NINETY-THIRD SESSION

Judgment No. 2146

The Administrative Tribunal,

Considering the complaint filed by Mr M. K. against the European Patent Organisation (EPO) on 16 January 2001 and corrected on 6 April, the EPO's reply of 5 July, the complainant's rejoinder of 26 September, and the Organisation's surrejoinder of 26 November 2001;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a German national born in 1951. On 1 June 1987 he joined the staff of the European Patent Office, the EPO's secretariat, as a messenger at its Berlin sub-office. At the material time he held grade C4. On 1 October 2001 he took early retirement.

On 20 April 1998 the complainant reached the maximum paid sick leave allowed over a three-year period under Article 62(6) of the Service Regulations for Permanent Employees of the EPO. An Invalidity Committee was duly constituted of the sub-office's medical officer, a doctor appointed by the complainant, and a third member chosen by mutual agreement between the first two doctors. The complainant's sick leave was eventually extended to 15 February 1999. On 16 February he returned to work for half a day; he then sent a medical certificate, bearing the same date, which attested that he was unfit for work for four weeks.

On 17 February the Head of the Administration Department informed the complainant that his salary had been stopped as of midday on 16 February, pending a new decision by the Invalidity Committee. On 2 March the doctor he had appointed to the Committee resigned, and the next day he was asked by the Head of the Administration Department to appoint another one; this request was renewed on 8 March and the complainant was also informed that the appointments of the other two members to the Committee would stand. In a letter of 24 March the complainant expressed disagreement with the fact that the appointment of the third member would not be affected by this resignation, but nevertheless he appointed a new doctor in late March. On 27 April the President of the Office reiterated to the complainant that the third member of the Committee did not need to be rechosen.

On 10 March the Head of the Administration Department informed the complainant that the sub-office's medical officer found him partially fit for work and he was to resume half-time work as of the following day, until the Invalidity Committee could take a new decision on his case. The complainant worked from 11 to 25 March and on 26 March he submitted a new medical certificate showing that he was unfit for work until 10 April. On 9 April he was informed that as "a gesture of goodwill" a reduced salary would be paid to him as an advance for the period from 26 March to 10 April, until the Invalidity Committee made a final decision. But payment of his salary was again stopped when he did not return to work by 12 April. From 14 April to 18 July he received in-patient treatment and his salary was once again paid as an advance, with effect from 14 April.

In its decision of 13 July 1999, the Invalidity Committee unanimously found that the complainant's sick leave should end on 18 July and that he could resume work full-time as of 19 July. By a majority the Committee found that he was "almost certainly fully fit for work from 16 February to 13 April 1999". On 2 September the Head of the Administration Department informed the complainant of the administrative consequences of the Invalidity Committee's decision. Among other things the letter confirmed the salary stoppage from 16 February to 10 March 1999 and it requested reimbursement for the salary advanced from 26 March to 10 April 1999. Further details were communicated to him in a letter dated 24 September 1999.

Between 14 March and 1 November 1999 the complainant filed five internal appeals. The first (RI/60/99) was against the provisional stoppage of his salary imposed on 17 February; the second (RI/51/99) was against the decision of the sub-office's medical officer to have him resume work on 11 March 1999; the third (RI/52/99) impugned the letter of 8 March asking him to appoint a new doctor to the Invalidity Committee and informing him that the resignation of the doctor he had appointed to that Committee did not require an entirely new Committee to be constituted; the fourth (RI/61/99) was against the Office's view expressed in a letter dated 27 April that the appointment of a new doctor of his choice to the Invalidity Committee did not mean that the choice of the Committee member appointed by mutual agreement was questioned; and the fifth (RI/106/99) was against the salary stoppage from 16 February to 10 March 1999 and the request for reimbursement for the salary paid from 26 March to 10 April 1999.

The Appeals Committee heard all five appeals together and issued a single opinion on 8 August 2000. It recommended rejecting RI/52/99 and RI/106/99 as unfounded, and RI/61/99 as inadmissible, as it considered that appeal to have the same subject matter as RI/52/99. Concerning the remaining two appeals, RI/60/99 and RI/51/99, it recommended allowing them in part in accordance with its opinion.

On 11 October 2000 the President informed the complainant, that "in so far as the Appeals Committee has recommended to reject [the] appeals, [he has] decided accordingly". That is the impugned decision.

B. The complainant makes several pleas. First, he submits that the fundamental rule relating to sick leave is Article 62(1) of the Service Regulations, which stipulates the obligation to provide evidence of an incapacity to work due to sickness or accident. Thus, upon the production of a medical certificate he should have been entitled to sick leave. According to him, paragraphs 6 and 7 of that article describe the consequences of an employee being on sick leave. He contends that the only decision to be taken by the Invalidity Committee is the length of the extended sick leave. It has no authority to vitiate a medical certificate provided by his doctor. Under Article 62 the Committee is authorised only to extend the period of sick leave or to find that the employee is permanently unable to perform his duties.

He also contends that the rules on sick leave are unclear and thus subject to misinterpretation. He argues that it is a general principle that when a rule is open to more than one interpretation, it must be interpreted against the party responsible for drafting it. But the EPO did not do so and this constitutes an abuse of power.

The complainant further argues that it was unlawful for the Organisation to withhold his salary. To do so it relied on Article 63 on unauthorised absence, but this article should not have been applied to him because he had submitted a medical certificate for his absence. The measures taken against him amounted to a *de facto* suspension without according him the procedural safeguards found in disciplinary proceedings.

Lastly, he impugns the composition of the Invalidity Committee. A validly constituted Committee is one member appointed by the President of the Office, one member appointed by the permanent employee, and a third that is chosen by mutual agreement between the first two. When the member appointed by him resigned and he appointed a new doctor, then the third member should have been rechosen as well. This did not happen.

He asks the Tribunal to quash the challenged decision, order repayment of the salary withheld and he claims material and moral damages.

C. The Organisation replies that the complaint is irreceivable insofar as it challenges the President's final decision on appeal RI/61/99 concerning the composition of the Invalidity Committee; that appeal does not go beyond the subject matter appealed against in appeal RI/52/99. This position was unanimously endorsed by the Appeals Committee. The claim for moral damages is also irreceivable; it was not submitted in due time and amounts to an unacceptable extension of the subject matter of the appeal. Moreover, the Appeals Committee noted that the complainant did not sufficiently substantiate the existence of moral injury.

On the merits, the EPO submits that the complainant errs in arguing that sick leave is an absolute right subject only to the production of evidence. The rules on sick leave are found in Article 62 of the Service Regulations. Paragraph 1 of that article sets out the general rule, the *lex generalis*, but this is overridden by the *lex specialis* set out in paragraph 7. This position is supported by the general principle of law, *lex specialis derogat generalis*. Additionally, Article 90 defines the powers granted to the Invalidity Committee. If the complainant's argument were correct, that the principle in Article 62(1) is unconditional, there would be no need for an Invalidity

Committee. However, this was not the legislator's intent. The Office's interpretation has been confirmed by the Tribunal's case law.

The EPO contends that there was no flaw in the composition of the Invalidity Committee: it was not required to constitute an entirely new Committee upon the resignation of one of its members. If this were so then the parties concerned would have a means of jeopardising the proper functioning of the Committee; this would run counter to the interests of both the staff member and the Office. Furthermore, any newly appointed member would already be aware of the composition of the Committee and could refuse to serve on the Committee if not in agreement with its composition.

The competence of the Invalidity Committee is set out in Article 90 of the Service Regulations and the Organisation points out that the Committee's actual competencies are more extensive than those alleged by the complainant. The EPO denies that the complainant's salary cut between 16 February and 10 March 1999 amounted to a *de facto* suspension. A suspension is an interim measure taken in response to alleged misconduct. The complainant's situation was different: his salary was withheld pending a determination by the Invalidity Committee on his fitness for work.

