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

EIGHTY-FOURTH SESSION

In re Gosselin

Judgment 1674

The Administrative Tribunal,

Considering the complaint filed by Mr. Daniel Gosselin against the European Patent Organisation (EPO) on 27 September 1996, the EPO's reply of 20 December 1996, the complainant's rejoinder of 9 Avril 1997 and the Organisation's surrejoinder of 9 June 1997;

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

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. The staff of the European Patent Office, the secretariat of the EPO, has medical insurance coverage under a collective contract concluded by the Organisation with a group of insurers. Management is in the hands of a company known as Van Breda.

The complainant, a Frenchman who was born in 1956, was at the material time in the Office's employ in Munich.

On 7 March 1995 he sent Van Breda a claim to the repayment of 7,639.61 German marks in medical costs. He appended a letter from his doctor stating that he owed only 5,000 marks, the amount of the prior estimate.

In a statement dated 17 March 1995 and again in a letter of 23 March Van Breda refused his claim on the grounds that their medical adviser had found "no medical or other grounds for the examinations carried out". They asked for a "further detailed medical report" so that they could reconsider the matter. In a letter of 27 March 1995 the complainant asked the President of the Office to refund the medical costs or else treat his letter as an internal appeal.

By a letter of 21 April 1995 the Director of Personnel Administration told the complainant that an Invalidity Committee would be meeting to look into "the medical dispute" and asked him to appoint a doctor to represent him on the Committee. He did so on 22 May 1995.

By a letter of 13 June 1995 he asked the President to reverse the decision to set up the Invalidity Committee and again, failing that, to treat his request as an internal appeal.

In a letter of 30 June 1995 the Director of Personnel Administration told him what the Office was doing to settle the dispute without convening the Committee.

The Principal Director of Personnel informed him in a letter of 17 July 1995 that Van Breda were still waiting for the detailed report they had asked for in March and that the Invalidity Committee would be taking the case up again. On the same day he got a second diagnosis from a Dr. Daunderer which he said broadly confirmed his own doctor's.

On 27 September 1996 he filed this complaint against the implied rejection of his appeal of 13 June 1995.

On 17 February 1997 the Appeals Committee, after giving him a hearing, recommended allowing his internal appeals.

By a letter of 18 March 1997 the President reversed the decision of 21 April 1995 to set up an Invalidity Committee but dismissed the appeal of 27 March 1995 claiming the medical costs.

B. The complainant submits that the Office and Van Breda have no reason to refuse his claim to the medical costs and that Van Breda cannot supply any contrary medical opinion in support of the refusal. His appeals of 27 March and 13 June 1995 had led to no decision by 27 September 1996, when he filed his complaint.

In his submission neither the insurance contract nor precedent affords any legal basis for the request for a "medical file" or a "more detailed medical report" and so it is unlawful. It is also in breach of German law, which governs the insurance contract in non-medical matters.

He objects to the convening of the Invalidity Committee: under clause 6 b) of the insurance contract it has no authority to settle medical disputes between Van Breda and an insured person. Besides, the Service Regulations do not allow the Office to convene such a Committee until all possibilities of arbitration have been exhausted.

He contends that Van Breda infringed clause 6 b) of the insurance contract by refusing to accept the diagnosis of the doctor appointed as arbitrator, Dr. Daunderer, and cites "the double-test principle" which is generally accepted in medical disputes.

Lastly, he submits that the Office failed to meet its obligations. As the policy holder it should have tried to get Van Breda to pay up.

He asks the Tribunal to quash the decision to convene an Invalidity Committee and to order Van Breda to accept Dr. Daunderer's opinion and refund the medical costs plus interest. He claims 50,000 German marks in material and moral damages. By way of subsidiary claim he asks the Tribunal to condemn Van Breda's practice of demanding full and detailed medical reports.

C. In its reply the Organisation blames the complainant and his own doctor for the delay in setting up the Invalidity Committee, which does have authority under Article 90(1) of the Service Regulations. So he had no reason to go to the Tribunal before exhausting the internal means of redress. His complaint is therefore irreceivable. Besides, by the time he filed his appeal against the letter of 21 April 1995 he had already complied with the request that he appoint a doctor to the Committee.

In a subsidiary argument the Organisation submits that the complaint is devoid of merit. Van Breda did explain the refusal of repayment since they said their medical adviser had found no medical grounds for the treatment the complainant had undergone.

The dispute is unquestionably about a medical matter. What Van Breda asked for was a "fuller medical report", not access to the complainant's medical file. That request was in keeping with the insurer's right of supervision, and the complainant does not challenge either that there is such a right or what it amounts to. Van Breda's medical adviser was quite entitled "to seek further information" if he had doubts about the need for treatment.

