Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

D. M. (No. 7)

v.

EPO

135th Session **Judgment No. 4636**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr P. D. M. against the European Patent Organisation (EPO) on 5 January 2015 and corrected on 13 February, the EPO's reply of 1 June 2015, corrected on 10 June, the complainant's rejoinder of 14 October 2015 and the EPO's surrejoinder of 18 December 2015;

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

Having examined the written submissions;

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

The complainant contests (i) the extension of his sick leave following the expiry of his maximum period of sick leave, under Article 62(8) of the Service Regulations for permanent employees of the European Patent Office, and (ii) the failure to recognise that he suffered from invalidity which was attributable to the performance of official duties.

The complainant is a former staff member of the European Patent Office, the EPO's secretariat. He retired from service on 1 December 2015.

By a letter of 3 January 2014 he was informed that on 15 December 2013 he had reached the "maximum amount of fully paid sick leave (250 working days) within the past three years" and that he would shortly receive information regarding the constitution of a Medical

Committee charged with the responsibility to determine what course of action should be taken. The complainant was also informed that: (i) his basic salary would be reduced by 10 per cent for up to 12 months and his contributions to the social security scheme would be levied in full with the exception of his contribution to the pension scheme, which would depend on the actual basic salary he received – he would nevertheless continue to accrue full rights under the pension scheme; (ii) he would no longer accrue annual leave; (iii) his advancement in step would be suspended until he was able to return to work; (iv) his entitlement to take home leave would likewise be suspended until he was able to return to work.

In his letter of 25 June 2014 to the President of the Office, the complainant indicated that he had been on extended sick leave with a proportionate reduction of his salary since mid-December 2013 and that more than six months later a Medical Committee had still not been constituted. He stated that the resulting uncertainty had further aggravated his health situation and requested the prompt constitution of a Medical Committee.

By a letter of 8 July 2014 the complainant was informed that the President had decided to appoint Dr D. to the Medical Committee and invited him to appoint himself a medical practitioner of his choice. The complainant responded on 29 July 2014 nominating Dr G.-M. Prior to that, on 11 July 2014, the Principal Director, Human Resources, informed the complainant that in light of the Administration's 8 July 2014 letter, he considered the complainant's request for the "prompt constitution of a Medical Committee" to be moot.

At its first meeting held on 23 September 2014, the Medical Committee, composed of two members, decided to extend the complainant's sick leave until 31 October 2014 and to request a recent medical report from his treating physician as well as input from his manager "[i]n order to have a complete picture of the situation". The Committee scheduled its next meeting for 9 October 2014.

By a letter dated 7 October 2014, to which the Medical Committee's report of its meeting on 23 September 2014 was attached, the Head, HR Expert Services, informed the complainant of the Committee's decisions. On 9 October the complainant submitted to the Medical Committee,

through Dr G.-M., three medical reports from his treating physicians. At the meeting of 9 October 2014, Dr D. and Dr G.-M., were not able to agree on a final decision and decided to appoint a third Committee member, Dr G., pursuant to Article 89(3) of the Service Regulations. The complainant was informed of these developments by a letter of 14 October 2014.

By a letter of 23 October 2014, the Head, HR Expert Services, informed the complainant that the President had decided to appoint Dr S. in Dr D.'s place, as the medical practitioner representing the Office in the Medical Committee examining his case. He explained that Dr D.'s appointment as the medical practitioner representing the Office had been made as an interim measure to ensure the continuity of service following the retirement of Dr K., the EPO's Medical Adviser, on 1 July 2014, and that it now appeared more appropriate to appoint a doctor residing in Germany.

On 30 October 2014 the complainant attended an appointment with Dr S. and, on 6 November 2014, with Dr G.

Also on 6 November 2014, the Medical Committee convened in its three-member composition to discuss the complainant's case.

In attachments to his letter of 26 November 2014, the complainant submitted to the Secretariat of the Medical Committee a number of documents (medical records) and requested that they be taken into consideration by the Medical Committee. In the same letter, the complainant also requested a copy of the report drawn up by the Medical Committee at its 6 November 2014 meeting and suggested that Dr S. and Dr G. themselves seek to obtain from the Office the non-medical information they had required, as he did not have the authority to provide them with such information.

