Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

109th Session **Judgment No. 2947**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr W. A. against the European Patent Organisation (EPO) on 6 September 2008 and corrected on 1 October 2008, the EPO's reply of 8 January 2009, the complainant's rejoinder of 21 February and the Organisation's surrejoinder of 5 June 2009;

Considering the third complaint filed by the complainant against the EPO on 15 October 2008, the EPO's reply of 9 February 2009, the complainant's rejoinder of 14 April and the Organisation's surrejoinder of 22 July 2009;

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

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

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

A. Facts relevant to this case are to be found in Judgment 2789, delivered on 4 February 2009, concerning the complainant's first complaint. Suffice it to recall that the complainant joined the European Patent Office, the EPO's secretariat, in 1991 having been granted leave

of absence from the German civil service. He was informed by the EPO Administration in August 2007 that he had exhausted his entitlement to sick leave on full pay and that, consequently, a Medical Committee was being convened to consider what course of action should be taken. By a letter of 17 October 2007 he was notified that, in accordance with the Medical Committee's opinion, he was to resume his duties at 50 per cent on 1 November 2007 and that the Committee would meet again in April 2008 to review the situation. The complainant challenged that decision in his first complaint, which the Tribunal dismissed in the above-mentioned judgment.

On 14 January 2008 the complainant submitted a request for parental leave, which he wished to take as from 10 March 2008. Since the decision to set his working hours at 50 per cent on medical grounds was meant to apply at least until the end of April, he specified that his parental leave would initially be taken on a half-time basis so that all his working time would be covered. However, in the event that his working hours were altered following the Medical Committee's review of his case in April, he asked that his parental leave be adjusted accordingly.

Before deciding on this request, the Administration asked the Medical Committee to provide a further opinion as to the complainant's 50 per cent sick leave. The Committee's review was therefore brought forward but its two members failed to reach an agreement on the measures to be taken in the complainant's case. Consequently, they decided to appoint a third doctor to the Committee and to maintain the complainant's reduced working hours pending a decision by the enlarged Committee.

After the third doctor had examined the complainant, the Committee issued an opinion on 30 May according to which the complainant was not suffering from invalidity and that his sick leave should end on 15 June 2008. The Committee's Secretary forwarded this report to the complainant on 2 June and informed him that the administrative consequences of this decision would be communicated to him shortly.

In an e-mail of 11 June 2008 an official of Directorate 4.3.3.1 (Administrative Employee Salaries and Time) explained to the complainant how his salary had been calculated for the period March to June 2008 following "the final decision on [his] parental leave". She stated that his request for half-time parental leave for the period from 10 March to 15 June 2008 had been approved and that from 16 June to 29 August he would be on full-time parental leave. She also asked the complainant to reimburse a salary overpayment which he had received between March and May 2008. The complainant replied the following day that he would transfer the amount claimed in the next few days.

By a letter of 17 June 2008 an official of the Personnel Administration Directorate, referring to the Medical Committee's opinion, informed the complainant that his sick leave would end on 15 June 2008 and that "it was planned that [he] would return to work on 16 June 2008 without any reduction of working hours on medical grounds". That official also informed him that his full-time parental leave had taken effect on that date, as he had requested, and would end on 29 August 2008. That is the impugned decision in the second complaint.

In a letter of 30 June 2008 the complainant objected to the fact that, since 16 June, he had not received any salary with respect to his 50 per cent sick leave, but only the parental leave allowance. He argued that "in order for the Medical Committee's recommendation to take effect", he should have been informed by the Personnel Administration Directorate of the administrative consequences of that recommendation, and that this had not been done yet; consequently, he remained, in his view, on 50 per cent sick leave. He therefore requested that his payslip for June 2008 should be adjusted according to the "existing arrangement" of 50 per cent sick leave combined with 50 per cent parental leave. By a letter dated 11 August 2008 the Personnel Administration Directorate confirmed to the complainant that his sick leave had ended on 15 June 2008, that owing to his parental leave his return to work was postponed until 29 August, and that he was expected to return to full-time work on 1 September 2008. That is the impugned decision in the complainant's third complaint.

