to which the complainant had requested access in his letter of 30 April 2015 were part of this medical file, the President of the Office erred in not granting him his request on that point.

The Tribunal notes that Dr V. was also mistaken when he wrote, in the letter of 18 November 2009 mentioned above, that he was not authorised to send the complainant a copy of his report. Indeed, according to an information note issued to medical experts from outside the Office who serve on a medical committee, produced by the complainant, former members of such a committee have a duty, if the staff member concerned so requests, to give her or him access to the medical files that the committee member prepared in the context of the proceedings.

6. The Tribunal will not, however, set aside the impugned decision insofar as it denied the complainant access to the documents in question because the complainant's claim to this effect is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, for failure to exhaust the internal means of redress available to serving and former permanent employees of the Office.

Contrary to what the complainant makes out, a decision to deny access to medical documents can be challenged under the internal review and appeal procedures respectively provided for in Articles 109 and 110 of the Service Regulations for permanent employees of the European Patent Office, especially since it does not have to be taken after consultation of the Medical Committee and hence does not fall under the scope of the exception for which these Articles provide in that specific case. However, the complainant did not make use of the internal means of redress before filing the present complaint.

7. The Tribunal notes that, according to the latest correspondence submitted by the parties, the Office did ultimately provide the complainant with a copy of his medical file including, in particular, the above-mentioned report of Dr V. However, the complainant is still not satisfied on this point, as he asserts that the file that was provided to him is incomplete and its contents unlawful. But in any case, that claim, made after the close of the written proceedings, cannot be considered by the Tribunal in the context of the present judgment.

8. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2018, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