L. (No. 2)

v.

EPO

129th Session **Judgment No. 4260**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms D. L. against the European Patent Organisation (EPO) on 9 March 2015 and corrected on 27 March, the EPO's reply of 4 August, the complainant's rejoinder of 9 December 2015 and the EPO's surrejoinder of 15 March 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 EPO's failure to allow her access to her complete medical file and to provide her with a copy thereof in a timely manner.

The complainant joined the EPO in September 2003. With effect from 1 August 2011 she was assigned to non-active status on the grounds of invalidity.

Following a period of absences from work due to sickness, a Medical Committee was set up to assess the complainant's state of health. Dr A.K., the EPO's Medical Adviser, was appointed as the EPO's representative on the Committee and Dr P.T., the complainant's treating physician, as her nominee thereon. At their first meeting, held on 4 October 2010, the Committee members were unable to reach

agreement on the complainant's state of health. They therefore jointly decided to appoint Dr P.V. as the Committee's third member. The Committee held a second meeting on 13 December 2010 in its three-member composition. At that meeting the Committee members unanimously recommended the complainant's reintegration in the workplace, in a different department and with a clear focus on practical work. On 7 March 2011 the Committee held a third meeting at which it noted that the complainant's reintegration in the workplace had been discontinued, that a new period of sick leave had been approved, and that further treatment starting at the end of March 2011 was envisaged. Although Dr P.V. did not attend that third meeting, he subsequently signed the relevant report. The Medical Committee met for a fourth time on 12 July 2011 and concluded by a majority – Dr A.K. did not agree with this opinion – that the complainant was suffering from invalidity within the meaning of Article 62a of the Service Regulations for permanent employees of the European Patent Office, the EPO's secretariat. By a letter of 13 July 2011, the Secretary of the Medical Committee informed the complainant of the Committee's opinion and invited her to contact Dr A.K. in the event that she wished to inspect her medical file.

Prior to this, on 19 May 2011, the complainant's counsel had written to Dr A.K. asking him to place on the complainant's medical file the reports – as well as the opinions based on these reports – drawn up by Dr A.K. himself and the other doctors who had previously examined the complainant, namely Drs P.T., P.V., W., S., and T., to allow the complainant access to her complete medical file, and to provide her with a copy thereof by 15 June 2011.

Having received no reply, the complainant's counsel wrote on 30 June 2011 to the President of the European Patent Office requesting, amongst other things, that the Medical Committee or, alternatively, the EPO's Medical Adviser: (i) document the medical findings, observations and opinions of the medical practitioners involved in the proceedings before the Medical Committee, as well as the relevant medical correspondence and records of discussions contained in the Committee's case file; (ii) submit for inspection the full and complete documentation

of the complainant's case file before the Committee and provide copies thereof to the complainant; and (iii) give a sworn statement that the complainant's case file before the Committee that would be made available to her for inspection was absolutely complete. In the event that the President decided not to grant these requests, the complainant's counsel asked that his letter be treated as an internal appeal.

Under cover of a letter dated 24 November 2011, the secretary of the Medical Committee sent to the complainant a copy of her medical file, and she informed the complainant's counsel of this by a letter of the same day. The complainant's counsel replied on 13 December 2011 stating that the medical file that had been sent to the complainant did not include the requested documents. He asked that such documents be provided to the complainant by 15 January 2012 or, if such documents were not in the possession of the Medical Committee or did not exist at all, that the complainant be provided with a written confirmation to that effect.

Further to the President's refusal to grant the complainant's requests of 30 June 2011, the matter was referred to the Internal Appeals Committee (IAC). A hearing was held on 14 May 2014, and on 9 October 2014 a majority of the IAC members submitted an opinion recommending that the appeal be dismissed as irreceivable in part for lack of cause of action and unfounded in all other respects. This opinion was not signed by the minority of the IAC members, who considered that the appeal was receivable and founded on the merits, and recommended that the complainant be awarded damages and costs. The IAC Chairperson subsequently decided to transmit only the majority opinion to the President, because she considered that the minority opinion had not been submitted in an appropriate format or within the set deadlines. By a letter of 16 December 2014, the complainant was informed that, acting by delegation of authority from the President, the Vice-President of Directorate-General 4 had decided to dismiss her appeal in accordance with the IAC majority opinion. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to provide her with the detailed opinion and recommendations of the minority of the IAC. She also asks the Tribunal to find: (i) that she was entitled to obtain a copy of her full medical file, including the notes from the medical advisers, their substitutes and Dr P.V., whose opinions formed the basis for the conclusion that she was suffering from invalidity, and also to obtain other documents upon which the invalidity decision was based; and (ii) that the EPO failed in its duty to provide her access to and full disclosure of her medical file within a reasonable time. She claims 5,000 euros in moral damages for the refusal to disclose her complete medical file before the decision concerning her invalidity was taken; 5,000 euros for the breach of her right to access her complete medical file and receive a copy thereof; 10,000 euros for the fact that her medical file on the basis of which the decision of invalidity was taken was incomplete; and 8,000 euros for the time that elapsed since she requested a copy of her complete medical file. She also seeks costs and interest on all amounts awarded.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part for want of cause of action and unfounded in the remainder.