B. The complainant contends that the decision of 17 June 2008 is not valid in that it "altered" his request for parental leave without stating any grounds for that adverse decision as required by Article 106(1) of the Service Regulations. He submits that he applied for parental leave from 10 March to 28 August 2008 only, but that according to the impugned decision his parental leave would end a day later, on 29 August 2008, which meant that his salary for that day would be reduced.

He also challenges its validity on the basis that it was not communicated to him immediately. Indeed, the decision to end his sick leave took effect on 16 June 2008, yet he was only informed of this later, by the letter of 17 June 2008.

Furthermore, the decision is "defective because it [was] incomplete and therefore contradictory" in that it did not state when he would return to work full time, but placed him on full-time parental leave without cancelling the previous combination of 50 per cent sick leave and 50 per cent parental leave, which is not possible.

The complainant also submits that the decision of 11 August 2008 is defective as it violates Article 106(1) of the Service Regulations because it was not communicated to him at once.

He argues that the Committee's opinion of 30 May 2008 is invalid because the third doctor was not properly appointed. In his view, this opinion is also incomplete, as it does not take account of all relevant information and contains no comment on his capacity to work. Consequently, insofar as they are based on the Committee's opinion, which is inconsistent with the established limitations on his capacity for work and with the health problem it identified previously, the decisions of 17 June and 11 August 2008 are not valid.

He asks the Tribunal to set aside both the impugned decisions and the Medical Committee's opinion and to either recognise his invalidity or send the matter back to the Committee for a new opinion, taking into account the "defects" mentioned above. He seeks compensation in the form of leave credit for the time he was wrongly required to work and the granting of fully paid sick leave "for the time without valid decision"; compensation for the direct and indirect financial

loss – including loss of salary, the reduction of his EPO pension and loss of pension entitlements as a German civil servant – caused by the Medical Committee's opinion, plus interests; and compensation for the additional pain suffered on days when he had to work pursuant to the impugned decisions. He also claims costs.

C. In its replies the EPO asks the Tribunal to join the two complaints. It submits that they are both irreceivable because they challenge confirmatory decisions. It explains that the complainant received notification of its decision to end his sick leave and grant him full-time parental leave by e-mail on 11 June 2008 and that its letter of 17 June merely confirmed that decision. It indicates likewise that the decision of 11 August 2008 was a mere confirmation of the e-mail of 11 June.

Citing the case law, the Organisation also submits that the complainant's claims for recognition of his invalidity are irreceivable as this is a purely medical issue.

The EPO holds that the complaints are unfounded. It asserts that the complainant agreed to postpone by one day the end date of his parental leave during a phone conversation on 4 June 2008.

The EPO asserts that there was no delay in notifying the complainant of its decision to endorse the third Committee's opinion, which was conveyed to him by e-mail on 11 June 2008. It rejects the argument that its decision was contradictory; indeed, the e-mail of 11 June clearly mentions the "final decision on [the complainant's] parental leave", and it was obvious that granting him full-time parental leave meant that his sick leave had ended.

With regard to the composition of the Medical Committee, the EPO argues that there is no procedural flaw which could vitiate either of its opinions. Regarding the information taken into account by the Committee, it contends that the opinion of the doctor appointed by the complainant was fully taken into account, and that as the three doctors signed the opinion without requesting further information, it can be concluded that they had all the necessary information to deliver their opinion. The EPO observes in this connection that the medical file is confidential and that, pursuant to Article 92(3) of the Service

Regulations, the Committee's deliberations are secret; consequently, there is no available record of the exact information supplied to the third doctor. The Organisation considers that the Committee's opinion provided a valid basis for the impugned decisions and that the complainant has failed to provide any evidence to the contrary.

Furthermore, the fact that the Committee did not make any comments on the limitations to the complainant's working capacity does not imply that its opinion is incomplete; on the contrary, the absence of such indications means that there are no particular limitations to the complainant's working capacity as an examiner. The EPO adds that the Committee's opinion was based on full knowledge of the complainant's physical condition and of the physical requirements of the job of an examiner. It also points out that arrangements may be put in place to deal with his health problems.

