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

FIFTY-FIFTH ORDINARY SESSION

In re TOTI

Judgment No. 652

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Luciano Toti on 17 May 1984 and corrected on 2 July, the EPO's reply of 18 September, the complainant's rejoinder of 15 November 1984 and the EPO's surrejoinder of 21 January 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 62 and 63 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, an Italian, is on the staff of the EPO in Munich. His health being run down, the EPO authorised him to take the waters at Forio d'Ischia in Italy. The treatment started on 16 May and ended on 10 June 1983. From 16 to 29 May he was on sick leave, from 30 May to 10 June on ordinary leave. On 11 June the spa doctor certified that because of "asthenia post curam" he should be granted sick leave until 24 June. Having returned to Munich, he informed the EPO by telephone on 13 June that he could not come to work and on 14 June he sent it the certificate. On 20 June the Personnel Department sent him an express letter saying that to qualify for further sick leave he needed a certificate from the EPO's own medical adviser. Getting that letter on 21 June, the complainant went to see his own doctor in Munich, Dr. Wandrey, who the same day gave a certificate endorsing what the spa doctor had said. The complainant sent it at once to the EPO. On Monday 27 June he went back to work. The same day the medical adviser, after speaking to Dr. Wandrey on the telephone, wrote a minute saying that in her view, and with Dr. Wandrey's agreement, only the first week of the additional leave should be treated as sick leave; for the second week the complainant must take five days' ordinary leave. On 5 August he appealed to the Appeals Committee against the decision to deduct the five days. In its report of 19 December the Committee said that only after 21 June 1983, when he had got the Personnel Department's letter, had the complainant been at fault for not getting in touch with the medical adviser; two of the days, 20 and 21 June, ought not to have been deducted from his ordinary leave credit. But the President of the Office rejected that conclusion in a letter of 15 February 1984 to the complainant, and that is the decision he impugns.

B. In narrating the facts of his case the complainant observes that the medical adviser almost forced Dr. Wandrey to go back on what he had certified. He submits that the reasons given by the President for not accepting the Appeals Committee's conclusion were unsound. The President was bound to grant him the sick leave under Article 62(1) of the Service Regulations: "A permanent employee who provides evidence of incapacity to perform his duties because of sickness or accident shall be entitled to sick leave." He sent the EPO the medical certificate from the spa doctor as promptly as Article 62(2) requires: "The employee concerned shall notify the Office of his incapacity as soon as possible". He was never told to report for examination by the medical adviser. Neither the President nor the medical adviser may question a medical certificate unless the employee undergoes further examination. The complainant was therefore not on "unauthorised absence" within the meaning of Article 63, and it was wrong to deduct five days from his annual leave under that article. He asks the Tribunal to set aside the decision, order the President to increase his leave credit by five days and award him 3,000 Deutschmarks in costs.

C. In its reply the EPO gives its own account of the facts. It submits that the impugned decision is sound. Circular No. 22 of 16 January 1979, which contains rules on the grant of sick leave, was correctly observed. Even though Dr. Wandrey originally said the complainant would be unfit for two weeks, the medical adviser later found that he had not been sick the second week, and Dr. Wandrey endorsed that view. There was therefore no certificate of sickness to cover the second week, and his absence was unauthorised, Article 63 being applied by analogy. He was actually given the benefit of the doubt, since no disciplinary sanction was imposed. His contention that he acted

promptly is irrelevant, since it relates only to the first week of his leave, which is not in dispute. As he well knew, the certificate from Dr. Wandrey was subject to review, according to point 6(i) of Circular 22, by the medical adviser, and there was therefore no breach of good faith on the EPO's part. There is no evidence to support the contention that Dr. Wandrey was forced to change his mind. There was no need to examine him since Dr. Wandrey, who had, agreed to alter what he had earlier certified.

D. In his rejoinder the complainant states objections to the EPO's account. He enlarges on his original arguments and seeks to refute in detail those put forward in the reply. He observes in particular that if the EPO's interpretation of point 6(i) of Circular 22 were right no employee could ever take sick leave without first securing the permission of the personnel department, and that would be impractical and arbitrary. He presses his claims.

E. In its surrejoinder the EPO submits that there is no argument in the rejoinder which makes it alter any of the submissions in its reply, which it further develops. It again asks the Tribunal to dismiss the claims as devoid of merit.

