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

EIGHTY-FOURTH SESSION

In re Forté

Judgment 1684

The Administrative Tribunal,

Considering the complaint filed by Mr. Jean-Pierre Forté against the European Patent Organisation (EPO) on 30 October 1996 and corrected on 14 November 1996, the EPO's reply of 5 February 1997, the complainant's rejoinder of 6 May and the Organisation's surrejoinder of 11 July 1997;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 9(6) of its Rules;

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 complainant, a Frenchman who was born in 1956, is in the employ of the European Patent Office, the EPO's secretariat, at Munich. He has medical insurance coverage under Article 83 of the EPO's Service Regulations. The Organisation has concluded a collective insurance contract with a group of insurers administered by brokers known as Van Breda.

Asserting that he and his family had suffered poisoning, he sent Van Breda on 15 December 1994 a claim to the refund of medical costs. By a letter of 28 December Van Breda asked him to provide a detailed bill and to undergo examination by the Office's medical officer, Dr. Hildebrandt. Between 30 December 1994 and 25 January 1995 he underwent three examinations, two by Dr. Hildebrandt and the third by his colleague, Dr. Lechner.

In a letter of 21 February 1995 he asked the President of the Office to pay the sum he had claimed from Van Breda or else treat his letter as an internal appeal. On 2 March the Director of Staff Policy told him that because the dispute was on medical matters he was referring the case to the Invalidity Committee under Article 90 of the Service Regulations and asked him to appoint a doctor to the Committee.

Meanwhile the complainant had asked several times to see the three reports written by Dr. Hildebrandt and Dr. Lechner. The Office having refused, he filed an internal appeal with the President in a letter of 24 March 1995. On 24 April the Director of Staff Policy informed him that the Office had not got Dr. Lechner's report and that Dr. Hildebrandt's reports were available to the members of the Committee.

He is challenging the implied rejection of his claims.

B. The complainant submits that his complaint is receivable because so much time has gone by since he filed his internal appeal.

On the merits he contends that Van Breda's refusal to refund his costs is unlawful, especially since it is based on medical reports he has never seen.

He pleads breach of Article 32 of the Service Regulations: the Administration has at least two files about him and the one he did see is incomplete because it does not contain the medical reports on his case. The Organisation has also failed to keep his records confidential since unauthorised people have had access to those reports.

The Office's medical officers broke German law on medical secrecy by letting the Administration see the reports without his consent. They were also in breach of clause 7 of the insurance policy.

He asks the Tribunal to order the EPO:

(a) to pay him 10,000 German marks in damages on each of the following counts: for the moral injury it caused him by appropriating the medical files; for the misconduct of its medical officers in disclosing them; and for the moral injury it caused him by refusing to let him see them;

(b) to let him see any medical file about him or members of his family, subject to payment of 100 marks a day by way of penalty as from the date at which the order is notified to the EPO's administrative services.

(c) to award him 10,000 marks in costs.

C. In its reply the Organisation says that the complaint is not receivable. The complainant himself was to blame for delay in processing his internal appeal. The Invalidity Committee was unable to meet because of a dispute between him and Dr. Hildebrandt, who was not free to submit the medical reports to the Committee without his consent.

In subsidiary argument the Organisation submits that the complaint is devoid of merit. It has three pleas.

First, it explains how Dr. Hildebrandt came to write the first report. The complainant brought several departments of the Office into his dispute with Van Breda, and he sought and obtained a sum in financial aid from the Office, which he was to pay back as his case and his own circumstances evolved. So it was only reasonable for the Office to get the information it required from its medical officer. It refused him access to the first report because Dr. Hildebrandt objected. Since the dispute was about a medical matter he was to see the report anyway once the Invalidity Committee met.

Secondly, it is a general principle of law that insurers may check claims and so must have access to all the available medical information. It was in the exercise of that right that Van Breda asked the complainant to undergo examination by Dr. Hildebrandt and then by Dr. Lechner. Since the reports they wrote were for Van Breda the Office had no authority to show them to him.

Lastly, on 9 August 1996 Dr. Hildebrandt sent the three reports, with leave from the complainant, to Dr. Manenti-Forté, his own sister, whom he had appointed to represent him on the Invalidity Committee. So by the time he filed his complaint, on 30 October, it was mistaken of him to plead breach of his right of defence on the grounds of denial of access to the reports.

