

P. (E.) (No. 5)

v.

EPO

132nd Session

Judgment No. 4425

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mrs E. P. against the European Patent Organisation (EPO) on 9 June 2014 and corrected on 21 July, the EPO's reply of 17 November 2014, the complainant's rejoinder of 23 February 2015, the EPO's surrejoinder of 2 June, the complainant's further submissions of 10 August and the EPO's final comments of 21 October 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 impugns the decision to reject her request for reimbursement of the cost of her spa cure as a type A cure undergone for "absolute medical necessity".

At the material time, the complainant was a permanent employee of the European Patent Office, the EPO's secretariat, who was assigned to non-active status and was in receipt of an invalidity allowance. On 26 March 2010 she submitted to the EPO Medical Adviser the standard form "Request for a cure" seeking, pursuant to Article 20, point 4.8(a), of the Collective Medical Insurance Contract, the Medical Adviser's agreement on the absolute medical necessity of the three-week thalassotherapy cure prescribed by her doctor on 25 March 2010. In an email of 30 March 2010, the Medical Advisory Unit informed her that the criteria for reimbursement of the cost of spa cures had changed and

that the EPO Medical Adviser had decided to recommend that her cure be reimbursed as a type B cure, i.e. medical costs would be reimbursed at 100 per cent and costs for board and lodging reimbursed at a flat rate of 50 per cent of the daily subsistence allowance – 100 per cent reimbursement of both medical costs and costs for full board and lodging is reserved for treatments approved as type A cures, also known as cures undergone for absolute medical necessity. The complainant wrote back that same day to indicate that the Staff Committee was not aware of any change in the reimbursement of the cost of medical cures by the insurance provider and requested access to the documents submitted to the General Advisory Committee in that respect. On 1 April 2010 the Medical Advisory Unit responded confirming the Medical Adviser's decision to recommend reimbursement as a type B cure and noting that there was no new document but, rather, that the reimbursement criteria were being applied in a stricter fashion.

On 3 May 2010 the insurance provider informed the complainant that the cost of her thalassotherapy cure would be reimbursed as a type B cure. On 12 July 2010 the complainant's spouse, an elected staff representative at the time, wrote to the Principal Director of Human Resources to request that the Office proceed immediately with the reimbursement of the cost of the complainant's cure as a type A cure undergone for absolute medical necessity, as sought by the complainant in her initial request. Following the rejection of this request, the complainant lodged on 26 July 2010 an internal appeal. The Internal Appeals Committee (IAC) held, in its opinion of 19 December 2013, that the question whether the cost of the complainant's cure ought to have been reimbursed as a type A cure was a medical question, which it was not competent to determine. A majority of the IAC members considered that the contested decision was vitiated by the delay in providing the complainant with the reasons for that decision and therefore recommended awarding her material damages equal to the difference between the total cost of the cure and the amount already reimbursed by the insurance provider (reimbursement as a type B cure). The IAC members unanimously recommended an award of moral damages but disagreed on the amount. A majority recommended awarding the complainant 400 euros for the failure to provide her with sufficient reasons in a timely manner and for the excessive length of the appeal proceedings, while a minority recommended awarding her 1,500 euros, which roughly corresponded to the difference between the total cost of

the cure and the amount already reimbursed by the insurance provider. It also recommended awarding her 500 euros in costs.

By a letter of 13 March 2014, the complainant was informed of the Administration's final decision to award her 800 euros in material damages, i.e. half of the amount recommended by the majority of the IAC, on the ground that the complainant was also responsible for the decision not to convene the Medical Committee, as she had not made a request in that respect and had refused in advance an examination by the Medical Adviser. The complainant was also informed that the Administration had rejected the recommendations for an award of moral damages and costs. That is the impugned decision.

The complainant asks the Tribunal to order the EPO to reimburse the cost of her spa cure as a type A cure undergone for absolute medical necessity and to award her 10,000 euros in moral damages. She claims 1,000 euros in costs for the internal appeal and an additional amount for the proceedings before the Tribunal.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant signifies in the complaint form that she wants a hearing under Article 12, paragraph 1, of the Tribunal's Rules and that she wishes to call the EPO's Medical Adviser as well as the former Principal Director of Human Resources to address the reasons that were given for the rejection of her request for reimbursement of the cost of the spa cure which she underwent. In her complaint she states that she believes that, given the unclear reasons the Office provided for the original decision to reject her request for the spa cure, particularly elements surrounding the "management instruction" to the Medical Adviser, an oral hearing would enable the truth to emerge. Inasmuch, however, as the facts of the case are not disputed, the request for an oral hearing is rejected.

