Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S. (No. 3)

v.

EPO

130th Session **Judgment No. 4324**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 19 March 2018, which is partly an application for execution of Judgments 3045 and 3792, the EPO's reply of 2 July, supplemented on 1 August, the complainant's rejoinder of 14 September, corrected on 2 October 2018, and the EPO's surrejoinder of 14 January 2019;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The applicant seeks execution in full of Judgments 3045 and 3792 and recognition that the disease which led to his invalidity status is occupational.

Facts relevant to this dispute are to be found in Judgments 3045, delivered on the complainant's first complaint, and 3792, delivered on his application for execution of Judgment 3045. Suffice it to recall that in Judgment 3045, delivered in public on 6 July 2011, the Tribunal set aside the decision to grant the complainant an invalidity allowance with effect from 1 November 2008, a decision which was taken after the Medical Committee had concluded that his invalidity was permanent but not caused by an occupational disease. The Tribunal held that in July and September 2008, without any legal basis, the EPO had denied

the complainant the possibility of changing the medical practitioner whom he had initially appointed to participate in the work of the Medical Committee and sent the case back to the EPO for referral to a properly constituted medical committee.

In the opinion which it issued on 13 June 2013, the new Medical Committee unanimously found that the complainant's invalidity did not result from an occupational accident. However, suspecting that it might have been caused by an occupational disease, the Medical Committee stated that, pursuant to Articles 62a(3) and 90(3) of the Service Regulations for permanent employees of the European Patent Office, the EPO's secretariat ("the Office"), it was "instructing an expert to determine whether there [was] a causal link between the employee's invalidity and the conditions he encountered in or during his work". When the aforementioned application for execution was filed with the Tribunal on 24 March 2015, that expert had still not been appointed. In Judgment 3792 the Tribunal noted that the referral to a new medical committee had been greatly delayed and that the expert – Dr N., who himself requested an additional examination, conducted by Dr H. – should have delivered his final report by 9 March 2016, but had not done so. The Tribunal observed that, as of the date on which Judgment 3792 was adopted (8 November 2016), in other words more than five years after the public delivery of Judgment 3045, the latter judgment was still being executed. It found that the EPO had seriously breached its duty to execute the judgment within a reasonable period of time and ordered the Organisation to "ensure that the procedure [was] now completed as soon as possible". That judgment was delivered in public on 8 February 2017.

Some days later, Dr N. submitted his final report to the Office's Medical Adviser, Dr B. By letter of 7 April 2017, the Principal Director Human Resources informed the complainant that Dr B. had concluded, on the basis of Dr N.'s report, that his invalidity had not been caused by a pathology or the exacerbation of an existing pathology that had arisen while he was performing his duties or in connection with the performance of his duties. On 26 April the complainant expressed his disagreement with that finding and requested a second medical opinion pursuant to the relevant provisions of Articles 89 and 90 of the Service Regulations. He asked for "the Medical Committee responsible for [his] case to give its final opinion on whether [his] disease [was] occupational". Dr S., who was appointed, delivered his opinion on 14 November 2017, in which he found that "[n]o causal link [could] be established with sufficient

certainty" and that "[c]onsequently, the existence of an occupational disease should be ruled out". By letter of 22 December 2017, the complainant was informed that, since Dr S. had confirmed Dr N.'s opinion, the Office could not proceed with his request for recognition of an occupational disease and that the procedure was closed. That is the impugned decision.

The complainant asks the Tribunal to find that the EPO has failed to execute Judgments 3045 and 3792, to set aside the impugned decision, to declare the expert opinions of Dr N. and Dr H. and the opinions of Dr B. and Dr S. invalid and to order their removal from his medical file, then to rule, on the basis of earlier medical opinions, that his illness is a consequence of his working conditions, that it corresponds to the definition of an occupational disease and that it must be regarded as such, or else to order the EPO to "complete the medical procedure" in execution of Judgments 3045 and 3792. He further claims compensation for moral injury and an award of 1,500 euros in costs.