CONSIDERATIONS:

1. On 8 April 1983 the medical adviser of the EPO prescribed for the complainant, a registry clerk, treatment at a spa which was to last four weeks, from 16 May to 10 June. In keeping with EPO practice he was to take part of the period as ordinary leave, the rest as sick leave.

At the end of the treatment, on 11 June 1983, the spa doctor delivered a certificate saying that his condition, described as "asthenia post curam", required rest for another fortnight, up to 24 June 1983. On 13 June the complainant so informed his supervisor by telephone and also sent him the certificate.

EPO premises were closed from 17 to 19 June, and not until 20 June did the EPO acknowledge receipt. It said that it could not agree to leave "post curam" and would grant sick leave only on the strength of a medical certificate and its medical adviser's opinion. The complainant was invited to telephone the author of the letter to talk the matter over and possibly arrange an appointment with the medical adviser.

2. On receiving the EPO's letter, on 21 June, the complainant saw his own doctor, Dr. Wandrey, and obtained another certificate which he sent to the EPO. This was much more explicit than the one of 11 June, since it stated that since 11 June he had been and until 24 June would be unfit for work.

This certificate reached the EPO on 22 June. After trying, to no avail, to reach the complainant by telephone, the EPO referred the matter to its medical adviser. The medical adviser telephoned Dr. Wandrey, who had given the certificate of 21 June, and they thereupon agreed to treat only the first week as sick leave.

3. The EPO concluded that during the second week mentioned in the certificates the complainant was fit for work and by a decision of 23 June it granted him only the first week as sick leave, the second being docked from his ordinary leave.

4. The complainant duly filed an internal appeal, and the Appeals Committee found partly in his favour. But by a decision, now impugned, of 15 February 1984 the President of the Office rejected the Committee's recommendation and dismissed the internal appeal in its entirety.

5. According to Article 62 of the EPO Service Regulations, "A permanent employee who provides evidence of incapacity to perform his duties because of sickness or accident shall be entitled to sick leave." He shall "notify the Office of his incapacity as soon as possible... If he is incapacitated for more than three working days, he shall, on the fourth working day, send a medical certificate".

The complainant satisfied those requirements. The first certificate was not explicit since it merely prescribed "a period of rest", but as soon as the Office pointed that out he asked Dr. Wandrey to examine him, and the second certificate was clear and unambiguous.

The mere production of a certificate from a doctor of the official's own choosing does not confer entitlement to sick leave. The Organisation may always challenge the certificate on the strength of the opinion of a practitioner it has itself designated: that is indeed what the guidelines on sick leave say.

6. The EPO did not refer the matter to its medical adviser until 24 June, the last day of the leave period, largely because several public holidays occurred during the period. When he got the EPO's first letter on 21 June the complainant could have got in touch; instead, as indeed the letter invited him to do, he went to see his own doctor to get a certificate which would put the matter beyond doubt. Actually the EPO suggested examination by its own medical adviser as just a possibility. Accordingly, it was not the complainant who prevented the medical adviser from forming an opinion. It was for the EPO to act -- by summoning him for examination by the medical adviser -- not for the complainant, who had already discharged his obligations under the regulations. When the case was referred to the medical adviser she decided against seeing him. Yet she could have examined him even though the period of leave was nearly over, and so at least would have got a clearer idea of the general state of his health. Nor would it have precluded her getting in touch with Dr. Wandrey.

At all events when the case was referred to her all she did was to telephone his doctor. In the course of their conversation Dr. Wandrey consented to change the earlier certificate and declare that by 21 June the complainant was again fit for work. The complainant strongly objects, saying that Dr. Wandrey was forced to change his opinion.

Such confabulation between professional colleagues is not in itself objectionable. It would no doubt have been more satisfactory if the two doctors had first carried out a clinical examination. It all depends on the particular circumstances of the case. But their approach undoubtedly made it harder to establish the facts, and for that the complainant -- whom they could have asked to undergo an examination -- is not to blame. The burden of proof is therefore on the EPO.

The Organisation has supplied a letter from the medical adviser to the complainant. It recounts how she came to have a conversation with Dr. Wandrey. The wording does not enable the Tribunal to find that the complainant was fit to go back to work before 24 June 1983, and it is the only item of evidence on this issue.

On the evidence the Tribunal is compelled to the conclusion that the EPO was wrong to refuse to treat the second week as sick leave, and the decision must be set aside.

7. The Tribunal also awards the complainant 1,000 Deutschmarks in costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside and the case referred back to the EPO for review.

2. The EPO shall pay the complainant 1,000 Deutschmarks in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.