CONSIDERATIONS

1. Essentially, this case revolves around the complainant's claim that, notwithstanding her request for her medical file, relied upon by the Medical Committee to conclude, in July 2011, that she suffered from invalidity (resulting in her being placed on non-active status), she was not granted full disclosure of the file, including all medical records and opinions on which the Medical Committee based its conclusion. She states that she was entitled to have timely access to that file after the request was made by her counsel in the letter dated 19 May 2011, pursuant to her right to transparency as well as her right to access personal data. She states that this was also in keeping with her right to know the reasons for the decision to place her on invalidity and whether those reasons were medically justified, and that no document disclosed on the file shows the reasons why the invalidity decision was made,

rather than a decision that she be reintegrated in the workplace in another department, as had previously been recommended by Dr A.A. and Dr P.T., her treating physician. Dr P.T. was also the complainant's nominee on the Medical Committee.

2. Regarding a staff member's request for the disclosure of her or his medical file, the Tribunal recalls that under its case law, stated for example in Judgment 4118, consideration 5, the principle of transparency as well as the 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). The only situation in which this rule does not apply is where specific circumstances temporarily prevent such access. However, a decision to deny a staff member full access to her or his medical file temporarily must be fully justified and reasonable (see, for example, Judgment 3994, consideration 10). The Tribunal also relevantly stated, in Judgment 3120, consideration 6, that in the absence of specific rules or regulations governing the right of a staff member to access her or his own medical file, that right must be considered to comprehend the right to view and obtain copies of all records and notes in the file, and to add relevant notes to correct any part of the file considered wrong or incomplete, and that, so stated, the right to access one's own medical file gives effect to the organisation's duty of transparency. It is also noteworthy that, at the material time, Article 92(1) of the Service Regulations permitted an employee to submit to the Medical Committee any reports or certificates from her or his regular medical practitioner or from other practitioners she or he had consulted.

3. In addition to challenging the internal appeal process, particularly the IAC's proceedings, and seeking awards of damages and costs, the complainant asks the Tribunal to:

(1) quash the impugned decision dated 16 December 2014;

(2) order the EPO to provide her with the detailed opinion and recommendations of the minority of the IAC;

(3) find, based on the right to transparency and unfettered access to personal medical data, that she was entitled to obtain a copy of her full medical file, including the notes from the medical advisers, their substitutes and Dr P.V., the third member of the Medical Committee, as well as other documents upon which the decision of invalidity was based; and

(4) find that the EPO failed in its duty to provide her with access to and full disclosure of her medical file within a reasonable time.

The second claim is moot as the EPO provided the opinion and recommendations of the minority of the IAC with its reply in these proceedings.

4. The complainant states that she was put on invalidity unaware of the reasons for which it was decided that she was unfit for work and without giving her an opportunity to work in another department, particularly considering that her career in the EPO had at least another ten years to run. This mirrors the contents of the letter, dated 19 May 2011, which the complainant's counsel had sent to Dr A.K., the EPO's Medical Adviser and representative on the Medical Committee. In that letter, the complainant's counsel noted that, by a letter of 21 March 2011, Dr A.K. had informed the complainant that no medical reports, opinions or notes of her medical examinations by him or five other doctors who had examined her were available. In the letter of 19 May 2011, the complainant's counsel further stated that the complainant had a right to the disclosure of those documents because they could have far-reaching consequences for her. He requested that copies of her medical results and the opinions thereon be sent to him and that they also be placed on the complainant's medical file. The complainant's internal appeal of 30 June 2011 was in similar terms. The first request in her internal appeal was that the Medical Committee or the EPO's Medical Adviser, as a member of the Committee, "be obliged to document the medical findings of [the medical practitioners who had examined the complainant, namely Drs A.K., P.T., P.V., W., S., and T.] [...] including the medical opinions and case histories and other medical observations on which these findings (of invalidity) are based, as well

as medical correspondence and records of discussions, in the Medical Committee's case file in these proceedings [...] and to obtain the relevant documents from the above-mentioned medical practitioners for the purpose of their documentation".

5. The EPO submits, mirroring the IAC majority opinion which was endorsed in the impugned decision, that the complainant's first and third claims, set out in consideration 3 of this judgment, are irreceivable because the complainant has no cause of action in relation to them. The EPO cites as authority the Tribunal's statement that a complaint will be receivable only if it is directed against a challengeable decision and is filed by an official who has a cause of action. The EPO further notes the Tribunal's statement in Judgment 1712, consideration 10, that "[t]he necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury [and] [t]he decision must have some present effect on the complainant's position".