The Organisation also submits that clause 6 b) of the insurance contract does not apply to this dispute, which is between an insured staff member and Van Breda. Consequently, Dr. Daunderer is not an "arbitrator" within the meaning of that clause, and Van Breda were therefore under no obligation to accept his findings.

The subsidiary claim to a ruling against Van Breda is irreceivable because it was not made in the internal appeal.

D. In his rejoinder the complainant alters his claims in the light of what has happened since the filing of his complaint. He drops his claim to the quashing of the decision to set up the Invalidity Committee but wants the Tribunal to declare that the Committee lacked authority to take up his case. He presses his other claims.

Citing the Appeals Committee's unanimous opinion, he maintains that there are no medical grounds for refusing repayment. That, he says, is what really matters in determining whether Van Breda were right to refuse his claim and the Organisation to set up the Invalidity Committee. He denies ever agreeing to the convening of the Committee: he appointed a doctor simply to preserve his rights. He denies holding things

up and accuses the Organisation of trying to discredit him.

The legal advisers of Van Breda and the Office acted in breach of medical secrecy by exchanging information without leave to do so. And by appointing its medical adviser to the Invalidity Committee the Office also broke the rule of secrecy which governs the Committee's procedure.

E. In its surrejoinder the Organisation maintains that what the complainant is challenging is the decision to set up an Invalidity Committee, not the refusal to repay medical costs. So the complainant may not rely on that refusal to support any of his pleas. Medical secrecy is therefore immaterial.

CONSIDERATIONS

1. The complainant, a Frenchman who was born on 19 September 1956, works for the EPO as an examiner at grade A3 at General Directorate 2 in Munich.

He said that his health had suffered because of chemicals that a firm had used to disinfect his flat.

The EPO has concluded a collective contract with a group of insurers represented by brokers known as J. Van Breda & Co. International. The policy covers the Organisation's liability towards its staff and includes medical insurance. On 7 March 1995 the complainant put a claim to Van Breda for the payment of 5,000 German marks out of the amount of a bill from his doctor, Dr. Caemmerer.

Van Breda sent him a statement on 17 March showing that they had not allowed his claim. They explained in a letter of 23 March that their medical adviser was "unfortunately not yet able to agree to repayment", having found no "information or medical need warranting the examinations carried out by the doctor". Van Breda wanted another opinion and suggested consulting the EPO's own medical officer, Dr. Hildebrandt.

In a letter of 27 March 1995, which the complainant did not get until 19 June, Van Breda again asked him to see a doctor other than Dr. Caemmerer.

In a letter of 27 March he asked the President of the Office to pay Dr. Caemmerer's bill or, if not, to treat the letter as an appeal. His request was turned down and his appeal went through as No. RI/31/95.

On 21 April the Director of Personnel Administration told him of the referral of the dispute to the Invalidity Committee in accordance with Articles 89 to 92 of the Service Regulations. By a letter of 13 June the complainant asked the President to reverse that decision. That case too went to the Appeals Committee as No. RI/72/95.

In the hope that the Invalidity Committee would sort things out the Administration went ahead with arrangements for convening it. At that stage the complainant did not really object and he went along with the arrangements. Nor did he expressly ask the Appeals Committee to proceed, notwithstanding the decision to convene the Invalidity Committee.

2. Taking the view that things had dragged on too long, he filed this complaint on 27 September 1996. He seeks the quashing of the implied rejection of his medical claim and of the decision to convene the Invalidity Committee. By a subsidiary claim he asks the Tribunal to condemn Van Breda's practice of systematically requiring "a full or detailed medical report" instead of the detailed diagnosis needed to ascertain "the nature of the illness".

The EPO seeks the dismissal of his complaint on the merits insofar as it is receivable.

3. Although his complaint was pending the Appeals Committee took up his two appeals and in a report of 17 February 1997 to the President recommended allowing them.

By a letter of 18 March the President allowed appeal RI/72/95, the one against the convening of the Invalidity Committee, but rejected RI/31/95, the one against the refusal of his claim to payment of Dr. Caemmerer's bill, on the grounds that he had so far failed to provide proof of chemical poisoning and Van Breda had adequately explained their refusal.

4. The complainant no longer has a cause of action insofar as he is impugning the decision to convene the Invalidity Committee and indeed he has withdrawn that claim in his rejoinder.

5. His subsidiary claim - to a ruling against Van Breda - is irreceivable on two counts. First, it is new, and so he has failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires. Secondly, it requires a ruling in law on an issue that discloses no cause of action: the issue may be raised and resolved in the context of some substantive claim.

6. As to his claim to repayment of Dr. Caemmerer's bill, there is a question of receivability (Article VII(1) of the Statute) because of the nature of the decision at issue and because the complainant has come to the Tribunal without waiting for a ruling on his internal appeals.

