Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G. (No. 5)

v.

EPO

135th Session **Judgment No. 4639**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Ms M.-F. G. against the European Patent Organisation (EPO) on 19 November 2018 and corrected on 3 December 2018, the EPO's reply of 18 March 2019, the complainant's rejoinder of 17 June 2019, the EPO's surrejoinder of 20 September 2019, the complainant's additional submissions of 17 March 2020 and the EPO's final comments of 31 July 2020;

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 complainant challenges the refusal to convert three days of statutory leave into days of sick leave.

The complainant was on leave in Canada between 28 April and 15 May 2014. To that end, she took home leave from 28 April to 13 May, a "compensation" day on 14 May, then two days of annual leave on 15 and 16 May. On 16 May 2014 the complainant notified her line manager that she had fallen ill on 12 May. He forwarded this information to the relevant service the same day. On 19 May the complainant submitted medical certificates confirming that she had

been incapacitated owing to sickness from 12 to 16 May. Only 15 and 16 May were registered as sick leave.

In an email of 23 May, the complainant requested that 12, 13 and 14 May be registered as sick leave in the same way that 15 and 16 May had been. The human resources section responsible for salaries, pensions and administrative services replied, also on 23 May, that, as her line manager had been told, an employee who is incapacitated owing to sickness is required under Article 62(2) of the Service Regulations for permanent employees of the European Patent Office to inform the Office on the first day of absence and that, as she had not notified the Office of her incapacity until 16 May, it would have been contrary to the applicable rules to set the start of her sick leave at 12 May.

The complainant requested a review of that decision on 14 August. The request was rejected by a letter of 27 August. The complainant referred the matter to the Appeals Committee on 26 September.

In its opinion dated 30 April 2018, the majority of the Committee's members recommended that the appeal be dismissed in its entirety but proposed that the complainant be paid 200 euros in compensation for the slowness of the internal appeal procedure. In a minority opinion, one member recommended that the three days at issue be converted into sick leave pursuant to Article 62(4) of the Service Regulations, which applied to incapacity occurring during annual or home leave, and that the complainant be awarded 500 euros in costs and for the "undue length" of the procedure.

By a letter of 21 August 2018, the complainant was notified that the Vice-President of Directorate-General 4, acting by delegation of power from the President of the Office, had decided to endorse the Appeal Committee's majority opinion and reject the complainant's internal appeal while awarding her 200 euros as compensation for the length of the proceedings. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 21 August 2018 and to order that she be credited with three days of leave. She requests an award of 500 euros in compensation for the injury she considers she has suffered as well as all other redress that the Tribunal determines to be fair.

The EPO asks the Tribunal to dismiss the complaint as entirely unfounded. It also requests the Tribunal to order the complainant to pay a symbolic portion of its costs, that is to say 100 euros, on the grounds that the complaint is an abuse of process.

CONSIDERATIONS

1. The complainant impugns the decision of 21 August 2018 by which the Vice-President of Directorate-General 4 confirmed, in accordance with the opinion of the majority of the Appeals Committee, the refusal to register as sick leave the first three days of the period from 12 to 16 May 2014 during which the complainant, who was on statutory leave until 16 May, was incapacitated owing to sickness.

That refusal was based on the fact that, although Article 62(4) of the Service Regulations allows employees to have days of statutory leave converted into sick leave in such circumstances, provided that the incapacity in question is confirmed by a medical certificate (which it was in this case), the complainant had not informed the Office of her sickness on the first day that it occurred, as Article 62(2) requires according to the EPO.

Since that information was not provided by the complainant until 16 May 2014, the Office agreed to register that day and – as a gesture of good will from its point of view – 15 May (which initially corresponded to two days of annual leave) as sick leave but refused to similarly convert 12, 13 and 14 May (of which 12 and 13 May corresponded to days of home leave, while 14 May was a "compensation" day under the arrangements for working hours).

2. In the version in force at the material time, Article 62 of the Service Regulations, entitled "Sick leave", read in relevant part as follows:

> "(1) A permanent employee who provides evidence of incapacity to perform his duties because of sickness or accident shall be entitled to sick leave.