D. In his rejoinders the complainant submits that his two complaints do not concern the same issues of fact and therefore should not be joined. He asserts that there is nothing in the impugned decisions to indicate that they merely confirm an earlier decision already notified to him and that the e-mail of 11 June 2008 and the decision of 11 August 2008 were issued in a different context. He adds that the e-mail of 11 June 2008 concerned only his request for parental leave and was unrelated to the Medical Committee's proceedings. He contends that, contrary to Article 106(1) of the Service Regulations, he did not receive the form regarding his request for parental leave amended by Personnel Administration, hence the amendment is irregular, and that it was not stated clearly and in due form and time that his sick leave had terminated. According to the complainant, there was also a breach of the principle of equal treatment in that the reports of the members of the Medical Committee were not given equal weight.

E. In its surrejoinders the EPO maintains its position. It emphasises that the complainant knew that his administrative situation was likely to change, considering that he had been notified of the Committee's opinion by letter of 2 June 2008.

CONSIDERATIONS

1. The complainant performed his duties as a patent examiner at the European Patent Office. As he had long suffered from health problems, he was granted sick leave for the maximum period during which he was still entitled to receive full pay.

2. By a letter of 17 October 2007 the Head of the Personnel Administration Department informed him that, in accordance with the opinion of the Medical Committee dated 26 September 2007, he should resume his duties on a 50 per cent basis as from 1 November. The complainant impugned this decision in a complaint filed with the Tribunal which, by Judgment 2789 delivered on 4 February 2009, nevertheless confirmed the lawfulness of the decision.

3. On 14 January 2008 the complainant applied for parental leave from 10 March to 28 August 2008 for the 50 per cent of his working hours which were no longer covered by his sick leave. As the Office granted this request, the complainant provisionally stopped working altogether. In his application he had taken the precaution of stating that, if the percentage of his working hours were to be altered in the wake of a forthcoming medical examination, his parental leave should be "adjusted accordingly so as to cover all [his] working hours".

4. Since the two doctors on the Medical Committee found that they were unable to agree on what measures should be taken with regard to the complainant, on 16 March 2008 they decided to appoint a third doctor in accordance with the procedure laid down in Article 89(3) and (4) of the Service Regulations. In a fresh opinion

of 30 May 2008 the enlarged Medical Committee confirmed that the complainant was not suffering from invalidity, considered that he was fit to resume full-time work and concluded that his sick leave should end on 16 June 2008.

5. This opinion was forwarded to the complainant on 2 June 2008. On 11 June he received an e-mail from Directorate 4.3.3.1 (Administrative Employee Salaries and Time) notifying him that his part-time parental leave would expire on 15 June and that he would then be placed on full-time parental leave until 29 August 2008.

6. By a letter of 17 June 2008 the complainant was informed that, as in accordance with the Medical Committee's opinion "it was planned that [he] would return to work on 16 June 2008 without any reduction of working hours on medical grounds", his "full-time parental leave took effect on 16 June 2008". The letter pointed out that this measure was being taken further to the complainant's own request regarding the action to be taken in the event that his sick leave was terminated and it again specified that his parental leave would end on 29 August. This is the decision which the complainant impugns in his second complaint filed with the Tribunal.

7. In a letter of 30 June 2008 the complainant objected to the reduction in salary shown on his latest payslip. He argued that his sick leave had not been "formally terminated" and considered that he was therefore still entitled to be paid on the basis of the "existing arrangement" of a combination of 50 per cent sick leave and 50 per cent parental leave. The Personnel Administration Directorate replied to this letter by a letter of 11 August 2008 rejecting the complainant's argument, confirming the Office's position and supplying him with various items of information about his administrative situation in the immediate future. The decision contained in this letter of 11 August forms the subject of the complainant's third complaint.