(a) The case law says that a complaint is irreceivable when the decision at issue is not one that adversely affects the complainant. A decision is an act by an officer of an organisation which has a legal effect on the staff member's status: see Judgment 532 (*in re* Devisme). It is not a letter that merely acknowledges receipt of an appeal and says that a decision will be taken later (*ibidem*), or the absence of a reply (the decision being implied) to a letter whose object is to "initiate a discussion" (see Judgment 336, *in re* Hayward). The complainant suffers no injury from having to wait for a later decision which he may impugn, for example when a communication from the organisation informing him that it will repay him as soon as he has supplied the necessary details (see Judgment 1506, *in re* Delos, under 7 to 9). Similarly, an internal appeal, followed by a complaint, is not receivable when the organisation's rules prescribe some formality to be completed first (see Judgment 468, *in re* Jadoul concerning "something which is only one step in a complex procedure and of which only the final outcome is subject to appeal").

In this case the President, who endorsed Van Breda's view, took no final decision to reject the claim. He merely asked for more evidence, which was not obviously unreasonable. He also told the complainant that, failing agreement, the procedure to be followed was the one in Article 90 of the Service Regulations:

"Duties

(1) The Invalidity Committee shall be responsible for determining action to be taken at the expiry of the maximum period of sick leave ... and for determining ... whether a permanent employee is suffering from permanent invalidity ...

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.

(2) Cases shall be submitted to the Invalidity Committee either on the initiative of the President of the Office or at the request of the permanent employee concerned."

Clause 6 b) of the collective policy applies to disputes between the policy holder, which is the EPO, and the insurers. Staff members may not deal directly with the insurers. It is common ground that they have to apply to the EPO, which in accordance with Article 83 of the Service Regulations insures them individually against specific risks. So the complainant is mistaken in relying on clause 6 b), especially in support of his contention that the doctor he saw at Van Breda's request was an "arbitrator" within the meaning of 6 b). He is further mistaken in arguing that Article 90 of the Service Regulations does not apply to him on the grounds that Van Breda failed to account for their refusal and there was no medical opinion. Van Breda's position, which the Organisation has endorsed, was not unsubstantiated. And the lack of evidence was a medical issue that he was free to raise in submissions to the Invalidity Committee.

The conclusion is that the Organisation has taken no final decision on the claim and that the dispute procedure provided by the Service Regulations is still open to the complainant, as he himself acknowledges. It is immaterial that in response to his objections the President reversed the decision to set up the Invalidity Committee.

Since it is premature for him to put his claim to the Tribunal, his complaint is irreceivable.

(b) Where the decision-making authority tarries over an appeal, the internal procedure must be deemed exhausted when the complainant has done his utmost to get things going yet no decision is likely reasonably soon: see Judgments 1243 (*in re* Singh No. 2) under 16; 1404 (*in re* Rwegellera) under 8; 1433 (*in re*

McLean) under 4 and 6; 1486 (*in re* Wassef No. 8) under 11 and 13; 1534 (*in re* Wassef No. 14) under 3; and the earlier precedents cited therein).

Here the criteria are not met. There was delay over the complainant's internal appeals, not because the Appeals Committee was neglectful or overworked, but because the Administration wanted settlement in the Invalidity Committee. That too is why the Appeals Committee had failed to report when he lodged his complaint. He was kept abreast of what was being done to set up the Invalidity Committee. As late as 14 August 1996 the secretariat sent him an e-mail message bringing him up to date, and he and his doctor took part in the procedure. He raised no objection until 17 September 1996 and never made it clear that he wanted his appeal against the convening of the Committee to be taken up first. He also recounts what he himself did to try and settle out of court.

Not until 17 September 1996 did he ask the chairman of the Appeals Committee when appeal RI/72/95 would come up. The chairman's answer was that he had forwarded that inquiry to the official who was writing the Administration's reply. The complainant sent a message to that official on 20 September 1996 asking when he thought the appeal "might come up" in the Committee. Having got no immediate reply, he filed this complaint on 27 September. On 1 October the Administration answered him that it would be replying to his appeal within a fortnight. Its brief was dated 14 October, the Committee put the appeal down for its session from 9 to 12 December and it reported to the President on 17 February 1997.

So at the date of filing of this complaint the complainant had not done what might reasonably be expected of him. He should have told the EPO and the Appeals Committee that he wanted his appeals to go through without further ado either before the Invalidity Committee was set up or while that Committee was meeting, and should then have waited a reasonable time to see what happened.

On this score again he has failed to exhaust his internal remedies and his complaint is irreceivable.

7. That being so, his main and subsidiary claims fail and so too must his claims to damages.

DECISION

For the above reasons,

1. The complaint shows no cause of action insofar as it challenges the instigation of proceedings before the Invalidity Committee.

2. The complainant's other claims are dismissed.

In witness of this judgment Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1998.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

A.B. Gardner

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