By an email of 9 December 2014, Dr G.-M. informed the complainant she had just received notification that the next meeting of the Medical Committee, initially scheduled to take place in December 2014, had been postponed to January 2015, because the Medical Committee's members wished to have enough time to study the documents submitted by the complainant.

On 5 January 2015 the complainant filed the present complaint with the Tribunal identifying the 7 October 2014 decision as the impugned decision.

The complainant asks the Tribunal to set aside the decision of 7 October 2014, to order the EPO to convene a new Medical Committee with a different composition, and to order this new Medical Committee to assess his state of health and to determine whether he met the criteria of invalidity, under the regulations in force in 2014, either on the day he reached 250 days of sick leave, or on 23 September 2014 or, alternatively, on 5 January 2015, the date of filing of the present complaint. He also asks the Tribunal to rule on whether Circular No. 22, Rule 13 "Verification of absence due to sickness" is lawful. He requests that the new Medical Committee be ordered to take into account the medical reports submitted by him and to base its decision on medical information only and not on the Administration's input. He seeks moral damages for the delay in the proceedings and the EPO's failure to fulfil its duty of care towards him. He seeks material damages for the deterioration of his health due to the delays in the proceedings. He also seeks moral and punitive damages on the basis that the EPO exercised undue influence on the proceedings before the Medical Committee.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary basis, as unfounded.

CONSIDERATIONS

1. The complainant requests an oral hearing. However, in view of the ample and sufficiently clear written submissions, documents and evidence provided by the parties, the Tribunal considers that it is fully informed about the case to make a reasoned decision on the issues raised in the complaint. It will not therefore grant this request.

2. This complaint arises out of a procedure, which followed the complainant's letter of 25 June 2014 to the President of the Office requesting him to promptly convene a Medical Committee, pursuant to Article 90 of the Service Regulations. The Medical Committee was

convened on four occasions between 23 September 2014 and 15 January 2015.

3. The letter of 7 October 2014, which the complainant impugns, was issued by the Head, HR Expert Services. It included a copy of the report of the Medical Committee's meeting of 23 September 2014 extending the complainant's sick leave until 31 October 2014. In the letter, the Head, HR Expert Services, informed the complainant that: (1) the Medical Committee wished to have a recent report of his treating doctor and the input of his manager "[i]n order to have a complete picture of the situation"; (2) his basic salary would continue to be subject to a 10 per cent reduction for the days on which he was on sick leave, but all allowances and expenses to which he was normally entitled would continue to be paid in full; (3) his contributions to the social security scheme would continue to be paid in full, with the exception of his contributions to the pension scheme which would depend on the actual basic salary he received; (4) his full rights under the pension scheme would continue to accrue; (5) he would no longer accrue annual leave, but this would not retroactively affect leave previously accrued; (6) his leave entitlements for the current year were recalculated on the basis of his present working hours as of 7 October 2014; (7) his advancement in grade and step was suspended until he was able to return to work; and (8) his entitlement to take home leave would also be suspended until he was able to return to work.

4. In seeking "to set aside the decision dated 7 October 2014" and consequential orders, the complainant contends that they violated Articles 26a, 62(8), 89(3), and 92(2) of the Service Regulations, Rule 13 of Circular No. 22 and the EPO's duty of care towards him.

However, the EPO raises receivability as a threshold issue. It submits that the complaint is premature and therefore irreceivable, because the medical procedure for determining whether a member of staff meets the definition of invalidity involves a series of steps and findings which lead to a final decision; such steps or findings do not constitute a decision, much less a final decision; they may be attacked as part of a challenge to the final decision but cannot be the subject of a complaint

to the Tribunal. The EPO submits that the letter of 7 October 2014 is not a challengeable decision, as it does not contain any "decisional elements".

5. What the complainant identifies as the impugned decision in this case was merely a "step in a process", which may simply have the appearance of a decision (see, for example, Judgment 3860, consideration 6). It cannot be considered as a final decision for the purposes of Article VII of the Statute of the Tribunal, because it was taken precisely in order for the Medical Committee to obtain additional information before making a determination as to whether the complainant was suffering from invalidity. In these circumstances, the complaint must be dismissed as irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 26 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