

NINETY-FIRST SESSION

In re Müller-Engelmann (No. 9)

Judgment No. 2045

The Administrative Tribunal,

Considering the ninth complaint filed by Mrs Jutta Müller-Engelmann against the European Patent Organisation (EPO) on 16 November 1999 and corrected on 20 December 1999, the EPO's reply of 19 April 2000, and corrected on 12 May, the complainant's rejoinder of 14 August, and the Organisation's surrejoinder of 13 November 2000;

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 and the pleadings may be summed up as follows:

A. Some facts relevant to this case are set out in Judgment 1829 on the complainant's first complaint. She was granted an invalidity pension and retired from the EPO on 1 August 1999.

On 16 September 1996 the complainant presented a medical certificate prescribing sick leave from 11 September to 31 December 1996. Consequently, she approached the maximum amount of sick leave allowable under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office. She was accordingly asked to consult the Office's medical officer, Dr F., by virtue of Article 26(2) of the Service Regulations and Rule 6(i) of Circular No. 22. She was examined by Dr F. on 26 September 1996.

On 29 September the complainant forwarded to Dr F. the results of the images from a Single-Photon Emission Computerized Tomography (hereinafter SPECT images), taken by a specialist which she had received from her own doctor only after her appointment with Dr F. The latter sent these results to a radiologist, Dr K., who assessed them on 2 October 1996. On 8 November Dr F. returned these results to the complainant without comment.

Dr F. issued a report, dated 5 December 1996, assessing the complainant's fitness for work, and the EPO sent the complainant a copy on 6 December. The report indicates that Dr F. based her opinion partly on "*allgemeiner Untersuchungsbefund*" (which is translated in an Annex provided by the complainant with her complaint as "general findings of the examination") and "*Befundung von Fremdaufnahmen vom 02.10.96*" (which is translated in the same Annex as "findings on external takings dated 02-10-96").

On 9 January 1997 the complainant appealed to the President of the Office asking that the general examination results and the assessment of the SPECT images be sent to her. On 12 February the Director of Personnel Development informed her that the President had rejected her request and had subsequently referred the matter to the Appeals Committee. On 13 February the complainant contacted Dr F. directly, asking her for the information in question. On 18 February Dr F. replied that the complainant did not have the right to obtain her personal notes regarding the results of the physical examination, and that to obtain the assessment of the SPECT images the complainant would need to contact Dr K. On 21 February the complainant asked Dr K. to send her the assessment. He replied on 25 February that he was unable to comply with her request without being ordered by the EPO to do so. In March she again wrote to the EPO to request the same information. In a reply of 19 March 1997 the Administration told the complainant that it did not have the information in its possession.

In its opinion dated 16 June 1999 the Appeals Committee unanimously recommended rejecting her appeal as unfounded on the grounds that "[a]s far as the Office is in possession of [the medical documents she refers to] they are also at the disposal of the Complainant (reports of the medical officers)". The President of the Office endorsed that recommendation on 17 August 1999. That is the impugned decision.

B. The complainant specifies that she challenges the President's decision only in part. Her claims are limited to the

disclosure of the "general examination results" and the assessment of the SPECT images, plus costs. She claims that she has a right to be informed of the findings of her medical examinations and this information could prove useful in her claims for reimbursement of medical expenses. She contends that she did not ask for the personal notes of Dr F. but was requesting two official documents on which that doctor's report was based. She had contacted Dr K. directly to ask him for his assessment, but he had refused to give it to her without an order from the EPO.

She notes that the Appeals Committee opinion does not mention the fact that she has requested these documents on more than one occasion; moreover, its recommendation to reject her appeal has made it even more difficult for her to obtain the requested information. She takes issue with the argument that the EPO cannot deliver the documents because it is not in possession of them. This contradicts the ruling in Judgment 1684, *in re Forté*, where the Tribunal held that because the EPO commissioned reports from its medical officer it could "get them back or demand copies". Since the medical officer's report was produced at the EPO's request she sees no reason why it could not order that the required documents be put at her disposal. The Appeals Committee did not give an opinion as to her claim for costs; she believes she is entitled to costs relating to the appeals proceedings. She requests oral proceedings.

She seeks a ruling that the EPO should instruct Dr F. and Dr K. respectively to make available to her the "general examination results" ("*allgemeiner Untersuchungsbefund*") and the assessment of the SPECT images, dated 2 October 1996 ("*Befundung von Fremdaufnahmen vom 02.10.96*") which were both referred to in Dr F.'s report of 5 December 1996. She also asks to be awarded costs relating to the internal appeal proceeding in the amount of 1,171.60 German marks plus interest at 8 per cent per annum, as well as costs equal to "the actually incurred amount" in bringing her complaint before the Tribunal.

