

## EIGHTY-SIXTH SESSION

### *In re Müller-Engelmann*

#### **Judgment 1829**

The Administrative Tribunal,

Considering the complaint filed by Mrs. Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 20 August 1997 and corrected on 14 October, the EPO's reply of 19 January 1998, the complainant's rejoinder of 15 May and the Organisation's surrejoinder of 20 August 1998;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

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

A. The complainant, a German who was born in 1951, joined the staff of the European Patent Office, the EPO's secretariat, as an examiner at grade A3. She was stationed in Munich.

On 16 September 1996, on receiving a medical certificate from her neurologist prescribing sick leave from 11 September to 31 December 1996, the Administration ordered her to report to the EPO's medical officer for an examination on 26 September. By a memorandum of 21 September she applied to the President of the Office for permission to spend the period of her sick leave "elsewhere" than at Munich.

On 26 September she reported with her husband for the examination. Because she would agree to be examined only in his presence the attending neurologist refused to carry out the examination. By a letter of 8 October the Administration told her that the President could take no decision on her application of 21 September if the medical officer did not report. The complainant protested and the EPO again called on her to undergo examination. Under terms agreed with her on 20 November the neurologist examined her on 21 November.

In a report dated 5 December 1996 the medical officer recommended an in-patient examination at a university hospital in Munich. On 6 December the Administration sent her a copy of the report and asked her to arrange for such examination with the medical officer. Inasmuch as her entitlement to sick leave under Article 62(6) of the Service Regulations was to run out on 21 January 1997 the Director of Personnel Management announced in a letter of 10 December 1996 the start of proceedings before the Invalidation Committee. In a letter of 10 January 1997 the Director gave her until 17 January 1997 to comply with the instructions of 6 December; if she did not, the Administration would treat her absence as from 20 January as "unauthorised" within the meaning of Article 63 of the Regulations. Although she made several appointments, she missed one, cancelled another, and imposed a condition unacceptable to the medical officer. By a letter of 10 March 1997 the Administration gave her a week to make an appointment with the medical officer; failing that, her absence would be considered unauthorised. After a further warning and postponement by her of appointments set for 24 and 27 March the Director declared in a letter dated 27 March that her absence was unauthorised as from 28 March.

By a letter of 11 April 1997 she appealed to the President against the decision of 27 March. By a letter of 15 May the Vice-President in charge of the Directorate-General for Administration (DG4) told her that he had put her case to the Appeals Committee.

By a letter of 21 May the Director told her that since she was to exhaust her entitlement to annual leave by 4 June the Administration would no longer pay her salary as from 5 June. By a letter of 19 June a personnel officer informed her that she must pay both her own and the EPO's contributions to the social security scheme.

She infers rejection from the EPO's failure to answer the claims in her appeal of 11 April, which she says she notified to the Administration on 16 April 1997.

B. The complainant submits that her complaint is receivable under Article VII(1) of the Tribunal's Statute because

she had reason to believe that the Appeals Committee would not report on her internal challenge within a reasonable period of time. In any event it is receivable under VII(3) since the President of the Office failed to act within the time limit of two months in Article 109(2) of the Service Regulations.

On the merits she charges the EPO with breach of its duty of care by failing to provide a healthy workplace. She blames her illness on dangerous pollution at the EPO and alleges breach of Article 3 of the Universal Declaration of Human Rights and of "international labour law". She takes the Administration to task for denying her, without explanation, the opportunity of seeking treatment in a better climate.

She seeks the quashing of the decisions of 27 March, 21 May and 19 June 1997; payment of salary due as from 5 June 1997 plus interest at 4 per cent a year and of the EPO's contributions for her social security and pension entitlements; and the production of information - certified "correct and complete" - on past and future levels of "harmful substances" in the complainant's office and communal premises in the building where she works at Munich. She claims awards of moral damages of not less than 10,000 German marks and costs.

C. In its reply the EPO contends that her complaint is irreceivable because she failed to exhaust the internal remedies open to her. There were no grounds for her assuming that the Appeals Committee might have taken more than reasonable time to report on her case. The only claim she put forward in her internal appeal was to the quashing of the decision declaring her absence "unauthorised". The others, being new, are irreceivable on that count too.

