

The Administrative Tribunal,

Considering the third complaint filed by Mr I.H. T. against the European Patent Organisation (EPO) on 24 August 2006, the EPO's reply of 29 November and the letter of 8 December 2006 by which the complainant informed 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. The complainant, who has dual Greek and German nationality, joined the European Patent Office, the secretariat of the EPO, on 1 September 1987 as an examiner. On 3 May 2004 he applied under Article 59(3)(c) of the Service Regulations for Permanent Employees of the European Patent Office for two days' special leave because his wife was due to undergo surgery. His application was turned down by the Personnel Administration Department on 26 May on the grounds that the medical report he had provided did not show that his wife was suffering from a "serious illness" within the meaning of Article 59(3). On the following day he filed an internal appeal against the refusal to grant him two days' special leave. He argued that his wife was suffering from a "serious illness" and that the decision to the contrary was flawed since it had been taken by a staff member with no medical background. He consequently requested that the challenged decision be set aside or, in the alternative, that a Medical Committee be convened. He also asked to be granted an additional day of special leave in compensation for the time spent preparing his appeal.

On 3 June 2004 the Personnel Administration Department informed the complainant that his request was being reviewed and that one of the Office's medical advisers had been asked to provide an opinion. However, this information did not reach the Head of the Employment Law Directorate, who wrote a letter to the complainant on 12 July to inform him that, after an initial review of the file, the President had decided that his appeal could not be allowed for the time being because his spouse's situation did not constitute a "serious illness" within the meaning of Article 59(3) of the Service Regulations, and had referred the matter to the Internal Appeals Committee. Noting that the appeal concerned a medical issue, he asked the complainant to indicate whether he wanted a Medical Committee to be convened. The complainant replied on 16 August that he wished to have a Medical Committee convened.

By a letter of 17 August 2004 the Personnel Administration Department informed the complainant that his request for special leave had been reviewed and that it had been decided to grant him two days' special leave. It asked him if he wished to withdraw his request for the convening of a Medical Committee as well as his internal appeal. The complainant replied on 31 August that it was no longer necessary to convene a Medical Committee, but that he wished to withdraw his appeal only insofar as it concerned the award of two days of special leave: he maintained his request for an additional day of special leave to compensate him for the time spent in preparing his appeal. He added that, as a token of goodwill, he would withdraw his appeal if the Administration agreed to establish clear instructions regarding the application of Article 59 of the Service Regulations.

On 19 December 2005 the EPO submitted its supporting documents and response to the complainant's appeal. Upon reviewing these documents, the complainant noted that his spouse's name had not been adequately erased in a medical report sent to the medical adviser. He also learned for the first time that on 14 July 2004 the latter had informed the Personnel Administration Department that in her opinion the requirement of "serious illness" had been met.

The complainant subsequently put forward additional requests in his submissions before the Internal Appeals Committee. Thus, in a letter of 16 January 2006, he stated that in the event that the additional day of special leave could not be granted, he was seeking 600 euros in compensation. He also claimed 1,300 euros in costs and 3,000 euros in moral damages for the "unfaithful way" in which the Administration had handled his case and for breach

of trust in relation to sensitive medical information.

The Internal Appeals Committee issued an opinion on 20 March 2006 recommending that the complainant be awarded “symbolic moral damages” in the amount of 500 euros for the injury to his dignity caused by the Office’s handling of his request. Indeed, the matter was not referred to a medical adviser from the outset; once it was, owing to a communication failure, the Administration mistakenly informed the complainant that his request had been rejected. Moreover, the medical adviser’s conclusions were sent to the complainant with one month’s delay. The Committee also recommended that the complainant’s costs be “reimbursed up to a reasonable limit” and subject to the production of supporting documents. The appeal was otherwise dismissed as unfounded. The Committee noted that neither Article 59(3) of the Service Regulations nor Circular No. 22, which contains the guidelines for the application of the aforementioned article, provides that an employee shall be entitled to special leave in compensation for the time spent preparing an internal appeal.

In a letter of 1 June 2006, which constitutes the impugned decision, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to endorse the Committee’s recommendation. Thus, the complainant would be granted 500 euros in moral damages. He also stated that the legal costs incurred during the course of the proceedings would be reimbursed insofar as they were considered to be reasonable and on the production of the “official bills issued”.

On 2 June the complainant informed the Administration that he had no supporting evidence for the costs incurred but that his request for 1,300 euros “[lay] within the range of amounts typically ordered for reimbursement by the Tribunal”. The Administration replied that the Office’s practice was to request evidence as to the costs incurred but that as a “gesture of goodwill” it was prepared to pay him 250 euros in full and final settlement of the case. The complainant rejected that offer and referred the matter to the Tribunal.