The EPO submits that Judgments 3045 and 3792 have been executed in full. It argues that the complaint is irreceivable on the grounds that, first, the complainant has not exhausted internal remedies and, second, the Tribunal is not competent to rule on whether a complainant's invalidity is caused by an occupational disease. In the alternative, it asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant asks the Tribunal to order the execution in full of Judgment 3045, delivered in public on 6 July 2011, and of Judgment 3792, delivered in public on 8 February 2017, in which the Tribunal found that the EPO had seriously breached its duty to execute Judgment 3045 within a reasonable period of time and ordered the Organisation to "ensure that the procedure [was] now completed as soon as possible".

The complainant further impugns the decision of 22 December 2017 in which the Office refused to recognise the illness which led to his invalidity status as occupational.

2. The complainant requests the Tribunal to find that the EPO has failed to execute Judgments 3045 and 3792. He submits that, in Judgment 3045, the Tribunal sent the case back to the EPO for referral to a properly constituted medical committee and, since that committee has not delivered a final opinion as to the existence of an occupational disease, the medical procedure ordered by the Tribunal has still not been completed.

3. The Tribunal recalls that, under Article VI of its Statute, its judgments are "final and without appeal", and they are therefore "immediately operative", as its earliest case law established (see, in particular, Judgment 82, consideration 6). The Tribunal has further noted that the principle that its judgments are immediately operative is also a corollary of their *res judicata* authority. Thus, international organisations that have recognised the Tribunal's jurisdiction are bound to take whatever action the decision in a judgment may require, which must be executed by the parties as ruled (see Judgments 553, consideration 1, 1328, consideration 12, 1338, consideration 11, 3152, consideration 11, and also 4235, consideration 9, and the case law cited therein). Judgments must be executed within a reasonable period of time (see Judgment 3656, consideration 3).

4. The Tribunal notes that the Organisation took a final decision on whether the illness which led to the complainant's invalidity status was occupational on 22 December 2017, following the delivery by Dr S. of the last opinion on 14 November 2017. The Tribunal therefore considers that the procedure was duly completed.

5. The complainant submits that this procedure was not carried out as ruled in Judgments 3045 and 3792 because the Medical Committee was unable to deliver its final opinion.

However, the written submissions show that decision CA/D 2/15 taken by the EPO Administrative Council on 26 March 2015 abolished the procedure that included a meeting of the Medical Committee. When an organisation is required to take a new decision after a case has been referred back to it by a judgment of the Tribunal, if the applicable provisions have been amended in the meantime, the organisation must take that decision in compliance with the procedure now in force (see, for example, Judgment 3896, consideration 4). The EPO was therefore

correct to take a new decision on 22 December 2017 without having consulted the former Medical Committee, which no longer existed at that time.

The Tribunal therefore finds that Judgments 3045 and 3792 have been executed in full.

Furthermore, the complainant's allegations that the Organisation deliberately delayed the procedure pending the amendment of the applicable provisions, in breach of the principle of good faith, are not borne out by the evidence.

6. The Tribunal notes that the execution of the judgments in question has undoubtedly been excessively slow. Nevertheless, the complainant's claims for compensation for the delay in execution are without merit.

In respect of the period preceding the public delivery of Judgment 3792, that injury has already been redressed by compensation in the amount of 20,000 euros, awarded in Judgment 3792 itself. The evidence shows that the Organisation has paid that sum.

In respect of the period following the public delivery of Judgment 3792, the evidence shows that Dr N. submitted his report on 13 February 2017, just a few days after the delivery. The continued delay in the procedure can mainly be attributed to the actions of the complainant himself, as he requested an additional medical opinion (from Dr S.), which, moreover, upheld the findings of the previous medical opinions. In these circumstances, the Tribunal finds that there is no need to order the EPO to pay a further sum in compensation for the length of the procedure.

7. The complainant further requests the setting aside of the decision of 22 December 2017 in which the Office refused to recognise the illness which led to his invalidity status as occupational.

8. The Tribunal recalls that under Article VII, paragraph 1, of its Statute, "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations".

