NINETY-FIRST SESSION

Judgment No. 2052

The Administrative Tribunal,

Considering the complaint filed by Mrs I. H. against the European Patent Organisation (EPO) on 7 August 2000 and corrected on 8 September, the EPO's reply of 27 November 2000, the complainant's rejoinder of 26 February 2001 and the Organisation's surrejoinder of 12 April 2001;

Considering Article II, paragraph 5, 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 complainant, a French citizen who was born in 1963, joined the staff of the European Patent Office, the EPO's secretariat, in 1986 as an examiner at grade A1 at The Hague; on 1 April 1990 she was transferred to Munich where she reached grade A3.

Article 23 of the Service Regulations for Permanent Employees of the European Patent Office provides that: "A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties". Article 62, on sick leave, stipulates in its third paragraph that prior permission of the President of the Office is required if the permanent employee wishes to spend sick leave elsewhere than at "his place of residence" referred to in Article 23.

The complainant has been ill since 1992. In view of the amount of sick leave she had taken the EPO notified her on 13 July 1995 that it would have to initiate proceedings before the Invalidity Committee. This Committee issued several reports over several years.

In its first report, issued in October 1995, the Committee concluded that the complainant was not suffering from permanent unfitness for work and should progressively resume her duties. In its second report, issued in January 1996, it decided that the complainant should undertake treatment in France. In its sixth report of July 1997 it decided that, although she still needed treatment, she should progressively resume work. She did so for a short period only. In letters sent to her in mid-1998 the Administration reminded her of her obligations under Article 62(3), to obtain prior permission if she wished to spend her sick leave in France.

In its eighth report, issued in early February 1999, the Committee unanimously decided to extend the complainant's sick leave to 31 December 2001. In an addendum, dated 24 February 1999, it concluded by a majority that she should continue her treatment, and that it could in principle be provided in Munich if it were dispensed by a French-speaking therapist.

By a letter of 3 February 1999 the complainant sought authorisation to spend her sick leave in France; on 18 February permission for this was granted. She was expected to return to Munich on 16 May 1999 but she did not attend a medical consultation arranged there for 20 May. On 17 June the EPO told her that she was in breach of her obligations under Article 62(3), since she was spending time in France without authorisation.

In its ninth report, of April 2000, the Committee maintained the decision to extend her sick leave until 31 December 2001 and decided that the specialist treatment that she had been undertaking should be continued with a view to restoring her fitness to work. By a majority it again decided that the treatment could in principle be provided in her place of work, which was Munich.

The Director of Personnel Management wrote to the complainant on 8 May 2000, sending her a copy of that report. He confirmed that her sick leave was extended on condition that the specialist treatment was continued. He said that

approval to spend her sick leave in France could not be granted since the required treatment had to be carried out in Munich, and any failure to fully comply with it could result in her emoluments being stopped and in disciplinary measures being initiated against her. The complainant impugns that decision.

In March 2001, in its tenth report, the Invalidity Committee found that the complainant was suffering from "total invalidity". She was awarded an invalidity pension as of 1 March 2001.

B. The complainant submits that the decision of 8 May 2000 was issued subsequent to an opinion given by the Invalidity Committee and therefore she did not need to file an internal appeal.

She wants to be allowed to spend her sick leave in France. She argues that the Invalidity Committee merely stated that the required treatment could "in principle" be carried out in Munich; it did not say that it "must" be done in Munich. Moreover, it was not within its power to decide in which country or city a particular treatment had to be carried out. Such an issue is not a medical question. It comes under employment law and therefore it is up to the Administration to take a decision on the matter. While a decision on where sick leave may be taken is at the discretion of the President or his representative, it should not be taken arbitrarily. The text of the letter of 8 May 2000 did not state the true grounds for the decision, nor did it show that any weighing of interests had taken place.

A correct weighing up of interests would come down in her favour. She wished to stay in France as she was sick and bringing up a small child on her own and wanted to benefit from the proximity of her family. She had built up a relationship of trust with her therapist. Treatment in Munich would have raised language problems. Since her sick leave had been extended to 31 December 2001 she would clearly not have been available to work before then. Given the length of her sick leave the Organisation had no legitimate interest in her remaining at her place of employment. Moreover, she continued to have "her residence in Munich"; therefore, she had not violated the residence obligation contained in Article 23 of the Service Regulations.

Because her problems have not diminished she is seeking, outside the framework of the invalidity proceedings, to determine the cause of her illness. Her state of health has been further damaged by the Organisation's threats of salary freezes and disciplinary measures.

The complainant seeks the quashing of the impugned decision in so far as it obliges her to undergo medical treatment in Munich and refuses to allow her to spend her sick leave in France. She claims an award of damages of at least 2,000 German marks and costs.

C. In its reply the Organisation concurs with the complainant on the issue of receivability. The EPO's decision of 8 May 2000 was based on the Invalidity Committee's ninth report; it relates to a medical matter and can only be challenged before the Tribunal. However, the Organisation notes that the complainant also contends that the decision of 8 May 2000 was "not a medical decision". In making that assertion she forgets that if that were the case, her complaint would be irreceivable by virtue of the fact that she did not file an internal appeal against the challenged decision.

Moreover, the EPO contends that the complainant's arguments are devoid of merit. Under Article 23 of the Service Regulations a permanent employee has an obligation to reside "in the place where he is employed". That obligation applies to staff on sick leave too, and under Article 62 staff must obtain the prior permission of the President of the Office if they wish to spend their sick leave elsewhere. Those provisions have their foundation in the defendant's duty of care towards its staff and the Invalidity Committee had to be in a position to monitor properly the complainant's treatment and progress. Furthermore, Article 23 requires the staff member to be actually living in the place of employment, and not just simply able "to indicate an address" there for the purposes of receiving mail. She did not even have the latter, because a registered letter despatched to the complainant on 10 August 2000 was returned undelivered to the EPO since the complainant had not collected it.

A majority of the Invalidity Committee found that the treatment she needed could in principle be provided in Munich and by applying that opinion the EPO took a reasoned decision. If her current treatment is the appropriate one then the opinion that it could be dispensed in Munich is correct. If, as suggested by the complainant, her current treatment is not the right one for her then there was no reason to pursue it in France.

The Organisation considers that there is no basis for the complainant's claim to damages. It repeatedly agreed to the complainant's requests to stay in France with her family, and did not cut her salary even though she was often in

breach of her statutory obligations.

D. In her rejoinder the complainant maintains that her complaint is receivable. She says that under Article 107 of the Service Regulations the lodging of an appeal "shall not apply to decisions taken after consultation of the Invalidity Committee"; she considers therefore that it would not have been appropriate to file an internal appeal.

Given the circumstances of her case the complainant sees no relevance in applying Article 23 to her. Under that article, permanent employees should live at a distance "compatible with the proper performance of [their] duties". Since she is on sick leave until 31 December 2001 she will not be performing her duties anyway. Although the Organisation, through the Invalidity Committee, has a "right of verification", this right is limited to verifying whether her medical treatment is appropriate and what progress has been made. Even if she was not residing in Munich, her therapist could still inform the Committee regularly of her progress.

She takes issue with the fact that the EPO continued to address mail to her personally although it was aware that she had a legal representative. As a result of her not collecting the letter dated 10 August 2000 the Organisation assumed she had "gone away from her place of work without permission" and then informed her it was proceeding with disciplinary measures against her.

The complainant contends that the impugned decision is unlawful, among other reasons, on the grounds of its medical foundation. In her view the Invalidity Committee's ninth report, on which the impugned decision was based, was not an "objective report by a joint body of medical practitioners"; in recommending therapy the Committee substantially reproduced the view of the EPO's medical officer.

E. In its surrejoinder the Organisation points out that the Invalidity Committee has decided that the complainant is now permanently unable to perform her duties and she has been awarded an invalidity pension as from 1 March 2001. That being the case, it sees no need to rebut all of the complainant's allegations relating to the proceedings before the Committee. Nevertheless it maintains its earlier arguments. It rebuts the complainant's allegations of lack of medical foundation and objectivity of the Invalidity Committee's opinion and states that her comments are not substantiated.

CONSIDERATIONS

1. The complainant, who is now on an invalidity pension but was formerly on sick leave, impugns the decision of the European Patent Office not to grant her permission to spend her sick leave elsewhere than at her place of residence in Munich.

2. According to Article 23 of the Office's Service Regulations:

"A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties."

Article 62 of the Service Regulations deals with sick leave. In its third paragraph it reads:

"If he wishes to spend sick leave elsewhere than at his place of residence referred to in Article 23, he shall obtain prior permission of the President of the Office."

In the Tribunal's view, it is clear that what is intended here by the concept of "residence" is actual physical presence on a regular basis. A mere address where mail can be forwarded is not sufficient.

3. Pursuant to Rule 6(iv) of circular 22 (the guidelines for Article 62):

"... The President may, after consulting a doctor appointed by the Office, authorise the person concerned to remove himself from his place of residence, as defined in Article 23 in order to spend his sick leave elsewhere."

As appears from the facts of the case, neither the President of the Office, nor the Administration on his behalf, consulted "a doctor appointed by the Office", but instead consulted the Invalidity Committee already dealing with the complainant's case and which was composed of three doctors, one of whom was chosen by her.

4. Articles 106 and 107 of the Service Regulations provide for appeal procedures. Article 106(1) reads:

"Any decision relating to a specific individual to whom these Service Regulations apply shall at once be communicated in writing to the person concerned. Any decision adversely affecting a person shall state the grounds on which it was based."

As for Article 107, the first and second paragraphs read:

"(1) Any person to whom Article 106 applies may lodge an internal appeal either against an act adversely affecting him, or against an implied decision of rejection as defined in Article 106.

(2) The provisions of paragraph 1 shall not apply to decisions taken after consultation of the Invalidity Committee."

5. The appeal of a decision granting or refusing permission to spend sick leave elsewhere than at the staff member's residence would normally be required to go through the internal appeals process before it could be brought to the Tribunal. The exception found in Article 107(2) appears to be designed to exclude any internal appeal against proceedings which must necessarily, under the Service Regulations, be decided by the Invalidity Committee and not, as the complainant contends, to create a "shortcut" to the Tribunal in every case where that Committee may have been consulted even if such consultation is not required. Whether the fact that the Administration may arguably have erred, by consulting the Invalidity Committee instead of a doctor appointed by the Office, could be sufficient to give the Tribunal jurisdiction by applying the exception found in Article 107(2) of the Service Regulations may, therefore, be seriously doubted. However, in view of the conclusion it has reached on the merits, the Tribunal does not find it necessary to express a final opinion on this question.

6. The decision not to give permission to spend sick leave elsewhere than at the staff member's place of residence is clearly discretionary in nature. It is well-established by the case law of the Tribunal that a discretionary decision is subject to limited review. As was said in Judgment 1969 (*in re* Wacker) under 7: "the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence" (see also Judgment 525 (*in re* Hakin) under 4).

7. Although the impugned decision may have been preceded by a procedural error in that the Administration consulted, not "a doctor appointed by the Office", but the Invalidity Committee, that error is of no avail in the circumstances. One of the doctors sitting on the Invalidity Committee is in fact a doctor appointed by the Office. There is no indication that the complainant was in any way prejudiced by the error.

8. The complainant's main criticism lies with the sufficiency of the reasons provided to her by the decision-maker. According to her, the decision of 8 May 2000 did not state the "grounds" upon which it was based, pursuant to Article 106(1) of the Service Regulations. The complainant is wrong. The relevant portion of the decision reads:

"The majority on the Invalidity Committee found that the necessary treatment can, in principle, also be carried out in Munich ... I would point out, however, that approval for you to be allowed to spend your sick leave in France cannot be granted, since the necessary treatment has to be carried out at your place of employment, Munich."

It is clear from this that the Administration refused to grant permission because it believed, on the advice of the Invalidity Committee, that the treatment could be carried out in Munich. There is no need for the decision to contain more elaborate reasons. There is nothing to suggest that the interests of the complainant were not weighed with those of the EPO. The Invalidity Committee had issued nine distinct medical reports over the years and was obviously knowledgeable about the complainant's health and personal circumstances. While it is true that there are humanitarian circumstances that play in favour of the complainant's position (her child, the fact that her friends, family and usual therapist are all in France), it is also true that the Organisation had a genuine interest in having the complainant close by to monitor properly both whether she followed her treatment and that progress was being made, as well as to be able to assess whether the treatment received was appropriate. The weighing of those respective considerations is properly a matter for the Organisation and the complainant has not demonstrated that there is any basis upon which the Tribunal could interfere.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Mella Carroll

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 27 July 2001.