B. The complainant alleges that the impugned decision is tainted with procedural irregularities. He asserts that a staff member with no medical background decided that his wife’s illness was not serious, as a result of which the Administration took a decision that adversely affected him. He consequently had to obtain an anaesthetist’s report stating that his wife suffered from a serious illness and file an internal appeal to defend his interests. He points out that although the Administration decided to reconsider its original decision not to grant him two days’ special leave after he filed his internal appeal, it should bear the consequences of not having acted in accordance with the Service Regulations from the beginning.

He contends that the EPO showed bad faith in refusing at first to grant him two days’ special leave. He stresses that according to the Internal Appeals Committee’s findings, the Office’s actions in that respect constituted “misconduct” that impaired his dignity. However, he disagrees with the Committee’s recommendation that he should be awarded “symbolic moral damages” in the amount of 500 euros. He submits that moral damages are paid to “offer a relief to practiced injustice that cannot be relieved differently”, and that the amount paid should therefore be “analogous to the degree of injustice” and not merely symbolic.

He further submits that the production of supporting documents is not a prerequisite for the award of costs. He argues that internal appeal proceedings and proceedings before the Tribunal being time-consuming, the EPO should compensate him for the time spent in preparing the defence of his interests.

The complainant asks the Tribunal to award him moral damages in the amount that it deems appropriate but specifies that, in his view, a “due amount” would be 3,000 euros. He also asks to be granted one day’s leave or 600 euros in compensation for the time spent preparing his appeal. In addition, he claims costs in the amount of 2,300 euros.

C. In its reply the EPO acknowledges that the original refusal to grant the complainant two days’ special leave was unfortunate and that the Administration should have requested the medical adviser’s opinion before taking its decision. It points out that at the time the Office asked for the medical adviser’s opinion only when it was “absolutely essential”. There was consequently no “malevolent intent”. It therefore argues that the award of 500 euros in moral damages, as recommended by the Internal Appeals Committee, constitutes “sufficient” compensation. It also points out that the matter was referred to a medical adviser after the complainant had filed his internal appeal; the Office has thus taken steps to correct its initial mistake.

The defendant contends that the complainant’s claim for compensation for the time spent in preparing and filing his

internal appeal is unfounded. It shares the Internal Appeals Committee's view that special leave may only be granted where there is a ground for doing so under Article 59(3) of the Service Regulations and Circular No. 22.

Citing the Tribunal's case law, the Organisation asserts that the complainant's claim for costs should be dismissed since he has not shown that any legal costs were incurred. It points out that the Administration has offered to pay him 250 euros in costs without requesting him to produce evidence of the costs incurred, an offer that was turned down by the complainant.

## CONSIDERATIONS

1. On 3 May 2004 the complainant applied for two days of special leave under Article 59(3)(c) of the EPO's Service Regulations because his spouse was about to undergo a surgical procedure requiring hospitalisation. The Personnel Administration Department denied the request because in his report, submitted by the complainant, the physician did not state that the complainant's spouse was suffering from a "serious illness" as required by Article 59(3).

2. On 27 May the complainant filed an internal appeal asking that the decision denying his request be set aside or, in the alternative, that a Medical Committee be convened. By a letter of 12 July he was informed that his appeal had been referred to the Internal Appeals Committee for an opinion.

3. In its report of 20 March 2006 the Internal Appeals Committee found that the time taken in pursuit of rights in the internal appeal proceedings cannot give rise to an entitlement to special leave. Accordingly, the complainant's alternative claim for monetary compensation in lieu of one day special leave also failed.

4. Regarding the claim for moral damages, the Committee found that a decision ought not to have been taken regarding the complainant's request for special leave without prior consultation with a physician. It also observed that a number of mishaps had occurred in the handling of the complainant's request. These included a failure in communication between the Personnel Administration Department and the Employment Law Directorate resulting in the complainant being advised that his request had been refused even though the medical adviser's opinion had not been received; a delay of one month on the part of the Personnel Administration Department in sending the medical adviser's conclusions to the complainant; and the inadequate erasure of the spouse's name from the medical report. The Committee found that misconduct had occurred and had caused injury to the complainant's dignity and had damaged his trust in a properly functioning administration. However, it considered that the Office had not acted maliciously.

5. The Committee recommended that the complainant should be awarded "symbolic moral damages" of 500 euros and that his legal costs should be "reimbursed up to a reasonable limit" upon the presentation of supporting documents.

6. The President of the Office accepted the Internal Appeals Committee's recommendations and awarded the complainant moral damages of 500 euros and costs on the terms articulated by the Committee.

7. In subsequent communications with the Administration, the complainant took the position that even though he was unable to provide official bills for his legal costs, he was still entitled to costs for which he claimed 1,300 euros. The Administration offered to pay him 250 euros for his costs as a goodwill gesture for a full and final settlement of the case. The complainant rejected the offer and asked that the 500 euros for moral damages be paid to the EPO's Third World Association. The defendant replied that it had already paid the moral damages to his personal account and confirmed that the 250 euros would be paid to that Association. However, the complainant stated that he could not accept that payment as a final settlement.