2. On 26 March 2010, the complainant (a non-serving EPO official) submitted, under Article 20, point 4.8(a), of the Collective Medical Insurance Contract, a request for reimbursement of the cost of a three-week therapy spa cure undertaken for absolute medical necessity on the recommendation of her doctor. The cure for which she sought

reimbursement under that provision was referred to as a type A cure in contradistinction to a type B cure which fell under Article 20, point 4.8(b), of the Collective Medical Insurance Contract. Article 20, points 4.8(a) and 4.8(b), of the Collective Medical Insurance Contract (in force at the material time) relevantly stated as follows:

- “a) In case of absolute medical necessity and after advance agreement has been given by the Office’s medical adviser, medical costs as well as costs for full board and lodging will be reimbursed under the same conditions than under Article 3.1 above with exception of the reference to a room with two beds.
- b) In all other cases, medical costs may be reimbursed only once every five years and for a maximum period of 21 days under the following conditions:
 - medical costs: 100%;
 - costs for board and lodging: a flat rate of 50% of the daily subsistence allowance (Group II) in the relevant country, as set out in Annex V to the Service Regulations for Permanent Employees of the EPO, at the rate applicable on 1 July of the previous year. The rate increases to 80% for two or more persons of the same family going on cure together;

[...]”

3. The prescribed form which the complainant submitted for reimbursement specifically stated that she proposed to undertake the cure in accordance with Article 20, point 4.8(a), of the Collective Medical Insurance Contract and that she requested the opinion of the Office’s Medical Advisor on the absolute medical necessity of the cure and its duration. According to the EPO, however, in practice, such requests by non-serving officials, such as the complainant, are processed “based on the documents pertinent to their doctors’ prescription” and it is for the official to make a request to be invited to a medical examination by the Medical Advisory Unit. The EPO however states that since, among other things, the Medical Adviser saw no particular reason to invite the complainant for an examination, her request for the cure was processed based on the documents presented. In any event, the Tribunal recalls the following statement it relevantly made in Judgment 2542, consideration 13:

“[...] a careful reading of Article 20, paragraph 4.8, reveals that it provides for the reimbursement of spa cures ‘[i]n case of absolute medical necessity and after advance agreement has been given by the Office’s medical adviser’. The Collective [Medical] Insurance Contract therefore only requires that the medical adviser give advance agreement. It does not require that the latter conduct a medical examination.”

4. However, on 30 March 2010, the Medical Advisory Unit informed the complainant that the criteria for the reimbursement of the cost of spa cures had changed and that most likely the cost of her requested cure would be reimbursed according to the terms applicable to a type B cure. The Medical Advisory Unit subsequently confirmed that she was granted a type B cure and clarified that there was no document attesting to a change of the criteria for the reimbursement of the cost of spa cures, but that the application of the reimbursement criteria had become stricter.

5. In her internal appeal, the complainant sought reimbursement of the difference between the amount which she had incurred for what was, in effect, a type A spa cure and that which she was reimbursed for a type B cure, the difference amounting to 1,600 euros; 5,000 euros for moral prejudice; and 1,000 euros for legal expenses. The impugned decision rejected the IAC's majority recommendation to reimburse the full amount which the complainant had claimed for the spa cure, deciding instead to reimburse her 800 euros, or half of the amount that she had claimed, on reasons which bear reproduction to the extent that they are herein relevant, as follows:

"It may also be noted that the majority recommendation fails to take into account several facts which have been advanced by the Office and which have not been disputed by you. In particular, you did not specifically request an A-cure; you refused in advance any examination by the Medical Adviser [...]; and you did not ask the Medical Committee to be convened. It is thus considered that you bear part of the responsibility for the decision which you consider detrimental.

At the same time, it is acknowledged that the Office could have taken steps to convene the Medical Committee of its own accord. It is not however pragmatic to convene the Medical Committee now, in view of the time which has passed.

In view of the above, it is considered that both parties should bear equal responsibility for any material loss. You will therefore be reimbursed half of the amount recommended by the majority for alleged material damage, thus [...] 800 [euros]."

6. To support the claim in her complaint for the full amount of 1,600 euros, which is effectively a claim for material damages arising from the reimbursement of the cost of her spa cure, the complainant submits that there is no basis in fact or in law for the view that she should share responsibility for the material loss which she claims.

The Tribunal does not consider it necessary to advert to her further submissions, or the EPO's responses to them, given that the practical effect of the statements contained in the impugned decision (reproduced in consideration 5 foregoing) is that the complainant would have been paid the 1,600 euros material damages she sought but for acts or omissions on her part, which rendered her equally responsible for those damages.