In subsidiary argument on the merits the Organisation says that it duly applied the material provisions of the Service Regulations and at no time impaired her dignity or rights. She does not, it observes, have an unconditional right to the presence of a third party during a medical examination. Her allegations of toxic pollution at the workplace have nothing to do with the present complaint - which is about her unauthorised absence - and she must first put them to the Invalidity Committee.

D. In her rejoinder the complainant rebuts the reply, enlarges on her pleas and alters some of her claims. She puts her costs at 12,686.93 marks.

E. In its surrejoinder the EPO observes that she has not put forward any new arguments in her rejoinder that might make it change its position. It merely corrects the factual record and enters comments on her pleas and amended claims.

## CONSIDERATIONS

1. The complainant invokes Article VII(3) of the Tribunal's Statute as the source of its jurisdiction and identifies 16 April 1997 as the date at which she notified her claims to the defendant Organisation. This is clearly a reference to the complainant's internal appeal, which the Organisation received at that date. The appeal sought the following relief:

"1. Condemnation of the Director of Personnel Management's action, i.e. to set unjustified terms under false pretences in regard to Article 89, Staff Regulations (obligation to the welfare of the employees).

2. Condemnation of the Director of Personnel Management's action, i.e. to intentionally make incorrect statements regarding Articles 62 and 90 of the Staff Regulations, as well as the circular letter No. 22, and to demand the honouring of these statements by threat of disciplinary actions (obligation to the welfare of the employees).

3. Condemnation of the Director of Personnel Management's action, i.e. preliminary to the ordered examinations, to enforce a relinquishment of rights by threat of disciplinary actions (obligation to the welfare of the employees).

4. Condemnation of the Director of Personnel Management's action, i.e. to delay the invalidity proceedings by holding in appointment a physician who does not honour a patient's rights (obligation to the welfare of the employees).

5. Nullification of the declaration of 27.03.1997 ('Unauthorized absence') from the start (Article 63 of the Staff Regulations).

6. Payment of all costs arising preliminary to as well as during the course of the proceedings, including especially

my barrister's fees."

2. On 15 May 1997 the Vice-President in charge of the EPO's Directorate-General for Administration (DG4) wrote, after initial examination, to tell the complainant that he could not agree with her claims and that in accordance with her wishes her appeal had been submitted to the Appeals Committee.

3. When this complaint was filed, on 20 August 1997, the Appeals Committee had not reported.

4. The complainant claims the quashing not only of the administrative decision of 27 March 1997 identified in the internal appeal regarding her unauthorised absence but also of other administrative decisions relating to her employment with the defendant in the period from May 1997 to February 1998. At least one of those decisions seems also to have been the subject of an internal appeal but the record does not reveal whether or not there has been any report by the Appeals Committee.

5. Any challenge to administrative decisions which were rendered with regard to the complainant after the filing of the first internal appeal but which were not the subject of further internal appeals is irreceivable: such decisions are not final, the complainant not having exhausted all existing means of resisting them as Article VII(1) of the Tribunal's Statute requires.

6. There remains the administrative decision of 27 March 1997 - relating to unauthorised absence - which the complainant asks the Tribunal to review notwithstanding that the internal appeal procedure has not been completed. The Tribunal's case law has it that where the pursuit of the internal remedies is unreasonably delayed the requirement of Article VII(1) will have been met if, though doing everything that can be expected to get the matter concluded, the complainant can show that the internal appeal proceedings are unlikely to end within a reasonable time: see Judgments 1243 (*in re* Birendar Singh No. 2) under 16, 1404 (*in re* Rwegellera) under 8, 1433 (*in re* McLean) under 4 and 6, 1486 (*in re* Wassef No. 8) under 11 and 13, 1534 (*in re* Wassef No. 14) under 3 and 1684 (*in re* Forté) under 3.

7. The complainant's internal appeal was received by the Organisation on 16 April 1997. Her statement is lengthy and has 24 annexes. Less than a month later the Vice-President completed his initial assessment of her claims and referred the matter to the Appeals Committee. She filed this complaint just over three months later.

8. The Tribunal holds that at the date of filing the present complaint the internal appeal process had not been unreasonably delayed and there was no indication that it was unlikely to come to an end within a reasonable time. That part too of the complaint is therefore irreceivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella carroll

James K. Hugessen

A.B. Gardner