D. In his rejoinder the complainant alleges that the sole purpose of the medical examinations was to find him unfit for work. There had not yet been any decision to convene an Invalidity Committee when he first asked to see the medical reports, and the Office had given him financial help before its medical officer examined him. It is the Office, not the Invalidity Committee, that may let him see the reports. He doubts that all the reports went to the Committee and asks the Tribunal to shed light on that issue.

E. In its surrejoinder the Organisation states that it knows of no medical report other than the three intended for the Invalidity Committee. It is the dispute about repayment of medical costs that prompted the three medical reports; the sole object of his internal appeal was the disclosure of them; and so the matter can be settled only in the context of a procedure involving the Invalidity Committee. The duty of medical secrecy in clause 7 of the insurance policy applies only to third parties, not to Van Breda nor to any doctor involved in the dispute. The complainant has no grounds for objecting to the absence of the medical reports from his personal file: Article 32(1) of the Staff Regulations requires that such file shall contain only reports on the staff member's ability, efficiency and conduct.

CONSIDERATIONS

1. The complainant holds a grade A3 post at the European Patent Office in Munich.

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

Like any other employee of the EPO he has medical insurance coverage under a collective insurance contract which the Organisation has concluded with a group of insurers represented by a firm of brokers, J. Van Breda & Co. International.

He submitted to Van Breda a claim to the refund of medical costs. Van Breda refused it, apparently questioning the nature of the ailments, doubting the usefulness and cost of the treatment and rejecting invoices from his doctor, Dr. Caemmerer.

To help him out the Office lent him 50,000 marks in December 1994, to be paid back as things took their course.

The EPO's medical officer, Dr. Hildebrandt, who is not a member of its staff, examined him on 30 December 1994 and 4 January 1995 and wrote a report. On 23 January 1995 an EPO officer refused to let him see it and told him to undergo further examination, first by Dr. Hildebrandt and then by Dr. Lechner, a colleague of Dr. Hildebrandt's. He did so on 25 January 1995 and both doctors wrote reports as the Office had asked, apparently on Van Breda's behalf. The reports went to Van Breda.

The complainant wanted to see them but the Office refused on the grounds that they had gone to Van Breda and would be forwarded to the Invalidity Committee just set up to settle his dispute with Van Breda over the bills.

2. On 8 March 1995 he asked the Personnel Department to let him see the three reports, but it refused. He filed an internal appeal on 24 March with the President of the Office. The President did not reply and his appeal was passed on to the Appeals Committee on 24 April 1995.

In a letter of 4 May 1995 the chairman of the Committee acknowledged receipt but said that owing to a large backlog he could give no date for hearing the case.

On 27 June 1996 the complainant wrote the chairman a note that went unanswered.

In the week from 5 to 9 August 1996 he telephoned the chairman, who he says told him that no date had yet been set for hearings or even for preliminary discussion.

He claims:

(1) an award of 10,000 marks in damages for the appropriation by the EPO of the doctors' reports;

(2) 10,000 marks in damages for breach of medical secrecy by the medical officers;

(3) another 10,000 marks for not letting him see the medical reports;

(4) disclosure of the doctors' reports and payment of 100 marks a day by way of penalty as from the date of the notification of the order until he is allowed to see the reports;

(5) 10,000 marks in costs.

The Organisation seeks the dismissal of the complaint.

Receivability

3. Article VII, paragraph 1, of the Tribunal's Statute says that for a complaint to be receivable the internal remedies must have been exhausted. But precedent has it that, if there is delay over the final decision, the requirement will be met provided that the complainant has done everything that might be expected of him to get one but the appeal proceedings are unlikely to end within a reasonable time. 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 cases cited therein.

The requirement was plainly met in this case. Having done all that he did, to no avail, the complainant could not reasonably be required to wait any longer, there being no grounds for expecting the Appeals Committee to report soon. The Organisation's domestic difficulties in running its appeal procedure afforded no excuse for denying him due process. And the very nature of his case called for a fairly prompt decision since he says he needed the reports for the purposes of his medical treatment and the defence of his rights.

Whether he may see the case records or any information that concerns him personally is an issue distinct from his claim to costs and one that he may press separately. It is mistaken for the EPO to retort that he may not do so on the grounds that its decision on that issue was merely incidental.

The conclusion is that he has exhausted his internal remedies as to the subject of his internal appeal.

4. He has not done so, however, as to the new claims he has put to the Tribunal about breach of medical secrecy.

5. The EPO contends that he has no cause of action on the grounds that he may see the three medical reports in the proceedings before the Invalidity Committee. He named his own sister, Dr. Manenti-Forté, as his "representative" on the Committee; as such she has seen them; and so can he.

If the EPO had the obligation to let him see the reports if he so asked, it is for the Organisation to show that it has discharged the obligation.

There is no evidence to suggest that he has yet seen them. Handing them over to his sister is not tantamount to letting him see them since it is not established that she is his legal "representative". Someone who is appointed to a committee is not necessarily the representative of the appointing party and empowered to act on that party's behalf. Nor is there any evidence to suggest that the complainant gave his sister authority to represent him.

No doubt his attitude is odd. He has produced a letter of 26 February 1997 from his sister saying that she has seen the three reports. So could he not easily have got them from her, particularly as the EPO had no objection? Actually he does not even say he asked her for them. But that is not remiss of him since if the EPO had the duty to produce them he was entitled to demand that it do so.

So his claim to disclosure of the reports holds good.

6. On 23 August 1997 he sought to file an unsolicited brief in answer to the Organisation's surrejoinder.

The Tribunal's Rules provide ordinarily for the filing of only two briefs by each party. There are no exceptional circumstances warranting a third one from the complainant, and since the arguments in it are immaterial the President of the Tribunal has disallowed it under Article 9(6).

The merits

7. Article 32(6) of the Service Regulations entitles the staff member to see the personal file and 32(5) says that there shall be only one such file for each staff member.

The complainant argues, and the Organisation denies, that those rules apply to medical records too.

Since medical records are strictly personal the staff member's right to see them may not ordinarily be challenged. But there is no need to say for the purposes of this case just how far the right should go, for example whether it holds good if disclosure may prove harmful to the staff member or whether letting a qualified nominee see the records will do.

In this instance the Organisation had no reason not to let the complainant see the medical reports. He plainly needed to know what they said, not just to settle his insurance claim with the Organisation and Van Breda, but also perhaps for the purpose of choosing the right treatment. Indeed the EPO too had asked, with his consent, to see the reports so as to settle its dispute with him. It needed to know whether his ailments and the treatment of them warranted repayment of the medical costs, and whether he was fit for work and so, for one thing, able to pay back its loan. It cites no material fact that would require any particular precautions in his own interests. Indeed it is willing to let him see the reports in the course of the Invalidity Committee's proceedings. Never since he said he wanted to see them has it suggested that it is unwilling to let him do so.

The Organisation states that some of the reports are not or are no longer in its possession because it passed them on to Van Breda. The argument is irrelevant. It commissioned the reports from its medical officer or

his substitute; so it can get them back or demand copies. It is likely to recover them eventually anyway.

The reason why the EPO refused to let the complainant see Dr. Hildebrandt's reports was that the doctor himself objected and asked it to treat them as confidential to spare him the risk of trouble from the complainant. But that is not a reason that can hold good against the complainant. It was for the EPO, not their author, to decide what to do with the reports it had asked for. Besides, how could the complainant accuse the doctor of breach of medical secrecy by letting him see the report when the secrecy was in his own interests?

The conclusion is that the reports must be put at his disposal.

Though the EPO scarcely objects any more since it is willing to let him see them in the Invalidity Committee proceedings, its quibbling has further embroiled its dispute with him.

8. In the circumstances he is entitled to an award of 2,000 marks in moral damages. But it is premature to order payment of a penalty for delay.

Since the complainant's main claim succeeds, he is entitled to costs.

DECISION

For the above reasons,

1. The complaint being allowed in part, the Organisation shall take steps to let the complainant see the three reports.

2. It shall pay him 2,000 marks in moral damages and 2,000 in costs.

3. His 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.