

The Administrative Tribunal,

Considering the sixth complaint filed by Mr W. H. against the European Patent Organisation (EPO) on 10 January 2005, the EPO's reply of 30 March, and the complainant's letter of 16 September 2005 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder;

Considering Article II, paragraph 5, 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. Some facts relevant to the present case are to be found in Judgment 2109, delivered on 30 January 2002, on the complainant's third complaint. He was employed by the European Patent Office – the secretariat of the EPO – as an examiner at grade A4(2) at The Hague, Netherlands. He was retired on grounds of invalidity as from 1 August 2002. He was due a lump-sum payment in that regard under Article 84(1)(b) of the Service Regulations, which concerns in particular permanent invalidity. On 3 October 2002 the Office transferred the amount due to the complainant's bank account, and it was credited to his account on 8 October 2002.

In August 2002 the complainant was paid a sum representing 14.5 days of untaken annual leave, plus four days in lieu of two weekends. In an e-mail of 25 September 2002 he queried the way his untaken leave had been calculated. He assumed that it should have been paid as though he had continued working for 14.5 working days after 1 August 2002, and that he should have been paid for three weekends, rather than two.

On 4 October 2002 the complainant wrote to the President of the Office stating that he had not yet received the lump sum due to him under Article 84 of the Service Regulations. He requested payment of the lump sum as well as interest at 8 per cent as from 1 October 2002. In the same letter he took up the matter of the balance of his untaken annual leave, contending that because of a wrong interpretation of the rules the calculation did not take account of six weekend days. He therefore requested payment for a further two weekend days. In the event that his claims were not met, he wanted his letter to be treated as an internal appeal. The matters were referred to the Appeals Committee and dealt with together.

The Appeals Committee issued its report on 14 September 2004. It found that the complainant's original request for payment of the lump sum due in respect of his invalidity was made void of substance by the payment ordered on 3 October and received on 8 October. It recommended that his request for payment of interest at 8 per cent per annum be allowed in respect of the period from 1 to 8 October 2002 only. With regard to his untaken annual leave, it found that the EPO had acted correctly in paying him for a total of 18.5 days' leave and recommended dismissing his claims in that regard.

By a letter of 27 October 2004, which is the impugned decision, the Director of Personnel Management and Systems informed the complainant that the President of the Office had endorsed the Appeals Committee's recommendations. He was thus to be paid 8 per cent interest on the lump-sum invalidity payment for the period from 1 to 8 October 2002. He was told that the corresponding amount (548.18 euros) would shortly be paid into his bank account. As for his claim relating to his annual leave payment, it was rejected.

B. The complaint is directed in part against what the complainant considers to be late payment of the "penalty interest" due to him for the period from 1 to 8 October 2002. That payment, he contends, fell due on 8 October 2002 but was not paid to him until 23 December 2004. He believes that he should be compensated for that late payment, particularly as, in his case, the Office could have "prolonged" the procedure before the Appeals Committee "for more years", which would have gone against him. When a payment is overdue, he believes that in order to avoid "bad habits" it is "good practice" to oblige the relevant party to pay interest.

The complainant is also challenging the President's final decision denying his request to be paid for a further two days' leave. Relying on Circular No. 22, which sets out guidelines concerning leave, he argues that under Rule 2(f)(iii) of the circular, the number of days payable in respect of outstanding annual leave will be "reckoned in the same way as if the leave had been taken when the permanent employee was still in post". He notes that the rules do not stipulate "when and how" that theoretical leave should be deemed to have been taken, and that it remains unclear as to whether it is deemed to have been taken before or after the cessation of employment. He considers that there is thus a "gap in the law". Relying on Judgment 1755 (under 12), he states that any ambiguity in the EPO regulations should be construed *contra proferentem* and in favour of the staff.

The complainant claims the following relief. He seeks payment for a further two days of leave, with interest at 8 per cent calculated from 1 October 2002 on the amount due. Regarding the payment of interest on the lump-sum invalidity payment that was due to him for the period from 1 to 8 October 2002, he claims interest on that sum of "548.18 [euros] starting October 8th, 2002, at 8%". He also seeks 650 euros in costs.

C. In its reply the EPO argues that the complaint is devoid of merit. It rebuts the arguments put forward by the complainant to justify his request for compound interest in respect of the period from 8 October 2002 to 23 December 2004. There was no "bad habit" for him to protest against. The procedure before the Appeals Committee was conducted within a reasonable period of time. The President's final decision was also implemented within a reasonable period of time: it was taken on 27 October 2004 and on 23 December 2004 the complainant acknowledged receipt of the interest in respect of the period from 1 to 8 October 2002. Moreover, the complainant does not indicate that he suffered any prejudice because of the timing of that payment and the Office acted fully in line with the Tribunal's case law.

The EPO provides information on the method used for calculating days payable in respect of untaken leave. It points out that it has a "certain amount of discretion" in applying Rule 2(f)(iii) of Circular No. 22. In exercising its discretionary power, it had to comply with the principle of equal treatment, and therefore applied a fixed-rate compensation for untaken annual leave, irrespective of the date of cessation of employment. In order to calculate the number of days to be paid in respect of outstanding leave, it first has to determine the number of remaining days of leave; to these it adds two days in lieu of the weekend for every five days of leave. The complainant had 14.5 days of outstanding leave to which was added twice two days of leave (i.e. for weekends), resulting in a total of 18.5 days.

## CONSIDERATIONS

1. The complainant was retired on grounds of invalidity as from 1 August 2002, and was to receive a lump sum under Article 84(1)(b) of the EPO Service Regulations. On 3 October 2002 the EPO transferred that lump sum – 308,349.36 euros – to his bank account; it was credited to his account on 8 October 2002.

Meanwhile, on 4 October the complainant had written to the President of the Office claiming interest as he had not yet received payment of that lump sum. In the same letter, he took up another issue which related to untaken annual leave. Upon cessation of his employment, the complainant was paid in respect of 14.5 days of untaken leave, as well as twice two days for the weekends. He was paid, according to a fixed rate, an amount corresponding to 18.5 days. According to the complainant the calculation should have included a third weekend, taking into account the precise day on which he left the EPO to take up the invalidity pension. In his letter of 4 October he claimed payment for a further two weekend days.

Both matters were referred to the Appeals Committee. On the matter regarding the lump sum in respect of his invalidity, the Committee was of the opinion that the normal length of time for processing payment was eight weeks, and that therefore the complainant should have been paid the amount due on 1 October instead of 8 October 2002, and was entitled to payment of penalty interest. However, it was of the view that his claim for compound interest for the period after 8 October 2002 should be denied. Regarding the calculation of his untaken annual leave, the Committee recommended dismissing his appeal as devoid of merit. By a letter of 27 October 2004 the complainant was informed that the President of the Office had decided to follow the recommendations of the Committee.

2. Before the Tribunal, the complainant claims that there was an undue delay in the payment of the interest for the period from 1 to 8 October 2002 and asks for compound interest on that sum. In that regard, it should first

be noted that the Appeals Committee's opinion of 14 September 2004 was accepted, and that the compensatory interest for the period from 1 to 8 October 2002 was awarded by the decision of 27 October 2004. An amount of 548.18 euros corresponding to interest at 8 per cent per annum on the original lump sum was credited to the complainant's account on 23 December 2004.

The complainant wants "interests over the sum of 548.18 [euros] starting October 8th, 2002, at 8%", considering the lateness with which the amount of 548.18 euros was paid to him. He only received it on 23 December 2004, but claims that the interest for late payment should have been paid at the same time as the lump sum he received in respect of his invalidity. The issue raised in his internal appeal relating to the late payment of the lump sum is not now being challenged by the complainant. He is only contesting the late payment of the interest itself, and puts forward additional claims concerning payment of outstanding annual leave.

3. On the matter of untaken leave the Appeals Committee found that allowing a fixed-rate compensation is not an arbitrary procedure, but one aimed at giving "uniform treatment" to all employees. It further held that, according to Rule 2(f)(iii) of Circular No. 22: "For the purpose of calculating the [emoluments due] the number of days payable in respect of outstanding annual leave will be reckoned in the same way as if the leave had been taken when the permanent employee was still in post" and the emphasis is put on the fact that this is a mere calculation.

The complainant argues that under the above-mentioned rule "the number of payable days need not necessarily be the same as the balance of untaken leave". He points out that the English, French and German versions of Circular No. 22 also refer to calculation and admits that they do not establish how this calculation should be made. He invokes that any such "ambiguity" should be construed *contra proferentem* as per Judgment 1755 under 12, which reads in part: "any ambiguity in the Regulations the EPO has issued should be construed *contra proferentem* and in favour of the staff."

The alleged ambiguity would be that Rule 2(f)(iii) of Circular No. 22 does not clearly establish how the untaken annual leave is to be calculated. Yet the aforementioned rule states that the calculation is to be made "as if [...] the permanent employee was still in post", which is clearly not a reflection of the actual date when the staff member really leaves office. The "as if", as the complainant himself admits, implies a theoretical calculation of untaken leave of former staff members.

The reference to "as if the leave had been taken when the permanent employee was still in post" can be reasonably understood to indicate a general rule for all years and all staff members, irrespective of the exact date when each staff member might have taken leave, but in fact did not really take it.

Rule 2(f)(iii) of Circular No. 22 indicates that a theoretical calculation is to be made, as if the employee were still at work, and some general criteria are necessary to determine how that should be done. That is not an ambiguity that can be construed against the Organisation, for it just requires a simple reasoning to be made by the interpreter of the rule. As it is obvious, there is no way of knowing when exactly the leave should have been taken, and for that reason the practice of the Office, as argued by the Appeals Committee, is to calculate two weekend days for each five days of leave, thus totalling seven days a week. It is a general rule equally applied to all staff members and it does not seem to be an unreasonable interpretation of the provision in question.

The Tribunal finds, therefore, that when the Office adopted a system of fixed-rate compensation for untaken leave, and added two days for each five days of untaken leave to compensate for weekends, it was acting within the proper exercise of its legal obligations according to the applicable regulations and to the principle of uniform treatment for all staff members. The complaint thus fails in this regard.

4. As stated above, the complainant was awarded 548.18 euros as interest for the delay in payment of his invalidity entitlement. He alleges that such interest was also paid with undue delay, and therefore asks for compound interest as a consequence of such delay. Yet, as has been noted above, the decision to award him interest for the late payment of the capital was taken on 27 October 2004, after the favourable opinion of the Appeals Committee of 14 September 2004 on the matter, and the corresponding sum was credited to his account on 23 December 2004 at a rate of 8 per cent per annum. The Appeals Committee argued, reasonably enough, that eventual entitlement to receive compound interest on the normal interest cannot even be considered until after entitlement to the latter has been established, which is one of the reasons why such compound interest does not apply here.

Furthermore, the Tribunal finds no undue delay in deciding the various claims made by the complainant in his internal appeal before the Appeals Committee, of which the interest claim was only one.

Neither was there any undue delay in the decision-making process since the Appeals Committee's opinion was rendered on 14 September 2004, and the final decision was taken on 27 October 2004. Nor was there any undue delay in processing and making his payment of interest.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Agustín Gordillo

Catherine Comtet