The EPO's submission is unsustainable. In the letter of 19 May 2011, about two months before the Medical Committee issued its opinion that the complainant suffered from invalidity, the complainant, acting through her counsel, expressed the concern that reports and opinions of six medical practitioners who had examined her were not on her medical file. Her obvious concern was that those documents should be on her medical file to permit the Committee to decide whether she should be placed on invalidity or be given another chance to be reintegrated in the workplace. That concern was caused by the letter of 21 March 2011 which indicated that the reports and opinions by the medical practitioners who had examined her were not on her medical file. In the letter of 19 May 2011, the complainant, acting through her counsel, not only requested that these reports and opinions be placed on her medical file by 1 June 2011, she also requested access to her file by 15 June 2011. She was not offered access to her file until 13 July 2011, the day after the Medical Committee submitted its opinion. The Tribunal concludes that by requesting access to her medical file at the time when she did and for the purpose which she did, and being denied access to it until after the Committee submitted its opinion, the complainant has a cause of action, within the meaning of the foregoing statement in Judgment 1712,

consideration 10, in relation to her third claim. Accordingly, the impugned decision, which rejected the main claims of the complainant's appeal determining that the complainant had no cause of action, must be set aside.

6. The third and fourth claims are interrelated. It is observed that the minority of the IAC (who found that the appeal was admissible) stated that the complainant had a right to have specific medical documents added to her medical file, but found that her request was unmeritorious, because she did not specify which documents the EPO should have added to the file and did not provide any herself for the file. This statement was inaccurate as the complainant did identify the medical reports and opinions on her medical examinations as the documents to be placed on her medical file. Critically, however, she was entitled, on the basis of the principle of transparency and the right to access personal data, to have access to her medical file soon after the letter of 19 May 2011 requested it and before the Medical Committee submitted its opinion, to allow her to determine what further steps may have been taken in her interest. The EPO has not explained why she was not granted access to her medical file before the Committee submitted its opinion. Given this background, it was too late when the complainant was granted access to her medical file for the purpose for which she had requested access. The effect of the delay in granting the complainant a timely access to her medical file, that is, before the Medical Committee issued its opinion, denied the complainant at least the satisfaction of knowing for certain that the Committee would not only have considered whether she suffered from invalidity, but also whether another attempt should have been made to reintegrate her in the workplace by a transfer to another unit, as two medical practitioners had previously suggested. This was in breach of the principle of transparency as well as her right to access her personal data in a timely manner. The third and fourth claims are therefore well founded and for this breach the complainant will be awarded 10,000 euros in moral damages, given the possibility that her career might have continued in another department instead of her being placed on invalidity. This award encompasses all her claims for moral damages. This does not, however, mean that the proceedings before the Medical Committee were biased and tainted with unfounded

subjective opinions, as the complainant contends, but for which she provides no proof.

7. Regarding the internal appeal proceedings, reproducing consideration 11 of Judgment 2282 and consideration 7 of Judgment 3075, the complainant submits, in effect, that she was denied due process, notwithstanding that the EPO has a duty to ensure a fair internal appeal procedure with proper deliberations. She alleges that her right to due process was disregarded because the IAC minority opinion had to be taken into account by the majority and a balanced opinion, which the IAC as a whole approved, had to be prepared. Article 13(1) of the Implementing Rules for Articles 106 to 113 of the Service Regulations applicable at the material time relevantly stated that the IAC's reasoned opinion to be delivered to the President (in this case) shall include: (e) the IAC's recommendation; (f) the dissenting views of any members of the IAC. This allegation is unfounded as, notwithstanding that the minority opinion (signed by two of the five IAC members) was not delivered to the President together with the majority opinion, the grounds of their dissent were mirrored in the majority opinion.

The complainant also alleges that her right to due process was disregarded because the Chairperson of the IAC acted contrary to her (the complainant's) interests when she submitted to the President a one-sided recommendation of the majority which included her own vote. This allegation is also unfounded. Article 13(2) of the Implementing Rules for Articles 106 to 113 of the Service Regulations applicable at the material time stated that the opinion of the IAC shall be adopted by a majority of the members and signed by the Chairperson and members. Article 13(3) stated that the IAC Chairperson shall not have the right to vote save on procedural questions or in case of equality of votes. The Chairperson voted because there was an equality of votes: two members recommended that the appeal be dismissed as irreceivable and unfounded, while two members found it receivable and recommended moral damages.

8. The complainant also alleges that the opinion of the majority is biased, as it denies her legitimate interest to have timely access to her medical file, and it also fails to give a proper explanation as to why it

considers that Dr A.K., the EPO's Medical Adviser, gave correct information in asserting that her medical file was complete. This allegation is also unfounded as, notwithstanding the Tribunal's finding that the majority of the IAC erred when it recommended that the internal appeal be dismissed as irreceivable, there is no evidence that its deliberations, analysis or recommendation were actuated by bias. Neither is there proof that there was bias in the proceedings of the Medical Committee, as the complainant further contends. The complainant's contention that there is clear evidence of a breach of due process in the IAC proceedings because a missing signature of an IAC member, Mr M.L., was replaced without the consent of all IAC members is also unfounded, as the complainant provides no evidence to support this allegation.

9. The complainant will be awarded costs in the amount of 7,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 16 December 2014 is set aside.
2. The EPO shall pay the complainant 10,000 euros in moral damages.
3. The EPO shall pay the complainant 7,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

HUGH A. RAWLINS

FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