SIXTY-SIXTH SESSION

In re NOWAK

Judgment 975

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Dominique Blanche Nowak against the European Patent Organisation (EPO) on 31 October 1988, the EPO's reply of 20 January 1989, the complainant's rejoinder of 14 March and the EPO's surrejoinder of 21 April 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3), 61, 62(4), 106(1) and 109(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Article 61 of the EPO Service Regulations reads:

"A pregnant woman shall be entitled, on production of a medical certificate showing the expected date of confinement, to paid leave starting not earlier than six weeks before the date given in the certificate and ending ten weeks after the date of the birth. ..."

Staff circular 22 of 16 January 1979 further provides, in Article 5(b), that an extension of maternity leave granted on production of a certificate shall be deemed to be sick leave.

The complainant, a French citizen, has been a permanent employee of the Organisation since 1984. Having been granted sick leave before the birth of her first child, she had her six weeks' pre-natal maternity leave accordingly extended after her confinement, which was on 4 November 1985.

During a second pregnancy she supplied medical certificates saying that again she needed sick leave, from 13 April to 16 June 1987, the expected date of her confinement being 14 June. On 13 May she applied for maternity leave from 17 June to 2 October. Her confinement was actually on 11 June, and so she claimed leave from 11 June to 30 September 1987 instead. On 14 July the Head of Personnel informed her that she was granted maternity leave from 4 May to 23 August. On 15 September she appealed against that decision. In its report of 2 May 1988 the Appeals Committee, relying on Article 61 of the Service Regulations and on 62(4) as well, which provides that if a permanent employee is incapacitated during annual or home leave the period of incapacity shall be deemed to be sick leave, unanimously recommended allowing the claim. By a letter of 2 August 1988, the impugned decision, the Principal Director of Personnel told the complainant that the President of the Office took the view that according to 62(4) sick leave might be substituted only for annual or home leave, not for any other kind, and he therefore rejected her appeal.

B. The complainant submits that the President should have stated his reasons for rejecting the recommendation. The Organisation has changed its practice as to the extension of maternity leave and has done so arbitrarily and without first consulting the General Advisory Committee or the Staff Committee. Its new practice is in breach of the principle of equal treatment since it discriminates in favour of the healthy pregnant woman who can work up to the date of confinement and so get a shift in the dates of her maternity leave, and to the detriment of the pregnant woman on sick leave, who cannot have the dates shifted. By way of comparison she cites legislation in the Federal Republic of Germany that makes post-natal leave compulsory and French law, which says that within prescribed limits maternity leave may be extended by a period equal to any period of sick leave granted to the pregnant woman.

She seeks the quashing of the President's decision of 2 August 1988, the grant of maternity leave in accordance with her claim of 13 May 1987 and an award of 2,000 Deutschmarks in costs.

C. In its reply the Organisation remarks that in keeping with Article 109 of the Service Regulations the Appeals Committee gives only advisory opinions: the President alone may take the actual decision. Moreover, in this case the President's reasons for his decision were notified to the complainant in the letter of 2 August 1988.

The EPO points out that maternity leave is peculiar in that it is hard to tell whether any indisposition the pregnant woman may be suffering from is to be treated as the ordinary consequence of pregnancy or as an illness, and, if the latter, from what date. That is why Article 61 of the Service Regulations, which covers the period of expected incapacity for work, makes a compromise. Before maternity leave begins and after it ends it is Article 62, on sick leave, that applies, as is clear also from Article 5(b) of circular 22. It would not square with the intent of the rules to grant the complainant any sort of leave other than maternity leave during the period covered by Article 61. Being an international organisation the EPO has its own rules on the matter. The complainant may not now rely on any mistake that may have been made in her favour when her first child was born. The refusal of her claim is based on a change in interpretation which is at the President's discretion and on which he need not consult the General Advisory Committee.

D. In her rejoinder the complainant seeks to refute the EPO's pleas and enlarges on her own. She points out that the Organisation recognises by implication that a woman may fall ill in the course of pregnancy. Whether the indisposition is the ordinary consequence of pregnancy or an illness is a matter which only the physician may determine. The success of her earlier application for leave was no mistake since the Personnel Department had told her that that was the practice, and she is not trying to rely on any mistake since the practice holds good, the staff not having been told of any change.

E. The EPO submits in its surrejoinder that there is no argument in the complainant's rejoinder that weakens its case, which it maintains. It briefly repeats its pleas, with particular reference to the reasons for the decision, its earlier practice and the distinction to be drawn between maternity leave and sick leave.CONSIDERATIONS:

1. Article 61 of the EPO Service Regulations as amended as from 1 January 1986 provides:

"A pregnant woman shall be entitled, on production of a medical certificate showing the expected date of confinement, to paid leave starting not earlier than six weeks before the date given in the certificate and ending ten weeks after the date of the birth. This leave shall be extended by two weeks in the case of multiple births or where the pregnant woman has already given birth to two or more viable children or where the household already has at least two children in its care. The total period of leave shall not be reduced if the confinement occurs earlier than the expected date."

Article 5 of staff circular 22 of 16 January 1979 deals in rather greater detail with the subject of the maternity leave to be granted under Article 61:

"a) Duration of maternity leave

(i) A permanent employee who is pregnant shall in accordance with Article 61 and in addition to the leave provided for in Article 59, be entitled on production of a medical certificate to maternity leave on full pay starting not earlier than six weeks before the expected date of confinement shown on the certificate and ending eight weeks [since amended to ten weeks] after the date of confinement provided that such leave shall not be for less than fourteen weeks [since amended to sixteen weeks].

(ii) A permanent employee on maternity leave shall retain all her rights to remuneration, advancement, annual leave and home leave. Her post shall not be declared vacant.

(iii) The permanent employee shall continue to pay her personal contribution to the Social Security Schemes and to the Pension Scheme.

(iv) In the event of termination of service, except in the case of dismissal on disciplinary grounds, a female permanent employee who has produced the medical certificate referred to in paragraph (i) shall be entitled to her emoluments up to the end of her maternity leave provided she does not enter the service of another employer.

b) Extension of maternity leave

An extension of maternity leave on the production of a medical certificate shall be deemed to be sick leave."

Article 62 of the Service Regulations, which is about sick leave, reads:

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

...

(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."

4. The complainant's doctor certified on 2 December 1986 that the likely date of birth of her child was 14 June 1987. Because of pre-natal complications he later gave her three successive medical certificates stating that she needed sick leave from 13 April to 16 June 1987. She gave birth to a daughter on 11 June. In this complaint she is challenging the refusal by the President of the Office to allow her to start her maternity leave at the date of birth of her daughter, and from that date take the sixteen weeks' leave provided for in Article 5(a)(i) of circular 22 as amended.

3. If a woman, having started maternity leave six weeks before the expected date of her confinement, gives birth after that date, she will ordinarily be entitled to ten weeks' leave after the actual, as against the expected, date of confinement in addition to whatever period has elapsed since she began her leave. She will thus be entitled to a total period of over 16 weeks, because the rule refers to the expected date for determining the start of the maternity leave and to the actual date for reckoning the period due thereafter and the two do not necessarily coincide. If the child is born before the expected date the mother will not have her leave curtailed: she will still be entitled to not less than 16 weeks, the period of leave granted after the date of birth being extended by the number of days by which the period of six weeks before that date was curtailed so as to make a total of 16 weeks.

4. The issue in this case is whether the certified sick leave the complainant took before the date of birth may be substituted for maternity leave so as to preserve her entitlement to a full period of 16 weeks' leave after that date.

The EPO refused such substitution on the grounds that sick leave might be substituted only for home leave or annual leave in accordance with Article 62(4) of the Service Regulations. On appeal the Appeals Committee held, citing Article 5(a)(i) of circular 22 as authority, that the total period of maternity leave was not reduced when the confinement had taken place earlier than had been expected or when the mother had continued to work up to the date of confinement. But the President confirmed the refusal of the complainant's claim.

5. It appears that there is a practice in the EPO of allowing employees who work during the six weeks before the expected date of confinement to add any days not taken to the period of maternity leave granted after the date of birth. The complainant is seeking to extend the privilege by claiming sick leave during the six-week period and adding it to the period of leave due after the date of birth.

6. The Appeals Committee held that the specific mention of home leave and annual leave in 62(4) did not prevent the substitution of sick leave for maternity leave; that the intention in 61 was to grant maternity leave in all normal cases; that the mother should be allowed discretion in the matter of timing; and that no pregnancy in which sickness was certified before the date of confinement might be treated as normal. The Committee unanimously found in the complainant's favour. In her submissions she endorses its reasoning, submitting that although the President did not accept its recommendation he was bound to do so or at least to state his reasons for refusing to do so. She further submits:

(a) that there was a departure from practice in her own case because she had previously been granted deferment of maternity leave because of sick leave before the date of birth;

(b) that whereas a healthy woman may work up to the date of birth and start her leave thereafter she was unable to do so because of sickness and that there is therefore inequality of treatment; and

(c) that a change in practice was made without prior consultation of the General Advisory Committee in accordance with Article 38(3) of the Service Regulations and of the Staff Committee.

7. The President was right in his decision. It is a principle of interpretation - expressio unius exclusio alterius - that express mention in a text of one or more things belonging to a category excludes by implication all other things in the category. Article 62(4) provides that if an employee is certified sick while on home leave or on annual leave the period is not deducted from such leave but is deemed to be sick leave; that precludes applying 62(4) also to maternity leave, which is another form of leave.

8. The President was not bound to endorse the Appeals Committee's opinion: Article 109(1) of the Service Regulations says merely that "the authority concerned shall take a decision having regard to this opinion". The President's duty is to consider the opinion before reaching his decision, not to follow it. Moreover, the letter of 2 August 1988 conveying the President's decision does give a reason for it, which is that sick leave may be substituted only for home leave or for annual leave. The complainant is therefore mistaken in contending that he failed to give the reasoned decision required by Article 106(1).

9. In support of her argument that there has been a change of practice in the deferment of maternity leave she cites her own case and says that since she was granted deferment for her first pregnancy she should be granted it for her second one.

The argument is not sustainable: the fact that she formerly benefited from misinterpretation of the rules does not entitle her to have the rules wrongly applied a second time.

The practice of allowing mothers to defer pre-natal maternity leave and to extend post-natal maternity leave correspondingly does not entitle the complainant to substitute sick leave for maternity leave, that being contrary to the provisions of the Regulations.

10. The purpose of maternity leave is to allow the pregnant woman a period of rest before birth if she wants it and a rather longer period after birth to recover and spend time with her child. The rules apply to all women whatever the state of their health. Though women in good health will enjoy their maternity leave more than those who suffer from complications or are not so robust, there is still equality of treatment in that all women are entitled to the same period of maternity leave. There is no inequality just because some are healthier than others and will be able to make more of their leave.

11. Lastly the complainant alleges that a change was made in the practice without consulting the General Advisory Committee or the Staff Committee. What happened was that the President changed the interpretation of Article 61 to bring it into line with a correct interpretation of 61 and 62(4) taken together. He did so in exercise of his authority to interpret the Service Regulations and was not required to consult the General Advisory Committee or the Staff Committee.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.