C. In its reply the Organisation submits that the complaint is irreceivable as regards her claim for costs relating to the internal appeal, since the complainant did not request these during the appeal proceedings.

It contends that the claim for the production of documents lacks substance. According to "information received orally" from Dr F., the term "*allgemeiner Untersuchungsbefund*" refers to a general physical examination i.e. height, weight, blood pressure, heart and lung functioning, and is synonymous with the term "*körperlicher Untersuchungsbefund*" which she used in her letter of 18 February 1997 to refer to the same examination. Dr F. said that she carried out such an examination on the complainant, noted down the results and used them as a basis for her report of 5 December 1996. She added that, in order to avoid any misunderstanding, she should have used the second of the two terms in her report. The complainant has, however, already admitted that she has no entitlement to such personal medical notes, and therefore her claim to "*allgemeiner Untersuchungsbefund*" no longer has any substance. Additionally, the complainant was informed that she could review the assessment made by Dr K. in his office any time she wished. In this regard, it points out that at no time has the complainant requested the EPO to authorise Dr K. to send her a copy of his assessment of 2 October.

The Organisation states that, since the complainant received a copy of the medical officer's report of 5 December, the reference she makes to Judgment 1684 is not pertinent. It stresses that although it requested the examination carried out by Dr F. it was that doctor who asked Dr K. to assess the SPECT images. The Organisation is not in possession of any medical report. As a matter of principle it does not receive such reports because they are covered by professional secrecy.

Given the lack of substance in the complaint, it asks that the complainant's requests for oral proceedings and costs be rejected.

D. In her rejoinder the complainant takes issue with the EPO's rendering of certain facts. She points out that she did indeed take up Dr K.'s offer to review the assessment. She went to his office and he read aloud his report. However, she was never given a written copy of it. As concerns the examination carried out by Dr F., she points out that Dr F. neither measured her height and weight, nor took her blood pressure, therefore the "general examination results" ("*allgemeiner Untersuchungsbefund*") cannot contain that information. She notes that the defendant is attempting to create the impression that such results do not exist.

She expands upon her plea that she has a right of access to her medical documents and asserts that this right is protected by German legislation.

E. In its surrejoinder the EPO reiterates that it has not withheld information from the complainant and that it is unable to give a copy of Dr K.'s assessment to the complainant since it is not in possession of it. Moreover, as the complainant has already admitted, she is not entitled to the personal notes of Dr F. The issue comes down to whether the "*allgemeiner Untersuchungsbefund*" was based on the physician's private notes, and it has no reason to doubt that this was so.

CONSIDERATIONS

1. The complainant attacks a decision of the President of the European Patent Office to reject his internal appeal which resulted in the complainant being denied copies of the "*allgemeiner Untersuchungsbefund*" (hereinafter "Document 1") and the "*Befundung von Fremdaufnahmen vom 02.10.96*" (hereinafter "Document 2").
2. The complainant was a permanent employee at grade A3 with the EPO. She was granted an invalidity pension and retired on 1 August 1999. On 16 September 1996 she provided a certificate prescribing sick leave for a period of four months. Since she was approaching the maximum sick leave allowed under the Service Regulations the EPO retained the services of its medical officer, Dr F., for an opinion as to the complainant's capability for service. The complainant was examined by Dr F. on 26 September 1996.
3. On 29 September 1996 the complainant provided Dr F. with the results of the images from a Single-Photon Emission Computerised Tomography ("SPECT images"), taken by a specialist, which she had received from her own doctor. At the request of Dr F. these images were assessed by Dr K., a radiologist. His assessment was dated 2 October 1996. On 6 December 1996 the EPO provided the complainant with a copy of the report submitted by Dr F. on 5 December. The report was based, inter alia, on the following:

"...

 - general findings of the examination [Document 1],
 - ...
 - findings on external takings dated 02-10-96 [Document 2],
 - ... "[\(1\)](#)
4. By a letter of 9 January 1997 the complainant appealed to the President requesting from the EPO, inter alia, a copy of Document 1 and Document 2. On 12 February 1997 the EPO refused the request and sent the appeal to the Appeals Committee for an opinion.
5. On 16 June 1999 the Committee recommended unanimously that the appeal be rejected as unfounded. As translated in an Annex provided by the complainant, the Committee stated the following at paragraph 97 of its opinion:

"The appeal for return of the named medical documents is unfounded. As far as the Office is in possession of such documents, they are also at the disposal of the Complainant (reports of the medical officers)."
6. On 17 August 1999 the President rejected the appeal in accordance with the Committee's recommendation. That is the impugned decision.
7. The complainant is seeking an order:
 - (1) enjoining the EPO's medical officer and Dr K., to provide the complainant with copies of their respective findings;
 - (2) awarding her 1,171.60 German marks in compensation for the expenses of the internal appeal proceedings, plus interest at a rate of 8 per cent per annum since the filing of the complaint; and
 - (3) awarding her costs for "the actually incurred amount" of the expenses incurred in the proceedings before the

Tribunal.

8. The EPO submits that the complainant's claim for the transmission of Document 1 lacks substance as the term "*allgemeiner Untersuchungsbefund*" means a general physical examination (height, weight, blood pressure, heart and lung functioning). Dr F. carried out such an examination, noted its results and used them as a basis on which she founded her report. According to that doctor, the term "*allgemeiner Untersuchungsbefund*" is synonymous with the term "*körperlicher Untersuchungsbefund*" used in her letter dated 18 February 1997, so the latter term should have been used in her report dated 5 December 1996 in order to avoid any misunderstanding. In view of this information and the fact that the complainant agrees that she is not entitled to the physician's personal notes, her claim for the transmission of this document no longer has any substance.

9. As for Document 2, the EPO submits that the complainant had the opportunity to view Dr K.'s assessment of the SPECT images in his office. The information she requests was, therefore, available to the complainant. However, instead of visiting Dr K. and insisting on delivery of the assessment as she did, she should have turned to the EPO to explain the situation and ask for authorisation of its disclosure. She did not do so. In addition, the complainant's request to Dr K. was not known to the EPO until 18 April 1999 when it received her comments on the position paper it filed on her internal appeal.

10. The EPO further submits that, although it requested the examination carried out by Dr F., who in turn asked Dr K. to assess findings by the complainant's own doctor, it does not possess any medical report since, as a matter of principle, it does not receive medical reports that are covered by professional secrecy.

11. As the Tribunal has recalled in Judgment 1684 *in re* Forté, medical records are strictly personal and the staff member's right to see them may not ordinarily be challenged. Accordingly, there is no reason for the complainant to be denied copies of documents that were used by Dr F. in her assessment of the complainant's capability for service. The real dispute between the parties seems to be as to whether the "general examination results", as described by the complainant, (Document 1), ever existed.

12. The only translation of the report of 5 December 1996 sent by Dr F. to the EPO is that provided by the complainant. There is no indication that more detailed findings were attached to this report. Given the various interpretations submitted by the parties, it is difficult to determine if the report described as Document 1 actually exists.

13. The EPO contends that the "*allgemeiner Untersuchungsbefund*" are Dr F.'s personal notes and that the term should be translated as "general physical examination". The EPO makes reference to the letter dated 18 February 1997 from Dr F. to the complainant informing her that she had no right to demand the surrender of her personal notes. The EPO also submits that Dr F. stated that she should have used the term "*körperlicher Untersuchungsbefund*" in her report of 5 December 1996, since it was that term that she used later in her letter to the complainant of 18 February 1997. However, the EPO does not provide its own translation of this term. The translation provided by the complainant of that letter renders it as: "personal notes regarding anamnesis and physical examination".

14. Since, in any event, the complainant's right is limited to receiving copies of whatever was given to the examining physician or transmitted by the latter to the EPO, it will be sufficient if the Tribunal orders the Organisation to direct the physician to furnish the complainant with whatever information the former has given to the EPO.

15. With regard to Document 2, there is no dispute that the document is a medical report prepared by Dr K. for the purposes of Dr F.'s opinion as to the complainant's capability for service. The fact that the EPO does not have Document 2 in its possession is entirely irrelevant. The EPO retained the services of Dr F., who in turn requested Dr K. to provide the assessment. In that way, the EPO had access to Document 2 and should have provided a copy to the complainant when she requested it. It is also irrelevant that the complainant may be aware of the content of Document 2 as a result of Dr K. reading it to her. Accordingly, the Organisation should also be ordered to direct that Dr K. provide a copy of that report to the complainant.

16. As for the claim for the award of costs for the internal appeal the EPO argues that it must be rejected as the complainant failed to submit this at any time during the internal appeal proceedings. The complainant does not deny that she did not seek an award of costs from the Appeals Committee. This being the case, the claim for those

costs is irreceivable.

17. There is no need to order oral proceedings.

18. Since the complainant succeeds, she is entitled to her costs before the Tribunal in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The Organisation is ordered to direct the examining physicians to provide the complainant with copies of Document 2 ("*Befundung von Fremdaufnahmen vom 02.10.96*") and, assuming that such document exists, Document 1 ("*allgemeiner Untersuchungsbefund*").

2. It shall pay the complainant 1,000 euros for her costs before the Tribunal.

3. All other claims are dismissed.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

1. As translated from German in an Annex provided by the complainant.