8. At the end of his parental leave the complainant who, contrary to the opinion of the Medical Committee, considered that he

was unable to resume full-time work, chose to work on a 50 per cent basis with the Office's authorisation.

9. The Organisation requests the joinder of the two complaints. These complaints, which are directed against decisions having essentially the same purpose, rest for the most part on the same facts and raise common issues. Despite the complainant's objection in this respect, the Tribunal considers that they should be joined in order that they may be ruled on in a single judgment.

10. The complainant first submits that the decision of 17 June 2008 is unlawful because it set the date for the expiry of his parental leave at 29 August 2008 and not 28 August, as he had requested, without explaining why the date had been changed. However, a note on the form regarding his request for parental leave indicates that it had been agreed with the complainant in a telephone conversation of 4 June 2008 that this date would be deferred by a day so that it coincided with the end of the corresponding working week. The complainant does not dispute the fact that he agreed to his request being altered in this way. In these circumstances, the date finally adopted by the Office must be deemed to be consistent with this request and there was therefore no need for the decision in question to provide any particular reasons in this respect.

11. In addition, contrary to his submissions, the fact that the amended version of the form was not sent to the complainant does not constitute a breach of the Office's obligation under Article 106(1) of the Service Regulations to communicate to the person concerned, at once and in writing, any decision relating specifically to him or her. Indeed, a request form cannot, by definition, be deemed to constitute a decision and this provision does not therefore apply here.

12. The complainant then contends that neither of the impugned decisions was communicated to him immediately and that this once again constituted a breach of the requirement of the above-mentioned Article 106(1) of the Service Regulations. He further submits that the

decision of 17 June 2008 was unlawful in that it was retroactive, because it took effect on 16 June, in other words before it was issued, and hence, *a fortiori*, before he could be notified of it. But the sequence of events described above shows that the complainant, to whom the latest opinion of the Medical Committee had already been sent on 2 June, had been notified in writing of the decision taken in the light of this opinion by an e-mail of 11 June which, in substance, contained the same information as the letter of 17 June. Given that the Tribunal's case law deems notification by e-mail to be valid (see Judgment 2677, under 2), and as the complainant had clearly received the message of 11 June since he replied to it on the following day, the complainant was informed of the decision in question at once and before it took effect. As for the letter of 11 August 2008, this was essentially a reply to the objection raised by the complainant in his letter of 30 June 2008, and the additional information which it contained was in fact merely a reminder of the consequences of the applicable rules. As this letter did not in any way alter the substance of the decision announced on 11 June, the period of time within which it was sent was not in breach of the Office's obligations.

13. The complainant submits that the decision of 17 June 2008 was "incomplete and therefore contradictory" because it did not say whether he was to resume work full time and, if so, on what date. In his opinion, the Office did not address this issue until its letter of 11 August 2008, and in the absence of a decision in the intervening period that expressly terminated his sick leave on a 50 per cent basis, it remained in force until that date.

14. However, the Tribunal will not accept this line of argument. By stating that, as per his request, the complainant's full-time parental leave took effect on 16 June 2008, the decision of 17 June 2008 indicated quite unambiguously that his sick leave on a 50 per cent basis would end on 15 June, as did the e-mail of 11 June already mentioned. As the complainant himself points out, any other interpretation would have resulted in his being given total leave amounting to 150 per cent

of his normal working hours, which would obviously have been absurd.

15. The complainant also challenges the lawfulness of the impugned decisions on the grounds that the Medical Committee's opinion of 30 May 2008 on which they rested was drawn up under unlawful conditions and is flawed in several respects.

16. In this connection, the Tribunal would draw attention to the fact that it is well settled that it may not replace the findings of medical boards with its own. It does, however, have full competence to say whether there was due process and to examine whether the Committee's opinion shows any material mistake or inconsistency, or overlooks some essential facts, or plainly misread the evidence (see, for example, Judgments 1284, under 4, 2361, under 9, or 2714, under 11).