8. Before the Tribunal the complainant advances four main arguments. First, he contends that the award for moral damages is inadequate given the damage he has suffered. He asserts that the Administration's misconduct was intentional and part of a larger scheme. In support of this assertion, he refers to an earlier matter concerning a decision made by the Head of the Personnel Administration Department that was ultimately reversed on appeal.

He claims that throughout the dispute the Head of the aforementioned Department and his staff acted in bad faith. He maintains the same assertion in relation to their conduct in the present case. In support of his allegation of bad faith the complainant points to the above-mentioned Head of Department's "strange" request for an anaesthetist's

report that did not appear to have been required by the medical adviser. This caused him to take time-consuming action to try to obtain a report that was not required. In addition, he points to the fact that the Head of Department continued to act in bad faith by not granting him the special leave upon receipt of the medical adviser's report. Instead, the leave was only granted a month later, after the report had been issued. Also, the medical report was not sent to the Internal Appeals Committee until he had requested that a Medical Committee be convened.

9. Second, the complainant considers that an assessment of the seriousness of an illness by a non-medical administrative staff member lacking the necessary competence and qualifications constitutes a serious procedural violation. He asks the Tribunal to make a determination to that effect.

10. Third, the complainant submits that a staff member who has filed an internal appeal to avoid the loss of a right is entitled to suitable compensation in the form of leave or a monetary equivalent.

11. Lastly, the complainant contends that moral damages are not awarded symbolically. He seeks costs for the internal appeal proceedings and the proceedings before the Tribunal in the amounts of 1,300 euros and 1,000 euros respectively.

12. Turning first to the issue of the amount of the moral damages awarded, the onus is on the complainant to prove that the Organisation acted in bad faith. In Judgment 2293, under 12, the Tribunal articulated the nature of the proof required in the following terms:

“Although to act in bad faith is always to mismanage, the reverse is not the case and honest mistakes or even sheer stupidity will not, without more, be enough. Bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose.”

13. Although the complainant believes that the actions of the Administration are more than “purely accidental”, the complainant has failed to adduce sufficient evidence from which the requisite element of malice, ill will, improper motive or dishonest purpose could be inferred. In fact, the complainant himself acknowledges that it would be difficult to infer malice on the part of the Administration in these circumstances.

14. Even though bad faith on the part of the Administration has not been established, an organisation has an obligation to treat its staff members with dignity and respect. The practice at the relevant time of minimising the number of referrals to the medical adviser and the fact that the initial medical report submitted by the complainant did not state that the illness was serious do not absolve the Organisation for the manner in which it dealt with his request.

15. Of particular concern is the manner in which the Personnel Administration Department dealt with the complainant's request after it had received the medical adviser's opinion.

First, there was a delay of one month before the complainant was informed that his request was approved. The EPO suggests that this delay may have been due to the fact that this transpired during the summer vacation period. If the Organisation wished to rely on this as a reason for the delay, something more specific by way of explanation would be expected.

Second, at the time the complainant was informed that his request had been reconsidered and the leave had been approved, he was not told that the medical adviser had recommended that the leave be granted. He did not discover this until he received the Organisation's submissions to the Internal Appeals Committee in December 2005. Had the report and the decision been provided in a timely manner it might have helped to dispel the complainant's growing mistrust in the proper functioning of the Administration and his belief that the Administration was acting in bad faith. As an aside, it should be noted that the Committee was erroneously under the impression that the content of the medical adviser's report had been communicated to the complainant at the time he was informed that the leave had been granted.

16. Although as stated earlier bad faith has not been established, the Organisation's actions in this case did not meet the standard of dignity and respect with which a staff member ought to be treated.

17. The complainant has asked the Tribunal to express an opinion as to whether the Internal Appeals Committee in its recommendation regarding moral damages ought to have estimated a “realistic” amount for such damages. In the present case, the Committee recommended “symbolic” or nominal moral damages as an

acknowledgment of the damage to the complainant's dignity due to administrative ineptitude. Given that the underlying basis for the appeal, namely, the request for special leave had been resolved very early in the process, the Tribunal is unable to conclude that the President of the Office erred by accepting that recommendation and awarding the complainant 500 euros as moral damages.

18. There is no need to address the question as to whether an assessment of the seriousness of an illness by a non- medically trained person constitutes a procedural error.

19. As to entitlement to leave or the monetary equivalent as compensation for the time spent preparing and filing an internal appeal, the Tribunal agrees that there is no regulatory entitlement to such a leave. Out-of-pocket expenses, time and trouble associated with both internal means of redress and complaints to this Tribunal are addressed by way of an award of costs.

20. In general costs are awarded to a complainant whose complaint has been allowed in whole or in part. As the complainant has not been successful in the proceedings before the Tribunal, the claim for costs is rejected. As to the costs for the internal appeal proceedings, the Tribunal notes that the EPO has already paid costs of 250 euros to the Third World Association on behalf of the complainant. No additional order of costs will be made.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2007, Ms Mary G. Gaudron, Presiding Judge for this case, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet