106th Session **Judgment No. 2804**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs H. S., G. B. and D. V. (his second) against the European Patent Organisation (EPO) on 29 August 2007 and corrected on 4 October 2007, the Organisation's reply of 28 January 2008, the complainants' rejoinder of 22 April, the EPO's surrejoinder of 4 August, the complainants' additional submissions of 22 September and the EPO's final observations thereon of 27 October 2008;

Considering Article II, paragraph 5, 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. The complainants are former staff members of the European Patent Office – the EPO's secretariat – whose appointments were terminated after an Invalidity Committee had determined that they were permanently unfit to perform their duties. Mr S., a Belgian national born in 1957, joined the Office in December 1990 as a formalities officer and retired on 1 June 2003. Mr B. was born in 1960 and has French nationality; he joined the Office in March 1988 as an examiner and retired on 1 July 2003. Mr V., a Dutch national born in 1961, was likewise employed as an examiner; he joined the Office in

January 1988 and retired on 1 September 2003. All three complainants served in The Hague (Netherlands). In each case, the Invalidity Committee found that their invalidity was attributable to an occupational disease within the meaning of Article 14(2) of the Pension Scheme Regulations of the European Patent Office as it then stood. They currently receive an invalidity pension equivalent to 70 per cent of their basic salary, the maximum rate provided for in the Pension Scheme Regulations.

Upon separation the complainants were paid a lump sum amounting to 2.75 times their basic annual salary, in accordance with Article 84 of the Service Regulations for Permanent Employees of the European Patent Office. However, they subsequently claimed additional compensation on the grounds that their invalidity was due to negligence on the part of the Office. They alleged that the various forms of repetitive strain injury (RSI) from which they were suffering – as well as an eye condition in one case – had been caused by working with computers for excessive periods in substandard ergonomic conditions. They also argued that, since the Office had failed to establish an adequate legal framework governing health and safety matters, the relevant provisions of Dutch law, i.e. the law of the host State, were applicable to their cases. The Office replied that the provisions of the Service Regulations and Pension Scheme Regulations had been correctly applied and that each complainant had received all the compensation that was due to him. It drew attention to the fact that the complainants were entitled to challenge that decision by filing a complaint with the Tribunal, provided that they first exhausted the internal remedies available to them.

At various dates in 2004 each complainant lodged an appeal with the President of the Office, who maintained his position and referred the cases to the Internal Appeals Committee. On 13 January 2006, while their appeals were pending, the complainants initiated proceedings before the District Court of The Hague seeking compensation for the past and future moral injury flowing from their occupational diseases. By interlocutory judgments of 3 August 2006 the District Court declined jurisdiction. One of the complainants

brought his case before the Court of Appeal of The Hague, which upheld the District Court's ruling in a judgment of 28 September 2007. He lodged an appeal with the Netherlands Supreme Court on 21 December 2007.

The Internal Appeals Committee issued separate opinions on 30 April and 9 May 2007. In each case the Committee examined the health and safety measures adopted by the Office for the staff as a whole before considering the actions taken with respect to the individual complainants between the time when their symptoms had first been brought to the attention of the Office and the time of their retirement. It found that the Office had generally complied with its duty of care, except in one respect. Article 4 of the Office's Ergonomics Guidelines for work with display screen equipment, which entered into force on 1 November 1993, placed the Office under a duty to carry out an analysis of all workstations "in order to evaluate the safety and health implications for their users, particularly with regard to possible risks to eyesight, postural problems and problems of mental stress". In the light of the deadline for adapting existing workstations, as established in Article 6 of the Ergonomics Guidelines, the Committee considered that the analysis of workstations ought to have been completed by 31 December 1996. In the present case, a comprehensive analysis had not occurred until 2000. According to the Committee, this delay of almost four years constituted a grossly negligent breach of the Office's duty of care. The Committee then considered the issue of whether a causal link existed between that breach and the injuries suffered by the complainants. Noting that the results of the ergonomics analysis carried out in 2000 had not revealed any serious failures to act on the part of the Office, the Committee was not convinced that an earlier workstation analysis could have prevented the complainants from developing their conditions. It concluded in each of the three cases that the staff member had not proved a sufficient causal link between the established breach of the Office's duty of care and the injuries he had suffered and unanimously recommended that the appeal should therefore be dismissed as unfounded.

The complainants were informed by letters dated 4 June 2007 that, for the reasons put forward by the Office during the internal appeal proceedings and in accordance with the unanimous recommendation of the Internal Appeals Committee, the President had decided to reject their appeals as unfounded. These are the impugned decisions.

B. The complainants contend that for many years the EPO has failed to implement adequate health and safety measures meeting international or national standards. They state that they have received compensation for work-related invalidity, in accordance with the Service Regulations, as if there were no fault on the part of the Organisation. In their opinion, since the EPO has been grossly negligent, additional compensation is due.

They raise a question as to what law is applicable to their cases, noting that the Service Regulations do not deal with health and safety. In particular, no provision is made in the Service Regulations for compensation in the event of invalidity arising through negligence or gross negligence. According to the complainants, the Organisation should apply the health and safety provisions of the local national law, and should leave it to the national authorities to verify, by means of inspections, that working conditions at the Office comply with those provisions.

They observe that the EPO has been warned repeatedly, particularly by the Central Staff Committee, that the health and safety measures in place within the Office are unsatisfactory; it is therefore not credible to suggest that the numerous RSI problems that have arisen in the Office were not foreseeable.

Referring to the opinions of the Internal Appeals Committee, the complainants submit that a fundamental error of law was committed by the Committee in that it applied the wrong standard of proof. The Committee clearly considered that the complainants had to prove their case beyond a reasonable doubt, whereas, in their view, they only needed to prove it on a balance of probabilities, as indeed they did. They criticise the Committee for accepting the Organisation’s submissions at face value.

The complainants produce two documents which, in their view, "remove the very foundations" of the EPO's position on their appeals insofar as they confirm that the Office was aware of the inadequacy of its health and safety measures yet failed to remedy the situation. Given that one of these documents had obviously been under consideration for some time prior to its publication, the complainants submit that the impugned decisions are tainted with bad faith, since both the President and the Office's legal services were necessarily made aware of the content of the document in question during the internal appeal proceedings in which the Office denied its liability.

The complainants ask the Tribunal to order the EPO to pay them compensation for loss of tax-free income until the age of 65, to the extent that this is not already covered by the payments they receive under Article 14(2) of the Pension Scheme Regulations. They also claim compensation for additional expenditure resulting from loss of social security and other insurance payments not covered by Article 84(1)(b) of the Service Regulations, compensation for loss of income due to loss of promotion opportunities, compensation for pain and loss of comfort, moral damages and costs. They request an oral hearing.

C. In its reply the EPO submits that the law applicable to these cases is to be found in the Service Regulations and the Pension Scheme Regulations. The provisions of national law are not directly applicable to relations between the Office and its staff. Pursuant to the duty of care that it owes to its staff, the EPO adopted the above-mentioned Ergonomics Guidelines, which form part of the law applicable to the staff. These Guidelines implement the health and safety requirements of Council Directive 90/270/EEC and of ISO standard 9241 concerning the use of display screen equipment and thus reflect internationally recognised standards. The EPO points out, however, that a standard of protection which appears appropriate on the basis of today's knowledge and technology cannot be applied to the Office retrospectively; the requisite standard must be assessed in the light of the knowledge and technology available at the time of the facts.

The Organisation explains that the lump sum received by the complainants upon separation in respect of their work-related invalidity is paid irrespective of fault. It is intended not only to help cover the employee's financial obligations, but also as a form of compensation for moral injury. In principle, it must therefore be regarded as settling all the employee's claims against the employer, except where the employer caused the damage intentionally. The EPO adds that it is questionable whether the employer is liable to pay further compensation in cases of gross negligence.

It shares the Internal Appeals Committee's view that, except as regards the workstation analysis required under Article 4 of the Ergonomics Guidelines, it fully honoured its duty of care. In view of the fact that the complainants have not proved the existence of a causal link between their condition and that breach, it does not consider that it owes them additional compensation.

Referring to the two recent documents on which the complainants rely, the Organisation observes that whilst the first of these documents, an internal audit report of July 2007, mentions a number of areas in which there is or was room for improvement, that does not prove that the Office committed any intentional or grossly negligent breach of its obligations in the complainants' particular cases. As for the second document, which the President submitted to the Administrative Council on 16 February 2007 under the reference CA/53/07, the fact that it contained a proposal to implement a general health policy at the Office does not imply that prior to July 2007 the Office had not honoured its duty of care with respect to health and safety at the workplace.

D. In their rejoinder the complainants maintain that the EPO does not have an adequate legal framework to protect the health and safety of its staff, and in view of this "legal vacuum" they invite the Tribunal to apply Dutch law. They consider that the Office's Ergonomics Guidelines represent no more than a preliminary statement of intent and do not provide staff members with binding rules on which they may rely. They add that Council Directive 90/270/EEC, on which the Guidelines are based, is by no means the only relevant standard in

matters of health and safety. With regard to the burden of proof, they point out that it is virtually impossible for them to prove something that has not occurred, that is to say the Organisation's failure to comply with health and safety standards, and that in this domain many national legal systems, including the Dutch system, rightly reverse the burden of proof. As for the causal link that the Internal Appeals Committee found to be lacking, the complainants argue that that link has been established, given that their invalidity has been declared as stemming from an occupational disease. They dispute the Organisation's interpretation of the results of the ergonomics analysis carried out in 2000, which in fact indicated that the situation at the Office was "very mediocre" and was not, as the EPO contends, "broadly average".

E. In its surrejoinder the EPO submits there is no "legal vacuum" with respect to health and safety which would warrant the application of national law in the present cases. It acknowledges that Council Directive 90/270/EEC is not the only directive governing health and safety at work, but points out that that directive is the one that is relevant to computer ergonomics. It maintains its position on the merits.

F. In their additional submissions the complainants object to the fact that the Organisation appended to its surrejoinder a witness statement on which they have not had the opportunity to comment. They consider that their request for an oral hearing is all the more justified.

G. In its final observations the EPO states that the author of the statement in question was heard by the Internal Appeals Committee, not as a witness but as a technical expert. Thus, the complainants had already had the opportunity to challenge that person's testimony, and indeed they did so in their rejoinder, which prompted the Organisation to seek further comments from the expert.

CONSIDERATIONS

1. The complainants are all suffering from repetitive strain injury (RSI) related to computer use. One of them also has eye problems.

2. Each of the complainants received a lump-sum payment when they separated from service. They also continue to receive an invalidity pension in accordance with the internal rules of the EPO.

In addition to the compensation they have received under the EPO's no-fault regime for work-related invalidity, they seek compensation for damages caused by the EPO's alleged gross negligence and the breach of its duty to safeguard the health and safety of its staff by establishing adequate health and safety measures.

3. Since the three complaints raise the same issues of fact and law and seek the same redress, they are therefore joined to form the subject of a single ruling.

4. In their submissions the complainants raise a number of questions, such as, what health and safety rules should apply within the EPO; which body can carry out inspections; what court or tribunal is competent to assess whether a regulatory breach has occurred; and what court or tribunal is competent to enforce the consequences of a breach.

5. More particularly, in their rejoinder they succinctly articulate the nature of the case in the following terms: "[t]he whole complaint is about not providing sufficient safeguard[s] to identify risks, and [not taking] measures to minimize them".

6. The complainants submit that the duty of care to provide safe working conditions requires an articulation of standards, including ongoing updating, a continuous monitoring of the workplace, the taking of remedial measures as required and an enforcement mechanism. They maintain that an organisation's health and safety

policy must be underpinned by a normative framework, otherwise an organisation will not know what must be done to protect the health and safety of its staff.

7. They assert that neither the European Patent Convention nor the Service Regulations provide an adequate framework to address health and safety in the workplace. In support of this assertion, they point to an internal report entitled "Report of the Working Group on Long-Term Sick Leave and Invalidity", in which there is an acknowledgement that the EPO is not in line with EC directives and national legislation and that key elements of a normative framework had not been provided.

