SIXTY-FIFTH SESSION

In re CURZI

Judgment 932

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Daniele Curzi against the European Patent Organisation (EPO) on 20 November 1987, the EPO's reply of 17 February 1988, the complainant's rejoinder of 27 April and the EPO's surrejoinder of 18 July 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 62, 89 and 90 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and EPO circular 22 of 16 January 1979;

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

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

A. The complainant, an Italian born in 1952, is employed by the EPO in Munich. On 5 May 1986 his own doctor, Dr. Dusik, certified that he was suffering from several injuries and needed a "health cure" lasting four weeks, preferably at Ischia, to prevent the worsening of his condition. On 7 May the EPO's assistant medical adviser, Dr. Schmittner-Brühl, examined him and declared that he did not need time off for a cure, annual leave being adequate. On 14 May an orthopaedist, Dr. Schmitt, signed another certificate prescribing three or four weeks' treatment. On 3 June he made a formal application under Article 62 of the Service Regulations for sick leave for a health cure, submitting Dr. Schmitt's certificate in support and challenging Dr. Schmittner-Brühl's decision. He took the cure at Ischia from 22 June to 6 July 1986. On 8 July 1986 the Principal Director of Personnel wrote saying that his application would be referred to the Invalidity Committee under Article 90 of the Service Regulations, naming the chairman of the Committee and asking him to appoint the second member in accordance with Article 89(1). He named two doctors in turn, but each of them dropped out. On 21 July 1987 the President of the Office appointed a second doctor under 89(2), and the Committee was duly constituted by the co-opting of a third member. Two of its members examined him on 6 August 1987. In its report of 14 August 1987 it observed that the EPO did not ordinarily grant special leave for the purpose of treatment; it held that he should undergo treatment in Munich and that only if that failed need he be granted leave for a cure. It decided to reject his claim and a personnel officer so informed him by a minute of 31 August 1987, the final decision he is impugning.

B. The complainant observes that he could take only a fortnight off for his cure and had it docked from annual leave. He submits that the Service Regulations do not make the failure of treatment at the duty station a condition for permission to be treated elsewhere. Nor does the EPO refuse sick leave for the purpose of treatment: many have been granted it. Statements attributed to him have been misrepresented and misunderstandings caused by his lack of fluent German, the only language the doctors understood. He finds fault with several statements in the Committee's report. He put in a certificate signed on 6 August 1987 by a doctor in Munich and two signed on 16 and 21 June 1986 by Italian doctors, but the Committee did not even comment on them. All three members of the Committee should have examined him. By the time two of them saw him his condition had improved because of the cure he had taken in 1986. He claims three weeks' sick leave and material and moral damages.

C. In its reply the EPO refers to Article 62 of the Service Regulations and to the guidelines on leave issued by the President of the Office in circular 22 of 16 January 1979. The medical adviser examines the applicant to see whether he needs to follow a cure either to make him again fit for work or else to keep him fit. In the former case he will qualify for the leave; in the latter he will not, but in the exercise of his discretion the President will grant half the period applied for. If the medical adviser finds a cure unnecessary for either of those purposes, no leave will be granted.

In this case the Invalidity Committee upheld the assistant medical adviser's finding that no cure was necessary and that annual leave would do. The Committee's findings were logical: the usefulness of the cure is not denied, but leave is refused. The Committee concluded that he was not unfit for work, that the cure was not needed to keep him fit for work and that treatment in Munich would suffice. No leave is due for undergoing treatment at the duty

station although the official may take time off where circumstances permit. The complainant may properly be expected to speak German, an official language of the EPO and the language of his duty station. The Committee's statements in its report are consistent, logical and proper, and there is no call to challenge the professional competence of any of its members. It was not necessary for all three to examine the complainant.

D. In his rejoinder the complainant enlarges on his pleas and seeks to refute the reply, which he describes as illogical. He contends that the Committee was wrong to ignore the medical certificates he produced and that misunderstandings arose, not so much out of his own shortcomings in German, but from the inability of the medical adviser and the other doctors to speak or understand any other language. Every member of the Committee had a duty to examine him. He presses his claims.

E. In its surrejoinder the EPO develops its case, which it submits the complainant's rejoinder does nothing to weaken. It seeks to refute his pleas, which it submits are irrelevant or mistaken.

CONSIDERATIONS:

1. The complainant, who is of Italian nationality, applied for sick leave to take a cure. He submitted a medical certificate dated 5 May 1986 from a Dr. Dusik attesting to disorders of his right elbow, right knee and left kneecap. The period of leave he applied for was from 16 June to 4 July 1986. He was referred for examination to the EPO's assistant medical adviser, Dr. Schmittner-Brühl, who on 7 May found that no cure was necessary.

2. The complainant again applied for sick leave submitting a certificate of 14 May 1986 from a Dr. Schmitt, who had carried out an orthopaedic examination, and again asking for the same period. He named a spa at Ischia. He said that if his application was not granted his letter should be treated as an internal appeal.

3. The complainant went to the spa without having been granted sick leave. On his return the Organisation asked him to appoint a doctor of his choice under Article 89(2) of the Service Regulations to an Invalidity Committee to be set up to decide the dispute over the assistant medical adviser's opinion in accordance with Article 90. The complainant named successively two Italian doctors who, as it turned out, proved unavailable. He was given an opportunity to name yet another doctor. Eventually, on 21 July 1987, the Organisation appointed a doctor, Dr. Petrowa, to represent the complainant in accordance with the second paragraph of Article 89(2). Dr. Loeffelholz von Colberg was appointed to chair the Committee, and the two doctors appointed a radiologist, Dr. Weigand, as the third member. On 27 July 1987 the Committee asked the complainant to undergo medical examination and he did so on 6 August.

4. Article 62(1) of the Service Regulations provides that a permanent employee who provides evidence of incapacity to perform his duties because of sickness or accident shall be entitled to sick leave. To qualify for the grant of sick leave for a cure, to be applied for on form 4356 09.85, either

(a) the official must be so incapacitated that he cannot perform his duties, in which case he is entitled to leave for the full duration of the cure, or else

(b) the cure must be necessary for the official to remain capable of performing his duties, in which case he is entitled to leave for half the duration.

If neither condition is fulfilled, sick leave for the cure will not be granted.

5. In its unanimous report of 14 August 1987 on the complainant's case the Invalidity Committee referred to the examination of him by Dr. Schmittner-Brühl, the assistant medical adviser, in May 1986. She had found that the periostitis of his right elbow was due to intensive tennis playing, as he himself acknowledged: when he played less the pain diminished. Dislocation of his left knee had occurred over six years earlier and for two years had been causing him intermittent pain. No restriction of movement was found. Pain in the arch of the left foot was due, according to the complainant himself, to his wearing flat shoes while playing tennis. He also confirmed that Dr. Dusik had not prescribed any treatment for the pain. The assistant medical adviser had come to the conclusion that if he played less tennis and followed the appropriate treatment at the place of residence his condition would improve and no cure was necessary. The complainant had then objected and presented the certificate dated 14 May 1986 from Dr. Schmitt. That certificate stated that the equilibrium of his spine was slightly affected by lumbar scoliosis to the right; that there was X-ray evidence of arthritic degeneration in his hip joints; that the X-rays also showed slight degeneration of the knee joint and dysplasia of the kneecap; and that the cure was necessary.

6. The Invalidity Committee based its opinion on whether he had needed the cure in May 1986 on physical examination, surgical and radiological expertise, an electrocardiogram and blood analysis. Its conclusion was that the assistant medical adviser's refusal had been justified.

7. The Committee stated in its report:

"(1) The complainant wanted the cure because of pain in his right elbow and left knee due mainly to the excessive practice of sport; indeed he admitted that his condition improved if he simply practised less.

(2) He was not following any medical treatment at the place of residence, and treatment did not appear necessary anyway because a change of pursuits lessened the pain.

Dr. Schmitt then certified pathological change in the spine, hip joints and knees. The examination carried out on 6 August 1987 revealed no pain and ruled out any latent rheumatism. Examination of the X-rays done on 13 May 1986 revealed very slight S-shaped scoliosis and, the complainant's age being taken into account, arthrosis of the lumbar-sacral vertebrae, hip joints, knee joints and kneecaps, none of it aggravated.

Dr. Petrowa does not rule out the possibility of occasional pain due to slight distortion in the spine, to the resulting strain on it and to incipient arthrosis due to age.

In that event what is needed first is proper treatment at the place of residence. Only if such treatment fails will a cure be considered under the regulations. Preventive measures should be taken on annual leave; whereas EPO staff will be granted leave to take treatment to cure an actual illness or to relieve the effects of a disorder, there is no such thing as special sick leave.

The Committee therefore refuses to grant sick leave for the cure followed at Ischia from 22 June to 6 July 1986."

8. A personnel officer wrote the complainant a letter on 31 August 1987 informing him that the Invalidity Committee had rejected his appeal against the decision of 7 May 1986 and enclosing its decision. Both the complainant and the Organisation have treated the letter from Mr. Nielsen as a decision by or on behalf of the President of the Office confirming the Committee's decision though it is not said to be in so many words. Since both parties have treated it as a final decision of the President's, the Tribunal will do likewise.

9. The decision impugned is a medical opinion. The Committee's competence was to give such an opinion: it had to determine whether in May 1986 the complainant had needed a cure either because he could not perform his duties or to enable him to continue to perform them. In order to succeed he must show that the opinion was tainted in some way, e.g. by failure to ascertain an essential fact or to take it into account.

10. The complainant attacks the opinion on many grounds which are dealt with below.

(a) He submits that the Committee's report is inconsistent and illogical. The report is wrong when it comments that the rules do not provide for a cure unless treatment at the place of residence fails. He asks why many EPO staff members are getting special leave to follow a course of treatment if, as the Committee states, no such leave may be granted.

The Committee's comments have to be seen in context. After stating the medical basis of the opinion and two specific reasons for the refusal of leave, the report discusses the pathological changes mentioned by Dr. Schmitt in his report subsequent to the medical opinion the Committee was reviewing. Having investigated those changes the Committee confirmed mild scoliosis and arthrosis but found no pain. Dr. Petrowa said that occasional pain might be caused. But if so ("in diesem Falle" or "in that event"), treatment should be at the place of residence.

The report is here discussing a hypothetical case where temporary pain might be suffered, the conclusion being that a cure at a spa would not be necessary as it could be dealt with by treatment at the place of residence. Only if that proved inadequate would the question of granting special leave for a cure arise. There is nothing inconsistent or illogical about that.

The remaining comments in the report are that annual leave should be used for preventive measures and that there is no right to sick leave - by implication, over and above what the rules allow. Such remarks are mere surplusage

and not relevant to the medical opinion which the Committee was called on to give.

(b) The complainant says that his appeal was based not on Dr. Schmitt's certificate but on his own observations which he submitted to the Organisation on 3 June 1986.

That is mere quibbling and has nothing to do with the matter at issue, namely the medical opinion the Committee had to give on whether the assistant medical adviser's decision, taken before Dr. Schmitt wrote his certificate, had been correct.

(c) The complainant contends that the statements attributed to him are either untrue or greatly exaggerated, "probably because of the linguistic barrier". He gives one example of exaggeration, viz. the statement that the pain was mainly due to the excessive practice of sport. He comments that he thinks himself lucky if he can play tennis two hours a week.

If in the original medical examination or the examination by the Committee the doctors and the complainant had failed to understand each other, that would afford grounds for impugning the opinion. But the complainant does not allege that. Although he alleges that statements attributed to him were untrue or exaggerated he does not say which. He merely gives one example which in his view shows exaggeration. The burden of proof is on the complainant to satisfy the Tribunal that the findings of the medical examination of May 1986 or of the one of 7 August 1987 should be set aside because of language difficulties. His own doctors, whom he consulted privately, are both German-speaking. Dr. Dusik and Dr. Schmitt wrote in German. The working languages of the Organisation include German; the complainant is working in Munich; and much of the correspondence with him was in German.

The Tribunal concludes that he has failed to show either any language difficulties or that remarks attributed to him are untrue.

(d) The complainant observes that according to the assistant medical adviser the practice of sport ought to be considered as having adverse effects on the body.

His comment is entirely irrelevant. In fact the medical adviser said no such thing.

(e) He further objects that his age was taken into account in different ways according to the conclusions to be drawn.

That is not so. One sentence says that, his age being taken into account, X-rays show arthrosis in the lumbar-sacral vertebrae, hip joints, knee joint and kneecap, none of it aggravated. The other sentence which mentions age says that Dr. Petrowa did not exclude the possibility that incipient arthrosis due to age, as well as other disorders, might cause intermittent pain. There is no contradiction.

(f) and (g) The complainant further alleges that other medical certificates he had supplied were not commented on; neither was there comment on the fact that before his examination on 7 August 1986 two weeks of thermal treatment had had a favourable effect on his health.

The simple answer is that the Committee was under no obligation to comment, its function being to decide whether the assistant medical adviser's opinion had been justified.

(h) Another objection by the complainant is that only two members of the Committee were present at the examination and that Dr. Weigand never saw him.

Although Dr. Weigand did not take part in the examination, he did read the X-rays, take part in the Committee's deliberations and sign its report. The procedure was therefore regular.

11. To sum up, the Invalidity Committee resolved the dispute after considering the opinions of the assistant medical adviser, of Dr. Dusik and of Dr. Schmitt, examining the complainant and his X-rays taken at the time, and having an electrocardiogram and a blood test taken. On that basis it decided that the assistant medical adviser's refusal of his application had been justified. There is no reason to hold that any essential facts were overlooked. The medical opinion given was within the Committee's competence and there is no valid reason to impugn it.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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