> (2) The employee concerned shall notify the Office of his incapacity as soon as possible on the first day of absence and at the same time state his present address and telephone number. If he is incapacitated for more than three working days, he shall, on the fourth working day, send a medical certificate; however if the doctor whom he has consulted refuses to issue a medical certificate, the employee shall supply the Office with that doctor's name and address.
>
> [...]
>
> (4) If, during annual or home leave, a permanent employee is incapacitated, this period of incapacity shall, subject to production of a medical certificate, be deemed to be sick leave and shall not be deducted from his annual or home leave.
>
> [...]"

3. Under the Tribunal's case law, it is a basic rule of interpretation that words are to be given their obvious and ordinary meaning and that words must be construed objectively in their context and in keeping with their purport and purpose (see, for example, Judgments 4066, consideration 7, 4031, consideration 5, or 3744, consideration 8).

Should an ambiguity remain in the relevant provision after this method of construction is applied, the regulations or rules of an international organisation must in principle be construed in favour of the interests of its staff and not those of the organisation itself (see, for example, Judgments 3539, consideration 8, 3355, consideration 16, 2396, consideration 3(a), 2276, consideration 4, or 1755, consideration 12).

4. Contrary to what the EPO submits, it is not obvious from the wording of Article 62 that the provisions of paragraph 2 thereof, and particularly the provision on which this dispute hinges, under which an employee requesting sick leave must notify the Office of her or his incapacity "on the first day of absence", which applies in the general case of incapacity for work during an ordinary period of activity, also apply in the specific case envisaged in paragraph 4 of sickness during annual or home leave. The question of whether the rules respectively set out in those two paragraphs should be regarded as mutually

exclusive or intended to apply in conjunction, and if so to what extent, may in fact give rise to considerable doubt.

In this respect, the Tribunal observes that a comparative analysis of paragraphs 2 and 4 shows that the two rules in question are intended to be self-standing at least as far as one fundamental aspect is concerned, namely the requirement to provide a medical certificate. Indeed, as is more clearly apparent from the English version of paragraph 2 than the French ("If [the employee concerned] is incapacitated for more than three working days, he shall, on the fourth working day, send a medical certificate"), a medical certificate is not required if sickness occurs during an ordinary period of activity unless it causes an absence lasting more than three days, whereas a medical certificate is required irrespective of the length of the sick leave requested if an employee becomes incapacitated during a period of statutory leave.

That being the case, the fact that the wording of Article 62 does not specify whether the related requirement to inform the Office on the first day of incapacity exists in both situations creates, at the very least, ambiguity as to whether that requirement applies to sickness during statutory leave. If the EPO had intended to stipulate that this requirement also exists in the latter situation, it ought to have referred to it explicitly in paragraph 4, either by referring to the condition set forth in paragraph 2 or by restating the relevant terms of paragraph 2 in paragraph 4.

The ambiguous nature of the applicable provision thus provides sufficient reason in itself to construe all of the provisions in question in favour of the interests of staff members.

5. Specifically in respect of whether the possibility to convert days of statutory leave into days of sick leave is conditional on immediate notification of incapacity on health grounds, the Tribunal observes that the reason behind the employees' duty to inform the Office of their incapacity for health reasons on the first day of the resultant absence is obviously to allow the Administration to plan as well as possible to deal with the unexpected absence and thereby minimise its negative impact on the Organisation's functioning. Consequently, while it is easy to understand the need for a requirement to provide

immediate notification in the case governed by aforementioned Article 62(2) of the Service Regulations during a period of ordinary activity when the employee is generally expected to be at work, save in special circumstances little point can be seen in this requirement in the situation referred to in paragraph 4, where the employee is on annual or home leave when she or he becomes unwell. In that situation, allowance has already been made for the employee to be absent on the corresponding dates in any case, and the fact of her or him becoming incapacitated has no practical consequences for the functioning of the organisation. The notification of sickness to the Office has no effect other than to allow it to alter the employee's leave balance retrospectively, which does not require that the information be provided immediately.

The Tribunal further observes that, literally speaking, the reference in Article 62(2) to the employee's duty to "notify the Office [...] on the first day of absence" appears little suited to the situation of a staff member whom the Office already knew to be unavailable – albeit owing to leave of a different kind – and who was already absent from the workplace when she or he became ill.

6. For all these reasons, and as the member of the Appeals Committee who delivered the minority opinion rightly considered, the Office's interpretation of the provisions of Article 62 must be found unlawful.

7. A specific difficulty arises with respect to the registration of 14 May 2014 as sick leave since, as stated above, this was a "compensation" day and not a day of statutory leave. As the EPO submitted to the Appeals Committee, the possibility of converting days of absence into sick leave pursuant to Article 62 of the Service Regulations is only provided for days of "annual leave" or "home leave", as stated in aforementioned paragraph 4.

However, applying the method of interpretation recalled above, the Tribunal considers that compensation days – and likewise "flexi" days – for which provision is made in the arrangements for working hours should be treated as days of statutory leave covered by the wording of

paragraph 4. Article 6 of the Guidelines on arrangements for working hours of 1 July 2010 provides that "[t]he use of time credits from [flexi-hour and compensation hour accounts] may be freely combined with each other and with leave", and the fact that the possibility of converting days of absence resulting from those arrangements into sick leave is not mentioned in Article 62 of the Service Regulations can be explained by the fact that the latter provision was drafted before those guidelines were issued.

Moreover, the EPO does not dispute the existence of a practice at the Office, referred to in both the Appeals Committee's majority and minority opinions, of allowing the conversion of compensatory or flexi days into sick leave in the same way as days of annual or home leave. Since, as has just been stated, that practice cannot be regarded as contrary to the applicable provision, the Office was required to apply it to the complainant in the same way as to other employees concerned (see, in particular, Judgments 2936, consideration 16, 2907, consideration 22, or 1053, consideration 6).

The Tribunal further notes that the EPO did not deem it necessary to repeat explicitly in these proceedings the arguments on this point that it made to the Appeals Committee.

8. It follows from the foregoing that the impugned decision of 21 August 2018, together with the initial decision of 23 May 2014 and the decision of 27 August 2014 rejecting the complainant's request for review, must be set aside, without there being any need to examine her other pleas.

9. In compensation for the days of leave which the complainant was thus unlawfully denied in 2014, the EPO must credit three additional days to the complainant's annual leave balance for the calendar year during which this judgment will be delivered in public, that is to say 2023.

10. The complainant seeks payment of the sum of 500 euros in compensation for the injury caused to her by the impugned decision. However, the Tribunal considers that, in view of the subject-matter of

that decision, the award of three additional days of leave to the complainant in 2023 will suffice in itself to redress all the injury suffered. The outcome would only be different if the complainant proved that the inability to take the days of leave at issue in 2014 had caused her particular injury owing to a specific need in that year in connection with, for example, exceptional personal or family circumstances. However, in the present case she did not.

11. As a counterclaim, the EPO has asked that the complainant be ordered to pay it the sum of 100 euros as a symbolic portion of its legal costs on the grounds that the complaint is an abuse of process. However, the mere fact that the complaint has for the main part been allowed by the Tribunal precludes it from being considered open to such criticism.

Admittedly, the Organisation does not contend in the present case that the complaint is improper on account of its actual content but that the complainant did not have a legitimate reason for filing it since she was offered an amicable settlement. However, and as the EPO itself notes in its submissions when criticising the complainant for having disclosed the existence of that offer in the present proceedings, the Tribunal cannot take account of information concerning any negotiations – which are inherently confidential – conducted by the parties with a view to settling a dispute before it amicably (see Judgments 4457, consideration 2, and 3586, consideration 5). Hence it could not, in any event, issue orders on the basis of such information.

DECISION

For the above reasons,

1. The decision of the Vice-President of Directorate-General 4 of 21 August 2018, and the decisions of 23 May 2014 and 27 August 2014, are set aside.

2. The complainant shall be credited with three days of leave, as indicated under consideration 9, above.

3. All other claims are dismissed, as is the EPO’s counterclaim.

In witness of this judgment, adopted on 16 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

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

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