8. Moreover, the complainants take the position that the EPO had two alternatives, namely to adopt internal regulations or to adopt national provisions as its own. They claim that in circumstances such as these, where the organisation is not qualified to establish standards and to monitor working conditions, the usual solution is to apply local national provisions by means of a cooperative agreement coupled with a right of inspection by the local national inspectorate. Since the Organisation has taken neither of these steps, they ask the Tribunal to imply an obligatory *renvoi* to the provisions of Dutch law and to enforce those provisions.

9. Regarding the Ergonomics Guidelines upon which the Organisation relies, they contend that the Guidelines are no more than a preliminary statement of intent. They point out that a key part of them, the Handbook, which was to prescribe concrete ergonomic measures, is only in draft form. As the draft has not been published, the substantive provisions have never been implemented, leaving staff members without recourse to any remedy. Similarly, the working documents to which the EPO refers are no more than that – working documents – and do not provide a legal framework upon which the staff may rely.

10. The first question to be addressed is what, if any, health and safety measures in relation to computer use did the EPO have in place at the material time.

11. In May 1990 the Council of the European Communities adopted Directive 90/270/EEC on the minimum safety and health requirements for work with display screen equipment. Section II of the Directive lists an employer's obligations, which include:

- performing workstation analyses to evaluate health and safety conditions (Article 3(1));
- taking appropriate measures to remedy the risks found (Article 3(2));
- ensuring that workstations meet certain minimum requirements (Article 4);
- providing information and training concerning workstations to employees (Article 6);
- planning workers' activities to permit breaks from display screen work (Article 7);
- consultation and participation of workers (Article 8);
- protection of workers' eyes and eyesight including testing and provision of corrective appliances at no cost to the worker (Article 9).

12. ISO Standard 9241, entitled "Ergonomic requirements for office work with visual display terminals (VDTs)", provides comprehensive, technical instructions for the procurement, design, development, evaluation and communication concerning the usability of VDTs.

13. The Ergonomics Guidelines were published in a special edition of the EPO Gazette on 25 October 1993 and came into force on 1 November 1993. According to the foreword to the Guidelines, Council Directive 90/270/EEC and ISO 9241 formed the basis for the preparation of the Guidelines. The foreword also indicates that the

draft was extensively reviewed and approved by the EPO's General Advisory Committee and the Automation Steering Group.

14. The implementation of the Ergonomics Guidelines is provided for under Article 12, which reads:

> "For the practical implementation of these guidelines, specific guidance is given in the following working documents which come into force at the same time as these guidelines. Documents 1, 2, 3, and 6 will, in due course, be incorporated into a Handbook for Project Management. Document 4 is intended to be used as an analysis tool by WUCs (Workstation User Coordinators), after suitable training, to help them ensure that users' workplaces are set up correctly.
>
> Document 5 is intended as a management tool to help them check that their display screen users are working safely, comfortably and effectively.
>
> The Automation Steering Group will co-ordinate the introduction of these guidelines, monitor their effectiveness and propose updates where necessary."

15. The working documents address a number of matters including the ergonomics requirements for the procurement of display screen workstations in the EPO, the procedure for addressing usability requirements, the involvement of users in the development and implementation of systems, a user's guide to workplace ergonomics, a working environment questionnaire and a user interface style guide.

16. In view of the foregoing, the Tribunal finds that the Ergonomics Guidelines in place at the relevant time provided a comprehensive policy on health and safety relating to computer use and measures to implement that policy. Additionally, the Guidelines reflected existing international norms.

17. The fact that the proposed Handbook had not been produced at the relevant time is, in the Tribunal's view, a matter of form rather than substance since the materials to be included in the Handbook are found in the working documents. Further, it cannot be concluded from the fact that the above-mentioned Report of the Working Group on Long-Term Sick Leave and Invalidity does identify certain deficiencies in the EPO's health and safety policy during the time

period when the complainants developed their injuries, that there was no policy, as alleged by the complainants.

18. Although the complainants stress that a health and safety policy must include a mechanism for independent inspection, they have not provided any basis in law for their assertion and it is rejected. This statement, however, should not be construed as detracting from the importance of carrying out surveillance of the workplace to ensure that the health and safety of employees is adequately protected. Indeed, ergonomic assessments of workstations, identification of risk, and remedial steps are an integral part of the Guidelines that were adopted.

19. It also follows from the preceding observations that the complainants' request for a *renvoi* premised on the lack of an adequate legal framework governing ergonomics is unfounded.

20. At this juncture, it is convenient to deal with another matter raised in the complainants' pleadings. They maintain that, in addition to the fact that binding rules must be in place in relation to health and safety, these rules must also provide a right to make a claim. The complainants argue that the Service Regulations do not address health and safety; in particular, there is no provision for compensation for invalidity arising from gross negligence and, even if the existing health and safety policies were adequate, there is still a "legal vacuum as regards the rights of staff."

21. This argument is without merit. Article 13(1) of the European Patent Convention states that:

> "Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation, in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations or arising from the conditions of employment of other employees."

22. Article II, paragraph 2, of the Tribunal's Statute reads:

> "The Tribunal shall be competent to settle any dispute concerning the compensation provided for in cases of invalidity, injury or disease incurred by an official in the course of his employment and to fix finally the amount of compensation, if any, which is to be paid."

23. These two provisions, taken together with well-established case law, clearly demonstrate that an international civil servant has recourse to the Tribunal for a breach of a duty owed by an international organisation.

24. As noted earlier, the complainants also advance a plea of negligence. In their initial pleadings they alleged gross negligence on the part of the EPO. Later, in their rejoinder, they took the position that it is not necessary to prove gross negligence or an intentional breach of a duty in order to extend the liability of the EPO beyond its liability under the no-fault regime. Instead, the complainants argue that negligence alone is sufficient. For the purpose of resolving the present dispute, a consideration of the question as to whether proof of gross negligence or an intentional breach of a duty is required to extend liability is unnecessary.

25. Negligence is the failure to take reasonable steps to prevent a foreseeable risk of injury. Liability in negligence is occasioned when the failure to take such steps causes an injury which was foreseeable. In the present case, there was a foreseeable risk of injury; the only questions are whether the EPO took reasonable steps to prevent injury and, if not, whether its failure caused injury to the complainants.

26. The Internal Appeals Committee engaged in a comprehensive analysis of the evidence and the steps taken by the EPO to implement the Ergonomics Guidelines. As well, the Committee considered the individual circumstances of each complainant and the steps taken by the EPO in relation to them.

27. In summary, the Committee found that the computer and office equipment of the complainants were either suitable or had quickly been made suitable by the EPO. In connection with the

allegations regarding the "Phoenix" software, the Committee found that the complainants had failed to identify specific failings in the rolling out of the software and that many of the problems identified in the process typically arise when a new software program is introduced, but these problems do not indicate that the program has been rolled out prematurely. In essence, the Committee found that, save with respect to one matter that it characterised as gross negligence, in light of the then current international standards and scientific knowledge, the EPO had taken all reasonable steps to avoid a foreseeable risk of injury to the complainants. Additionally, the Committee examined the steps taken to provide alternative duties to the complainants and found no breach of the EPO's duty of care in that respect. In the absence of specific allegations of negligence, all of these findings are well founded.

28. The only element of negligence identified by the Internal Appeals Committee was the failure to carry out the workstation analysis in a timely manner. However, even if the workstation analysis had been carried out in a timely manner, it cannot be said that the complainants would not have sustained their injuries. That is because, when the analysis was carried out, only minor defects were identified and there was no evidence to suggest that had those defects been identified and rectified earlier, the injuries sustained would have been prevented. In other words, the Committee found that there was no causal relationship between that failure and the complainants' injuries. The Tribunal agrees with that conclusion.

29. The complainants advanced a number of additional arguments that require comment. On the question of the standard of proof, they acknowledge that they bear the onus of proving their case on a balance of probabilities but they assert that the language employed by the Internal Appeals Committee indicates that it employed the criminal standard of beyond a reasonable doubt. However, the complainants do not point to any language in the Committee's opinions in support of this assertion. Although the Committee did not specifically articulate the standard of proof, there is

nothing in the opinions from which it could be inferred that the Committee evaluated the evidence on the basis of the criminal standard of proof. The complainants also allege that the Committee displayed bias and a lack of objectivity. These allegations are unsubstantiated and must therefore be rejected.

30. Lastly, the complainants have requested an oral hearing. The parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. The complainants' application for hearings is therefore rejected.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet