SEVENTY-SEVENTH SESSION

In re GLENN (Joseph)

Judgment 1341

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joseph Glenn against the European Patent Organisation (EPO) on 28 October 1993, the EPO's reply of 21 January 1994, the complainant's rejoinder of 15 February and the Organisation's surrejoinder of 25 March 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 62(7), 84(1)(b), 89, 90, 92(2) and 107 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Article 90(1) of the EPO Service Regulations reads:

"The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave provided for in ... these Regulations, and for determining ... whether a permanent employee is suffering from permanent invalidity which prevents him from performing the duties attaching to his employment at the Office.

It shall also be competent to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations, on the one hand, by the medical officer designated by the President of the Office and, on the other, by the permanent employee concerned or his medical practitioner. ..."

and Article 89(1) provides:

"The Invalidity Committee shall consist of three medical practitioners:

- the first appointed by the President of the Office;

- the second appointed by the permanent employee concerned; and

- the third appointed by mutual agreement between the first two."

The complainant, a British subject who was born in 1951, joined the staff of the EPO in 1984 as a lawyer at grade A3 in Directorate-General 5 (DG5) in Munich. In February 1992 he was found to be suffering from scarlet fever, which infected the eardrum, and had tinnitus and acute pain in his right ear. Surgery and drugs afforded no relief in the months that followed. On 12 February 1993 he underwent a mastoidectomy, which entailed cutting off his ear and sewing it back on. Although the operation checked the infection it did not cure the tinnitus.

On 25 February the chairman of the Invalidity Committee examined the complainant, as did its third member, the one appointed under Article 89(1) of the Service Regulations "by mutual agreement". In a report dated 12 March 1993 the Committee said that since there was no organic cause of his tinnitus he should have four months' extended sick leave for "neurological" treatment, if possible as an in-patient in a psychiatric ward.

By a letter of 1 April 1993 the Director of Personnel informed him that the Committee had decided to extend his sick leave by four months as from 1 April 1993; in that period he would draw half his basic salary providing he followed the "full range of treatment" which the Office's medical officer and his own doctor prescribed.

In a letter of 4 April to the Vice-President of DG5 the complainant alleged flaws in the Committee's composition: the Administration had not made plain that the third member was a subordinate of the chairman in his capacity as chief medical officer in the Munich City Council's Department of Health. He disputed the validity of the

Committee's recommendations and sought the removal of its report from his file, review of the decision to put him on half pay and the setting up of a new Committee with a different chairman.

By a letter of 7 April to the Director of Personnel he appealed against the decision to put him on half pay and pressed the claims in his letter of 4 April to the Vice-President: the Committee, he said, had forced him to choose between going into a psychiatric ward and compromising the welfare of his wife and children through loss of income.

The parties having agreed to replace the third member, though not the chairman, the complainant withdrew his appeal in a letter dated 11 May 1993 to the Director of Personnel.

The complainant then appointed a neuro-psychiatrist to a new Committee. In a letter of 21 June 1993 the neuro-psychiatrist informed the chairman that the complainant had responded to out-patient treatment for "reactive depression" and no longer required neurological or psychiatric treatment; he also submitted the name of an ear, nose and throat specialist to serve as the Committee's third member.

The parties having agreed to his appointment as third member, the specialist informed the chairman by a letter of 26 July 1993 that the complainant was suffering progressive loss of hearing and a degree of tinnitus that impaired concentration; his disability for work was 40 per cent.

By a letter of 13 August the Director of Personnel told him that the Committee had said, in a report of 12 August that was appended, that it saw no need to extend his sick leave nor any evidence of permanent disability within the meaning of Article 62(7) ("sick leave"); he must therefore report for duty on 16 August. That is the decision he impugns.

By a letter of 16 August to the Director of Personnel he tendered his resignation. The Director accepted it with immediate effect on the President's behalf in a letter dated 17 August.

On 24 October 1993 the complainant lodged an appeal against the decision of 13 August claiming, among other forms of relief, the reversal of the President's acceptance of his resignation.

B. The complainant submits that the Invalidity Committee whose report gave rise to the impugned decision failed to comply with the requirements of the Service Regulations. He has two main pleas.

He objects first to the composition of the Committee. Its chairman lacked integrity by putting on the first Committee a subordinate - a psychiatrist - who was bent on diagnosing mental illness. To keep the chairman from appointing another prejudiced psychiatrist to the new Committee the complainant had to appoint his own psychiatrist in preference to an ear, nose and throat specialist.

His other objection is to the procedure the Committee followed. The Administration never made the rules plain: two of its members acted as if the German rules on assessing invalidity applied, and they did not. The chairman failed to consult the other members of the Committee and drafted its report on his own. It never even considered reducing his working hours, as it could have done. He resigned only because he mistakenly assumed that its opinion was "fair and valid" and therefore acquiesced in what he sees as "constructive dismissal".