9. Under Article 109 of the Service Regulations of the Office, "[a] request for review shall be compulsory prior to lodging an internal appeal, unless excluded pursuant to paragraph 3", which provides that "[a]ppraisal reports [...] shall be excluded from the review procedure".

Furthermore, Article 110 of the Service Regulations states that: "[a]n internal appeal shall be lodged within a period of three months, through the Appeals Committee, with the appointing authority which took the individual decision challenged. [...] The following individual decisions are excluded from the internal appeal procedure:

(a) individual decisions taken on requests to carry on working after reaching the age of sixty-five [...];

(b) individual decisions taken after consultation of the Disciplinary Committee [...];

(c) individual decisions taken after consultation of the Joint Committee [...];

(d) individual decisions taken on requests to perform duties at a location other than the Office's premises [...];

(e) appraisal reports [...]."

10. In view of the nature of the impugned decision, which was neither an appraisal report, which may be challenged without filing a request for review pursuant to Article 109 of the Service Regulations, nor a decision in one of the categories of decisions excluded from the internal appeal procedure under Article 110 of the Service Regulations, before the complainant filed his complaint with the Tribunal, he had to request a review of the impugned decision and, if that request were refused, to lodge an internal appeal. However, it has been established that the complainant, who did not even submit a request for review, did not comply with those requirements.

11. The complainant argues that decisions taken on the basis of medical opinions had long been exempted from the internal review and appeal procedures and that, although the Service Regulations were amended in that regard in July 2017, the EPO did not direct his attention to that amendment in its decision of 22 December 2017. However, the Tribunal observes that, as it has repeatedly stated, every international civil servant is expected to know the rules and regulations to which he is subject (see, for example, Judgments 2962, consideration 13, and

3878, consideration 12) and that "ignorance of the law is no excuse" (see Judgment 1700, consideration 28). If the complainant wished to contest the decision in question, he was hence automatically required to comply with the internal review and appeal procedures, without it being incumbent on the EPO to direct his attention specifically to the amendment to the Service Regulations which extended the scope of those procedures to decisions of that type.

12. It is true that the complaint could not be dismissed as irreceivable on the ground of the complainant's failure to exhaust internal remedies if he was misled by the Organisation on that point (see, for example, Judgment 3674, considerations 5 to 7).

The complainant submits that on the date that the impugned decision was taken, the Organisation's website still displayed the version of Articles 109 and 110 of the Service Regulations dating from March 2017, which excluded decisions taken on the basis of medical opinions from the internal review and appeal procedures.

However, the EPO has demonstrated, on the basis of evidence tendered to the Tribunal, that it posted on 19 October 2017 decision CA/D 7/17 amending Articles 109 and 110 of the Service Regulations with effect from 1 July 2017 on the section of its website intended for retired staff members, which sufficed to ensure that those retired staff members were duly notified of the entry into force of the new version of the provisions in question.

The complainant's argument that he was misled by the Organisation is therefore untenable.

13. Moreover, the complainant admits that he deliberately refrained from submitting a request for review and initiating the internal appeal procedure. He states that he considered himself compelled to act in this manner owing to the length of the medical procedure and the Organisation's continuing failure to deal with his previous internal appeals even though they dated back several years.

That argument cannot be accepted. The Tribunal recalls that it is firmly established that a staff member may not on her or his own initiative evade the requirement to exhaust internal means of redress before filing a complaint with the Tribunal (see Judgments 2811, considerations 10 and 11, 3190, consideration 9, 3458, consideration 7,

and 3947, consideration 4). It is true that where an internal appeal procedure is paralysed over an exceedingly long period, the Tribunal will allow a complainant to refer a matter directly to it. However, that case law is not applicable where, as in this case, the complainant of her or his own accord refrains from bringing internal proceedings on the basis that previous appeals have been handled unreasonably slowly, even where this is proven.

14. Consequently, the complainant's claims against the decision of 22 December 2017 must be dismissed as irreceivable since he has failed to satisfy the requirement under Article VII, paragraph 1, of the Statute of the Tribunal that internal means of redress be exhausted.

15. It follows from the above that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 June 2020, Mr Patrick Frydman, President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