7. First, however, some statements relied upon in the impugned decision to arrive at the conclusion that the complainant was equally responsible are inaccurate. As indicated in considerations 2 and 3 above, the complainant specifically requested reimbursement for a type A cure. In the second place, the statements in the impugned decision that the complainant refused in advance any examination by the Medical Adviser and did not ask that the Medical Committee be convened are inconsistent with the EPO's statements, referred to in consideration 3 of this judgment, that, in practice, requests for reimbursement for spa cures by non-serving officials are processed "based on the documents pertinent to their doctors' prescription" and that the Medical Adviser saw no particular reason to invite the complainant for an examination, with the result that her request for reimbursement of the cost of the spa cure was processed based on the documents presented. In the third place, it is noteworthy that the Office had informed the complainant that her request for reimbursement of the cost of her spa cure could not be processed under Article 20, point 4.8(a), of the Collective Medical Insurance Contract, first, because of a change in the rules and, subsequently, rather, because of a stricter application of the reimbursement criteria for type A cures. This was wrong in law because, as the case law confirms, the principle of non-retroactivity requires that a new administrative practice (which must also include a decision to apply stricter criteria) must be clearly announced to staff prior to its application (see, for example, Judgment 3884, considerations 4 and 12, and the case law cited therein). There is no evidence that a decision to change the rules and/or to apply stricter criteria for reimbursement of the cost of type A cures was announced to EPO staff prior to determining that the complainant was not to be reimbursed for a type A cure.

8. Given that the decision to pay the complainant half of the amount she sought in material damages has no factual or legal basis, that aspect of the impugned decision must be set aside. The EPO will be

ordered to reimburse the cost of the complainant's spa cure as a type A cure undertaken for absolute medical necessity and to pay her 1,600 euros, less any amount already paid to her on this account. However, there is insufficient evidence to prove that abuse of authority, in the sense indicated in Judgment 4081, consideration 19, or failure to treat the complainant with due care, or arbitrariness tainted the decision to reject her request for reimbursement of the cost of her spa cure as a type A cure.

9. The complainant claims moral damages stating that the request for 5,000 euros, which she made in the internal appeal process, is increased to at least 10,000 euros for the EPO's conduct since her reimbursement request was introduced; the revelation of the underlying reasons for rejecting her request; the untrue allegations in the impugned decision and the unacceptable delays in the internal appeal process.

10. Regarding the complainant's claim for moral damages not based on delay, the case law states that the complainant bears the burden of proof and must provide evidence of the alleged unlawful act, of the injury suffered, and of the causal link between the unlawful act and the injury. The case law further states that the mere fact a decision was initially flawed does not suffice to warrant awarding damages for moral injury and, to be entitled to moral damages, an official must have suffered more severe injury than that which an improper decision ordinarily causes (see, for example, Judgment 4156, consideration 5). The complainant provides no evidence to show that she has suffered more severe injury than that which an improper decision ordinarily caused her. Her claim for moral damages for the delay in the internal appeal process is however well founded, as a period of almost four years from the filing of the request for review to the issuing of the impugned decision is too long and, additionally, the complainant has provided evidence of the injury (the stress) which that delay caused her. She will therefore be awarded the amount of 2,500 euros in moral damages for the delay in the internal appeal process.

11. Regarding the complainant's claim for costs arising from the internal appeal process, Article 8(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations (in force at the material time) provided that any costs incurred by an appellant in the course of

the internal appeal proceedings shall be borne by the appellant, unless the competent appointing authority decided otherwise. The Tribunal has determined that such costs may only be awarded under exceptional circumstances (see, for example, Judgments 4157, consideration 14, 4217, consideration 12, and 4392, consideration 13), which do not exist in the present case.

12. In the foregoing premises, the impugned decision will be set aside to the extent that it rejected the complainant's claim to be paid 1,600 euros in material damages for the Office's failure to reimburse her the full amount of her spa cure under Article 20, point 4.8(a), of the Collective Medical Insurance Contract, and to the extent that it rejected the IAC's recommendation to award her moral damages for the delay in the internal appeal process. As the complainant prevails on her main claim in the complaint, she will be awarded 7,000 euros in costs.

DECISION

For the above reasons,

1. The impugned decision dated 13 March 2014 is set aside to the extent stated in consideration 12 of this judgment.
2. The EPO shall pay the complainant 1,600 euros in material damages for its failure to reimburse her the full amount of her spa cure under Article 20, point 4.8(a), of the Collective Medical Insurance Contract, less any amount already paid to her on this account.
3. The EPO shall pay the complainant 2,500 euros in moral damages for the delay in the internal appeal process.
4. The EPO shall also pay the complainant costs in the amount of 7,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 25 May 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