He seeks (1) the convening of a new Invalidity Committee "with clear rules of procedure"; (2) the destruction of the Invalidity Committee's records on his case; (3) the quashing of the President's decision to accept his resignation; (4) an order of payment of the expenses he incurred in attending meetings of the new Committee; and (5) replacement of the EPO's medical officer with one "not connected to Munich City Council Health Department".

C. In its reply the EPO submits that his claim about resignation is irreceivable. Before he could challenge the President's acceptance of his resignation he had to exhaust the internal remedies open to him under the Service Regulations. Under Article 107(2) direct appeal to the Tribunal lay only against decisions taken after consultation of the Invalidity Committee: the acceptance of his resignation was not such a decision.

On the merits the EPO denies flaws in the Committee's composition and procedure. The complainant had agreed that the same chairman who had considered his case in February 1993 should review it at the end of his extended sick leave. He puts forward no evidence of any lack of integrity in the chairman. He freely chose the second member, who himself proposed the ear, nose and throat specialist who served as the third.

The material rules of procedure are in the Service Regulations. For the sake of its independence the Committee's deliberations are kept secret: Article 92(2) requires disclosure only of the recommendation and the reasons for it. Since all three members signed the report it is insulting to suggest that any of them did so without first examining it. Besides, informal consultations between the members of the Committee "normally take place". The Committee expressly referred to the applicable Regulations when it concluded that the state of the complainant's health showed no evidence of permanent invalidity likely to prevent him from carrying out his duties at the Office. There is no evidence that the Committee failed to consider the possibility of shorter hours. In any event the complainant has no-one but himself to blame for tendering his resignation.

D. In his rejoinder the complainant disputes the arguments in the EPO's reply. His doctors say there was no consultation between the members of the Committee on his case, nor did it consider putting him on part-time work. He sets out his reasons for questioning the suitability of the chairman. Inasmuch as Article 90 of the Service Regulations requires that invalidity be assessed on the basis of the staff member's duties, why did the secretary of the Committee not give the Committee the text of his job description? When he decided to resign he thought returning to work would damage his mental health; only later did he realise there was an alternative to resignation.

E. In its surrejoinder the EPO observes that there are no arguments in the rejoinder that might cause it to change position. In its submission his entire case rests on two accusations: that the Administration and its medical officer are disreputable and that the other two doctors are incompetent. Neither is substantiated.

CONSIDERATIONS:

1. The EPO employed the complainant from 1 July 1984 until his resignation, on 16 August 1993. On 13 February 1992 he was found to be suffering from scarlet fever and it caused ear infection. He underwent three operations between March 1992 and February 1993. In March 1993 an Invalidity Committee established under Article 89 of the Service Regulations of the European Patent Office recommended extending his sick leave by four months. He is not appealing against that decision.

2. On 13 July 1993 a second Invalidity Committee again considered his case. It found that although he was still suffering from tinnitus medication was no longer necessary. It noted further loss of hearing and assessed at 40 per cent the reduction in his capacity to work. It held that he was suffering neither from "permanent invalidity" within the meaning of the Service Regulations, nor from any permanent invalidity which prevented him from carrying out his duties and that no extension of sick leave was necessary. The complainant is impugning that decision, which the Director of Personnel notified to him by a letter of 13 August 1993.

3. The complainant contends that the EPO was culpably negligent in failing to establish rules of procedure for the Committee that required its members to meet or at least communicate by telephone to discuss their decision. He seeks an order that the Committee be reconvened and given clear rules of procedure. He says that, contrary to what its report stated, each of the doctors constituting the Committee examined him separately.

4. The Tribunal holds that, even if that was so, the impugned decision remains valid nevertheless because there were two aspects to the complainant's illness: loss of hearing and severe reactive depression. The doctors concurred in finding that the tinnitus was chronic but that he was suffering from no organic, neurological or psychic illness of note. They concluded that there was further loss of hearing in the inner ear which, in the opinion of one of them, the ear, nose and throat specialist, accounted for a 40 per cent reduction in his capacity to work. Such disability was insufficient to warrant a finding of "permanent invalidity totally preventing him from performing" his duties within the meaning of Article 84(1)(b) of the Service Regulations.

5. The complainant seeks an order cancelling his resignation, which the Organisation accepted on 17 August 1993. Unlike his challenge to the decision on the grounds of the Invalidity Committee's findings, this claim is irreceivable because he has failed to avail himself of the internal means of redress provided under Article 107 of the Service Regulations and so to satisfy the condition of receivability laid down in Article VII(1) of the Tribunal's Statute.

6. His claims to destruction of the records of the Invalidity Committee on his case, to repayment of expenses incurred in attending meetings of a new Invalidity Committee and to the appointment by the EPO to such a Committee of a doctor who has no connection with the Department of Health of the City of Munich are all contingent on the success of his principal claim. Since that claim fails, so too must the accessory claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tirbunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner

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