D. In his rejoinder the complainant contends that his claims for moral and material damages were submitted during the internal appeals procedure, therefore they are admissible before the Tribunal.

He reiterates that the Invalidity Committee's authority is limited: it does not have the authority to require a permanent employee, who is still unable to perform his duties, to return to work full-time. He submits that he was declared fit to work by doctors who had not examined him. He cites a letter written by the first doctor he had appointed to the Invalidity Committee as proof that the proceedings were flawed.

E. In its surrejoinder the EPO maintains that the claim for moral damages was not submitted in due time and is, therefore, irreceivable.

It refutes the complainant's allegations that the Invalidity Committee does not have the authority to determine that a permanent employee is fit to return to work. It also points out that this does not mean that a permanent employee still unable to perform his duties would be required to resume work. There was no abuse of authority by the Committee. The Organisation refers the Tribunal to the reports in the file by the Invalidity Committee and other doctors to refute the complainant's allegation that he was not examined before being declared fit to work. Regarding the letter by the complainant's doctor, the EPO submits that it was written more than a year after he had resigned from the Committee and the latter had taken its decision on the complainant; if his appointee felt the proceedings were flawed he should have voiced his concerns right away.

CONSIDERATIONS

1. This complaint arises from the final decision of the President of the Office on five internal appeals filed by the complainant. The recommendation of the Appeals Committee, in its opinion dated 8 August 2000, was only partially accepted by the President. The complainant now asks the Tribunal to quash that decision, order the repayment of remuneration withheld during the period from 16 February to 10 March 1999, and award him material and moral damages.

2. The facts, although somewhat complicated, are not in dispute.

3. The complainant suffered from an illness that was severe enough to make him use up all his paid sick leave by 20 April 1998, that is, twelve months within three consecutive years as specified in Article 62(6) of the Service Regulations. Therefore, pursuant to Article 62(7) of the Service Regulations, an Invalidity Committee was constituted to assess whether his sick leave should be extended, whether he should return to work on a full or part-time basis, or whether he was permanently incapacitated.

4. The President of the Office and the complainant were each entitled to appoint one doctor to the Committee. In turn, the two doctors would agree upon a third. Dr K. was appointed to represent the Office; she also happened to be the medical officer for the sub-office. The complainant appointed Dr L. These two then chose Dr T. Later, Dr L. resigned from the Committee and was eventually replaced by Dr D.

5. On 3 November 1998 the Invalidity Committee had decided to end the complainant's sick leave on 9 November 1998. That date was further extended to 15 February 1999, with the complainant due to return to his post on 16 February.

6. The complainant returned to work on the morning of 16 February but left in the afternoon. On 17 February he submitted a medical certificate from Dr B. declaring that he was unfit to work for a period of four weeks. By a letter dated the same day, the Head of the Administration Department told the complainant that his salary would be withheld from the afternoon of 16 February and that the medical certificate would be passed on to the Invalidity Committee for its consideration.

7. Following the resignation of Dr L. from the Committee on 2 March 1999, the complainant was asked, on 3 March, to appoint another doctor to the Invalidity Committee within thirty days. That request was reiterated by the Administration on 8 March 1999 when it also confirmed that the appointments of Dr K. and Dr T. were unaffected by Dr L.'s resignation.

8. Upon receipt of a medical report by Dr K. on her assessment of the complainant's condition on 9 March 1999, the Head of the Administration Department informed the complainant, by a letter of 10 March, inter alia, that Dr K. had found him partially fit for work, contrary to the medical certificate he had provided on 17 February. Therefore, he asked the complainant to resume his duties part time as of 11 March. He added that this arrangement would apply until a decision was made by the Invalidity Committee, which in turn could only resume its work once the complainant had appointed a new doctor. This letter, including whether the medical officer (rather than the Invalidity Committee) could determine the complainant's fitness for work, is at the source of appeal RI/51/99.

9. The complainant resumed his duties - but only until 25 March - in accordance with Dr K.'s recommendation. He also requested that the decision to withhold his salary from 16 February to 8 March 1999 (contained in a letter dated 17 February 1999) be rescinded. This gave rise to appeal RI/60/99.

10. As the complainant endeavoured to appoint a new doctor to the Invalidity Committee, he asserted in a letter dated 24 March 1999 that the Committee should be constituted again in accordance with Article 89(1) of the Service Regulations so that the two appointed doctors would once again have to agree upon the third member. The EPO's refusal of this request led to appeal RI/52/99.

11. On 26 March 1999 the complainant submitted a certificate from Dr D. certifying that he was unfit to work until 10 April 1999. In a letter dated 9 April 1999, the Office wrote to the complainant as follows:

"The only reason for stopping your salary for the period 16 February to 10 March 1999 is Article 62(6) and (7) [of the Service Regulations], as there has been no more 'extended sick leave' since 16 February 1999."

12. On 23 May 1999 the complainant wrote to confirm that Dr D. had agreed to represent him on the Invalidity Committee but reiterated his position challenging Dr T.'s appointment. This gave rise to appeal RI/61/99.

13. Finally, on 13 July 1999, the Invalidity Committee met once again and unanimously decided that the complainant's sick leave would end on 18 July 1999 and that he should resume full-time duties on 19 July 1999, in the same job and under the same conditions. The following annex was attached to the Committee's opinion:

"The following majority decisions were made for the past period from 16 February 1999 to 13 July 1999:

[The complainant] was almost certainly fully fit for work from 16 February to 13 April 1999, as also decided by mutual agreement at the Invalidity Committee meeting on 15 February 1999 and also on the basis of the results of ... tests and examinations. [The complainant] is granted sick leave from 14 April to 18 July 1999."

14. In a letter dated 2 September 1999 the Office informed the complainant of the consequences of the Invalidity Committee's decision, including retroactive elements dating back to 16 February 1999. The complainant was asked to make certain choices and further details were then communicated to him by a letter from the Office dated 24 September 1999. Essentially, 7.5 days would be deducted from leave owing to the complainant in 1999. His absence from 26 February to 10 March was unauthorised and withholding the complainant's salary during that period was confirmed. However, Dr D.'s certificate, covering the period from 26 March to 10 April 1999 was invalidated and the Office was therefore entitled to recover any remuneration paid to the complainant during that

time. The absence during that period was also characterised as "unauthorised".

15. On 1 November 1999 the complainant filed appeal RI/106/99 against the decisions taken by the EPO as a result of its interpretation of the Invalidity Committee's report. In particular, he challenged the authority of the Invalidity Committee to make decisions with retroactive effect.

16. The Appeals Committee was of the view that Article 62(7) of the Service Regulations should be generally and provisionally applied when a decision from the Invalidity Committee is forthcoming. Here, where there was conflicting medical evidence, there was no reason to depart from the general rule and the Organisation could not safely conclude at such a time that the complainant's absences were "unauthorised" pursuant to Article 63 of the Service Regulations. The Appeals Committee therefore recommended the acceptance of appeal RI/60/99 (in part) and concluded that the Organisation should have continued to pay the reduced, albeit recoverable, salary until the question of the complainant's fitness for work had been clarified.

17. With respect to the request that the complainant resume his duties on 11 March 1999, the Appeals Committee accepted that the Organisation was entitled to ask for a recommendation from the medical officer, given that the Invalidity Committee would be unable to resolve the issues quickly as the doctor appointed by the complainant had resigned. However, it recommended that appeal RI/51/99 be partially accepted to the extent that the Organisation said that Dr K.'s findings had retroactive effect, which in its opinion they did not.

18. The Appeals Committee recommended that appeal RI/106/99 be dismissed as unfounded. It acknowledged that the medical findings of the Invalidity Committee may not be reviewed (in any event the Appeals Committee would lack jurisdiction). The Appeals Committee determined that the Invalidity Committee's obligation to extend sick leave once the issue of fitness for work had been clarified included the ability to do so retroactively (see Judgment 1440). Despite its recommendation in appeal RI/60/99, the Appeals Committee concluded that the Invalidity Committee's final opinion affirmed the Organisation's decision to withhold the complainant's salary during the relevant period.

19. The Appeals Committee was also of the view that the complainant's arguments with respect to the composition of the Invalidity Committee were unfounded. The Appeals Committee found that any agreement with respect to the third member of the Invalidity Committee only had to be in place at the time when that member was appointed. It said that continuity and independence of the Invalidity Committee were paramount. Furthermore, on the basis that the newly appointed member would know the identity of the other two members and should not agree to join the said Committee unless he or she felt that they could work together. The Appeals Committee recommended that appeal RI/52/99 be dismissed accordingly and RI/61/99 was thought to be inadmissible because the latter covered the same subject matter as the former.

20. To the extent that the complainant requested exemplary damages at the hearing, the Appeals Committee held that the arguments added new scope to the claims, were submitted too late, and were unsubstantiated.

21. The President only disagreed with the Appeals Committee insofar as it said that there was an obligation upon the Organisation to pay a provisional salary to the complainant on receipt of the 16 February 1999 medical certificate from Dr B. He wrote as follows in his letter dated 11 October 1999:

"... I consider that once a decision has been taken by the Invalidity Committee, any new medical certificate provided by the staff member must be forwarded without delay to the members of the Invalidity Committee (or to the Office's medical advisor if the Committee is not functioning), in order for them to review their decision if necessary. I do not consider that on receipt of a new medical certificate a provisional salary should be paid again, notably because the doctor providing that certificate is not necessarily informed of, or may disagree with the Invalidity Committee's arguments for deciding that the staff member should take up work again."

22. The points made by the parties in their pleadings raise the following issues:

- Was the Invalidity Committee properly constituted?

- Was the complainant entitled to sick leave after 15 February and prior to the Invalidity Committee's decision of 13 July?

- If not, was his absence unauthorised so as to attract the penalties imposed?

- What was the effect of the Invalidity Committee's decision of 13 July on past absences?

- Is the complainant entitled to damages?

23. The first issue has to do with the composition of the Invalidity Committee. At the material time, Article 89 of the Service Regulations read as follows:

"Article 89

Composition

(1) The Invalidity Committee shall consist of three medical practitioners:

- the first appointed by the President of the Office;

- the second appointed by the permanent employee concerned; and

- the third appointed by mutual agreement between the first two.

(2) The employee concerned shall appoint a medical practitioner of his choice. This appointment shall be notified to the President of the Office within thirty days of the President of the Office notifying the employee of the appointment of the first medical practitioner.

In the event that the employee fails to appoint a medical practitioner who is so able and willing to act, a medical practitioner shall be appointed on his behalf by the President of the Office.

(3) A permanent employee of the Office shall act as secretary to the Committee."

While the Tribunal does not necessarily endorse all the reasoning of the Appeals Committee, it does agree that there was no fatal flaw in the procedure adopted here. It is not necessary to decide whether or not a member of an Invalidity Committee who resigns or who becomes unable to act must always be replaced. It is clear, however, that if a member is replaced, the appointment should be by the same person or persons who originally appointed the member who has left. The complainant is wrong to liken the Invalidity Committee to an arbitral body that must always have representation from each side and must always be presided by someone chosen by the parties' representatives. The Invalidity Committee is a statutory body and once regularly constituted, it has the powers vested in it by the rules. The appointments to it do not become invalid simply by reason of the departure of a member.

24. Secondly, both the Appeals Committee and the Office were wrong to treat the complainant's absences from 16 February to 10 April as "unauthorised" and thereby attracting a penalty so that days of leave were used up pursuant to Article 63 of the Service Regulations. It may indeed be the case that the Invalidity Committee ultimately decided that he was not entitled to sick leave despite the production of medical certificates but that does not necessarily determine the characterisation of those absences.

25. At the material time the relevant provisions of the EPO's Service Regulations were as follows:

"Article 62

Sick leave

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

...

(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

(7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 1, whichever is the greater. However, where the incapacity to work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of this basic salary.

...

Article 63

Unauthorised absence

Except in cases of sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior. Without prejudice to any disciplinary measures that may apply, any unauthorised absence which is duly established shall be deducted from the annual leave of the employee concerned. If he has used up his annual leave he shall forfeit his remuneration for an equivalent period."

26. Article 62 does not deal with authorised absences except indirectly. It is solely concerned with entitlement to sick leave, that is to say absences with pay. A permanent employee on sick leave is, of course, authorised to be absent but there are other circumstances where absence can be authorised, either with or without pay.

27. Article 63 deals with absence from work and imposes a penalty so that leave time is lost when such absence is unauthorised. It is formal, however, in making an exception for cases of "sickness". While the text is silent as to procedure, it is only normal that such sickness will ordinarily be established by means of a medical certificate. The production of a medical certificate will usually involve a claim for sick leave, but that is not necessarily the case. In particular, in a case such as this where sick leave entitlement is exhausted, the certificate's only effect is to explain and justify the employee's absence from work and to shield him from the penalties imposed by Article 63.

28. The decision of the EPO to impose such penalties on the complainant was wrong and the Tribunal will order that they be rescinded. That does not mean, of course, that the complainant is entitled to be paid his salary for those days when he did not work and had no sick leave; the complainant's argument that Article 64(1) of the Service Regulations creates an independent entitlement to salary where no services are performed is plainly wrong. The upshot is that, even though the Tribunal orders the recission of the penalty imposed, it is unlikely to have any material effect since it appears that the complainant was in fact paid for the days he did not work during the relevant period and whether such pay was received as salary or as leave allowance is irrelevant.

29. However, the complainant is wrong to complain of the allegedly "retroactive" nature of the Invalidity Committee's decision dated 13 July 1999. The decision is no doubt retrospective in the sense that it creates entitlement to sick leave from a date in the past (it could scarcely be otherwise in a case such as this where sickness occurs after the expiry of maximum paid sick leave). But that does not offend the rule against retroactivity and will normally operate to the permanent employee's benefit, since only the Invalidity Committee can permit sick leave after the expiry of the maximum term. If it were otherwise, the employee whose sick leave is exhausted and who is prevented from working by sickness would receive no benefit at all, even if the Invalidity Committee subsequently decided to extend sick leave. The complainant is wrong to argue that the Invalidity Committee's decision deprived him of benefits, for he was never entitled to such benefits in the first place. The Tribunal dealt with a very similar situation in Judgment 1440, under 10, where it said:

"The complainant had exhausted his entitlement to paid sick leave by 23 October 1992. He would become entitled under Article 62(7) to further sick leave either (a) on full salary, if the Invalidity Committee determined that his incapacity for work was due to a serious illness; or else (b) on half salary, but only for any period by which the Invalidity Committee extended his sick leave. Thus at 24 October 1992 he had no immediate entitlement to further sick leave, on full or half salary: any such entitlement arose only if and when the Invalidity Committee decided in his favour. That decision did not take away a pre-existing entitlement, but on the contrary created the entitlement with effect from 24 October 1992. Thus the rule against retroactivity has no application in this case, and the claim fails."

30. The complainant is entitled to moral damages which result from the EPO's improper actions. Such damages were in fact claimed before the Appeals Committee and could have been granted by it; the claim is receivable. The Tribunal fixes them in the amount of 1,000 euros and awards costs in the amount of 500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it confirms that the complainant's absence for the period of 16 February to 10 March 1999 was unauthorised and denies the claim for damages.

2. The EPO is ordered to rescind any penalties imposed on the complainant in respect of his absences from work during the period from 16 February to 10 April 1999.

3. It shall pay the complainant 1,000 euros as moral damages and 500 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.