17. The Tribunal will not dwell on the plea that the third doctor on the Medical Committee was not properly appointed. As stated above, this doctor joined the Committee in accordance with the procedure laid down in Article 89 of the Service Regulations by virtue of the opinion issued by the two other doctors on 16 March 2008. The fact on which the complainant relies, namely that this opinion did not contain any finding as to his invalidity, did not affect its lawfulness and did not in any way vitiate the appointment of this third doctor, the very purpose of which was to make it possible to decide essential questions of this nature.

18. The complainant maintains that the Medical Committee's opinion overlooked some relevant items of information because, according to him, it was based exclusively on the report drawn up by the third doctor after he had examined the complainant on 16 April 2008. But over and above the fact that the Medical Committee is free to pay particular attention to the opinion of one of its members, the very terms of the report in question show that it rested largely on the

findings and assessments of the doctor appointed to the Committee by the complainant. Moreover, the Tribunal notes that the report of 16 March 2008, which was drawn up by the other practitioner who was the complainant's treating physician, also came to the conclusion that the complainant was fit to resume full-time work, provided that his working conditions were suitably adapted.

19. The complainant's argument based on the fact that in his report the third doctor did not clearly identify the various documents on which he based his opinion is equally unfounded. Not only was this doctor under no obligation to provide the details of these documents, but above all, it is only the validity of the Committee's opinion which counts. It is plain that its members considered that they were sufficiently well informed to issue this opinion in full knowledge of the facts and there is nothing in the file to suggest the contrary.

20. Similarly, the complainant's argument that his medical file contained no records of his meeting in November 2008 with a doctor from the Occupational Health Service does not invalidate the Committee's opinion. The evidence shows that this meeting, which was held at the Office's initiative, was essentially a mere formality insofar as the complainant did not request support from the service in question.

21. The complainant extends his argument by submitting that the principle of equal treatment was not observed by the Medical Committee in drawing up its opinion. But, in this connection, he merely contends that the reports of the various members of the Committee were not given equal weight and that the absence of the above-mentioned records from his medical file deprived him of information possessed by the Administration. It may be concluded from what was stated earlier that these assertions are irrelevant. Moreover, the Tribunal notes that they are in fact unconnected with the principle of equal treatment, the sole purpose of which is to ensure that staff members of an organisation who find themselves in a similar

position are on the same legal footing, and to which the complainant seems to refer here by mistake.

22. The complainant taxes the Medical Committee with not specifying the limitations on his capacity for work in its opinion of 30 May 2008, although these had been recognised in the two earlier reports of 16 March and 16 April 2008. However, the Tribunal observes that there are no provisions placing the Committee under any particular obligation in this respect. It could therefore forgo any express mention of these limitations if it considered that it was not indispensable. In addition, the lack of any reference to the limitations in question in the opinion itself obviously did not preclude their consideration by the complainant's supervisors and the relevant services of the Office with a view to ensuring that the complainant had suitable working conditions.

23. The complainant criticises the appositeness of the medical assessment of his condition and submits that resuming work full time would in fact be incompatible with his state of health. But, as explained in consideration 16 above, it does not behove the Tribunal to replace its own findings for those of the Medical Committee on this point.

24. The complainant refines this argument by submitting that the Committee's opinion showed inconsistency, a matter over which, as has been said, the Tribunal does have competence. The complainant considers that the Committee could not recognise that his health problems affected his capacity to work and at the same time conclude that he could resume work full time. But although the authors of the above-mentioned medical reports found that the complainant could remain seated for only a short time, the file shows that he could be given working conditions which were suited to this specific constraint. The travel difficulties to which he refers, for which the Office is not in any case responsible, could be considerably reduced by an adjustment of his working hours. The Tribunal therefore considers that there are

no valid grounds for asserting that the Committee's opinion showed inconsistency. Furthermore, the fact that the complainant thought it preferable to resume work part time at the end of his parental leave is in itself no proof that the Medical Committee plainly misread the evidence.

25. It may be concluded from the above that the impugned decisions are not unlawful in any way. The claims in the two complaints must therefore be dismissed in their entirety, without it being necessary for the Tribunal to rule on the objections to receivability raised by the Organisation.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 28 April 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet