

NINETY-SECOND SESSION

In re Hoornaert (No. 3)

Judgment No. 2109

The Administrative Tribunal,

Considering the third complaint filed by Mr Winfried Hoornaert against the European Patent Organisation (EPO) on 19 February 2001 and corrected on 5 March, the EPO's reply of 23 May, the complainant's rejoinder of 6 August, and the Organisation's surrejoinder of 1 October 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. Some facts relevant to the complainant's career are set out under A in Judgment 722 on his second complaint. He is currently an examiner at grade A4/2. On 19 December 1989 the complainant became ill; he resumed work at 80 per cent a few months later. He had a relapse in 1998, and on 30 September of that year, he had reached the maximum amount of paid sick leave allowed under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office. Thereafter, he was able to resume work on a 50 per cent basis. The relevant paragraphs of Article 62 are as follows:

"(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

(7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 1, whichever is the greater. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of this basic salary.

(8) The Invalidity Committee may decide that a permanent employee on extended sick leave must resume his duties, but subject to a reduction in his working hours. As from the date on which he resumes his duties, the permanent employee shall again be entitled to advancement to a higher step and to annual and home leave. In so far as he did not receive the whole of his basic salary under the provisions of paragraph 7, he shall receive a proportion, equal to the fraction of the normal hours actually worked, of the basic salary appropriate to his grade and step, and a proportion, equal to that fraction of the normal working hours for which he is authorised not to work, of the salary he received in accordance with paragraph 7."

On 4 November 1998 the complainant was informed, by a note from the Personnel Department, that as he had reached the maximum amount of paid sick leave allowed under Article 62(6), paragraph 7 of the same article now applied to him. Accordingly, under Article 89 of the Service Regulations, a medical practitioner had been appointed to represent the Office on the Invalidity Committee and the complainant was invited to appoint a medical practitioner of his choice to that Committee. He was also informed that since he had worked only 50 per cent from

5 October 1998, his annual and home leave would be reduced proportionally to his working hours, but his salary would provisionally be paid in full until a decision on his incapacity to work had been taken.

On 23 November the complainant wrote to the Personnel Department contesting the reduction in his annual leave and asking on what basis this had been done. The Director of Personnel Development replied on 23 December 1998 that, because of the holiday period, the examination of this question would take more time than usual. By a letter dated 1 February 1999 the complainant asked the President of the Office "to undo the reduction of leave" or, if he could not, to consider the letter as introducing an internal appeal.

The Director of Personnel Development responded to the complainant on 22 February stating that, as the wording of Article 62(8) "does not detail the calculation of annual and home leave[,] the provision needs interpretation". He went on to say that a distinction is made in Article 62 between "paid sick leave" and "extended sick leave": under paid sick leave the staff member retains his entitlements in full, whereas under extended sick leave entitlements are reduced. A staff member on extended sick leave who is able to resume duties subject to a reduction of working hours receives his entitlements in full again but only proportionate to his working time: any other, more generous, interpretation would imply an unjustified privilege compared to staff members on extended sick leave who are not in a position to resume their duties on a part-time basis. The Director concluded by stating that the complainant's letter of 1 February was being treated as an internal appeal, but that he hoped the complainant would reconsider it in the light of his explanations. On 9 March 1999, the complainant pressed his appeal, claiming a breach of Circular No. 22, Rule 2 (b) iii).

In August 1999 the Invalidity Committee determined that the complainant suffered a serious illness within the meaning of Article 62(7) and set his working hours at 50 per cent.

In its opinion of 8 December 2000 the Appeals Committee unanimously recommended rejecting the appeal as unfounded. On 20 December 2000 the Director of Personnel Development informed the complainant that the President had rejected the appeal. That is the impugned decision.

B. The complainant contends that Article 62(7) concerns permanent employees "totally" unable to perform their duties and for that reason entitlement to half salary is provided therein, whereas paragraph 8 defines "other remuneration" for employees resuming their duties subject to a reduction in working hours. He concludes that in order to have paragraphs 7 and 8 in line with one another, "full" sick leave is meant in paragraph 7; but as he was able to work 50 per cent after reaching the maximum amount of sick leave under paragraph 6 he claims that he never lost his rights to advancement, annual or home leave. He asserts that since the entitlement to advancement had not been affected, full leave rights should also be granted; to interpret paragraphs 7 and 8 any differently would not respect the legislator's intent.

He submits that the contested decision leads to discrimination between sick employees: those who do not reach the limit under Article 62(6) continue to accrue full annual and home leave, but those who have reached the limit get only a portion. The complainant argues that sick leave should not be used as a replacement for, or to complement, home leave. He states that the Appeals Committee made a comparison between extended sick leave and unpaid leave, but in his view these are not comparable: unpaid leave is normally asked for by the employee, whereas extended sick leave is imposed on the employee by doctors.

This difference is reflected in Circular No. 22, Rule 2 (b) iii) which takes into account any period of sick leave in the calculation of leave entitlement, whereas unpaid leave "gives no entitlement". He contends that the President of the Office has breached his obligation to respect the intent of the legislators and he has therefore drawn wrong conclusions from the facts surrounding his case.

He asks the Tribunal to quash the President's decision of 20 December 2000 and to grant him full annual and home leave in accordance with Article 59(1) of the Service Regulations, and to order that he be paid compensation in the amount of 20 per cent of his monthly remuneration, including allowances, for each day of leave that has been "illegally withheld". He also claims interest and 2,500 euros in costs.

C. The EPO replies that a staff member on extended sick leave who returns to work on reduced hours receives full entitlements in proportion to his working time.

It points out that Article 59(1), to which the complainant refers in his claims, concerns only the entitlement to

annual leave and does not concern staff on sick leave. The complainant's entitlements are governed by Article 62 because he has been on extended sick leave. Although he is authorised to work only 50 per cent he receives a full salary because his illness has been recognised as serious. Article 62 makes a distinction between "paid sick leave" and "extended sick leave" and specifies different entitlements for each. However, as regards annual and home leave entitlements, the Administration has interpreted Article 62, paragraphs 6 to 8, by deciding that:

"- a staff member on "paid" sick leave retains full entitlement to annual and home leave;

- a staff member on "extended" sick leave loses entitlement to annual and home leave, unless he returns to work at reduced working hours - in which case entitlement is restored in a proportion equal to that fraction of normal working hours for which he is authorised to work."

Article 62(8) which provides that a staff member on extended sick leave who returns to work at reduced working hours "shall again be entitled to ... annual and home leave" is an exception to Article 62(7) but it does not specify the precise extent to which that entitlement is restored.

Article 56, which relates to part-time employment, expresses the principle that the annual leave of a part-time permanent employee is reduced in proportion to the working time authorised. The complainant being authorised to work part-time, his annual leave entitlement is calculated in the manner set out in Article 56. Similarly, paragraph 3 of Circular No. 34, Rev. 1, applies to the calculation of home leave for part-time employees. Circular No. 22, Rule 2 (b) iii), therefore, cannot be interpreted as the complainant would wish. Since Article 62(7) expressly excludes entitlement to annual leave in cases of extended sick leave, the words "any period of sick leave" in Rule 2 (b) iii) can only refer to the paid sick leave for which a staff member retains his entitlement to annual leave. The EPO points out that the Appeals Committee did not compare staff on extended sick leave with those on unpaid leave, but rather with those working part-time.

It submits that the claim to 20 per cent of monthly pay in compensation for injury suffered is excessive.

D. In his rejoinder the complainant clarifies his claims in response to the EPO's comments. He submits that Article 59(1) does apply to staff members on sick leave. He argues that paragraphs 7 and 8 are alternatives and that it is a mistake to treat paragraph 8 as an exception to paragraph 7. In his view, the latter paragraph deals with staff fully unable to work, whereas paragraph 8 deals with staff able to work part of the time.

He reiterates that part-time work involves "free choice" whereas sick leave is imposed on the staff member by doctors. There are, therefore, good reasons to treat them differently and the legislator did just that. He submits that one should consider that half of his leave time is "spoiled" by his sickness.

E. In its surrejoinder the Organisation reiterates that Article 59(1) does not apply to the complainant. It concerns the entitlement to annual leave of staff working 100 per cent of the normal working hours; the complainant is on extended sick leave, therefore it is Article 62 which applies in his case. The complainant's interpretation - that Article 62, paragraphs 7 and 8 are mutually exclusive - is not sound, nor are his arguments concerning Circular No. 22, Rule 2 (b) iii).

The correct method for calculating annual leave for staff authorised to work part-time is to be found in Article 56(5). It is not relevant why someone works part-time, but merely the fact that he does so. The EPO contends that the complainant's assertion that he is deprived of half of his leave due to his illness is not correct; he suffers no hardship as regards the free time available to him for annual and home leave. The complainant has no entitlement to annual and home leave for the 50 per cent of the normal working hours during which he is on extended sick leave. Hence, he is only entitled to a fraction of the statutory annual and home leave, regardless of the fact that he receives full remuneration.

CONSIDERATIONS

1. The complainant is an examiner at grade A4/2 at the European Patent Office, the secretariat of the EPO. After several absences due to illness he was informed by a note from the Personnel Department of 4 November 1998 that by 30 September 1998 he had used up his entitlement to paid sick leave of twelve months over a period of three years. The Invalidity Committee was therefore to be convened pursuant to Article 89 of the Service Regulations.

Furthermore, since he had started to work half time as from 5 October 1998, his annual leave and home leave would be reduced in proportion to his working hours.

On 23 November the complainant protested, deeming the reduction in leave to be in breach of his rights. The Administration replied on 23 December 1998 that there would be some delay in examining his case owing to the holiday period, but that the time limit for filing an internal appeal would not start to run until he received the decision responding to his objection. On 1 February 1999 the complainant filed an internal appeal. On 22 February the Director of Personnel Development explained to him how Article 62 was to be construed: leave entitlements are retained in full in the event of paid sick leave, but not where a staff member on extended sick leave returns to work part time. On 9 March 1999 the complainant pressed his appeal. The Appeals Committee unanimously recommended rejecting the appeal, and the President of the Office endorsed the recommendation on 20 December 2000.

The complainant has come to the Tribunal seeking the quashing of that decision. He also seeks compensation for each day of leave "illegally withheld", plus interest and costs.

2. This dispute brings to light the fact that the Service Regulations make no specific provision for the complainant's case. The EPO itself admits to a gap in the material rules, which therefore need interpretation. It is worth recalling the relevant provisions before taking up the complainant's pleas.

3. Article 56(5) of the Service Regulations says that the "annual leave of a permanent employee who is authorised to work part-time shall be curtailed in proportion".

4. Article 59(1), which in his statement of claims the complainant asks to benefit from, provides in general that "employees shall be entitled to annual leave of thirty working days per calendar year".

5. Sick leave is governed by Article 62 of the Service Regulations. Under Article 62(6), an employee on sick leave retains full rights to his basic salary and to advancement provided that the leave has not exceeded twelve months either in one unbroken period or in several periods within three consecutive years. Under Article 62(7), which deals with extended sick leave, an employee who exceeds the maximum period of twelve months ceases to be entitled to advancement, annual leave and home leave, and is entitled to half the basic salary received at the expiry of those twelve months. The last sentence of 62(7) provides, however, that the employee is entitled to the whole of the basic salary if the incapacity for work is the result of an accident or a serious illness - as in the complainant's case.

Article 62(8), which covers extended sick leave where the Invalidity Committee allows the employee to resume duties part-time, says that in such cases the employee recovers the entitlement to advancement to a higher step and to annual leave and home leave. It also says:

"In so far as [the employee] did not receive the whole of his basic salary under the provisions of paragraph 7, he shall receive a proportion, equal to the fraction of the normal hours actually worked, of the basic salary appropriate to his grade and step, and a proportion, equal to that fraction of the normal working hours for which he is authorised not to work, of the salary he received in accordance with paragraph 7."

6. Two circulars should also be mentioned. Circular No. 22, cited by the complainant, states under Rule 2(b) iii) that leave entitlement will accrue on the basis of the total length of service completed, including any period of sick leave or annual leave or home leave. According to Circular No. 34, Rev. 1, for the purpose of calculating seniority for advancement in step or promotion, part-time work is counted as full-time. The circular also provides that the period of home leave will be correspondingly reduced. But it does not appear to cover the case of someone who works part time for medical reasons.

7. The conclusion is that the material rules do not specify the leave entitlements of someone who is on extended sick leave and authorised to work part time, so the Administration had to resort to interpretation, as it itself admits.

8. The Appeals Committee based its recommendation, which the President endorsed, on its finding that the provisions offer no alternative but to apply the same principle, set in Article 56(5), that the annual leave of staff authorised to work part-time is curtailed in proportion.

9. That, retorts the complainant, makes for inconsistency because entitlements to advancement and leave entitlements are treated differently: the former are maintained while the latter are restricted. It also leads to

discrimination between employees who have taken less than twelve months' sick leave and those who may be more seriously ill and have exceeded the limit. In his view the Administration has obviously misunderstood the legislator's intent. Part-time work is a choice whereas sick leave is imposed by a doctor and one's state of health, so it stands to reason that the legislator would treat them differently.

10. As the Appeals Committee noted and the Administration conceded, there is a gap in the law. Nevertheless, the rule to be applied is the one set in Article 56(5) of the Service Regulations. It is general in scope and is in keeping with the Tribunal's finding in Judgment 1985 (*in re Vézina*) that leave entitlements are ordinarily granted for service completed. There being no express provision for an employee on extended sick leave authorised to work part time while retaining entitlement to full pay, the rule to resort to is Article 56, on part-time work. Its application will not result in discrimination since an official on extended sick leave and one on paid sick leave are not in like case. Nor will there be disregard of the legislator's intent, which was that the rule set in Article 56 should be a general one.

11. The complainant's claim to the quashing of the decision must be therefore dismissed and so too must his claims to compensation.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet