108th Session **Judgment No. 2886**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs V. M. against the European Patent Organisation (EPO) on 17 April 2008, the Organisation's reply of 8 August, the complainant's rejoinder dated 15 November 2008 and the EPO's surrejoinder of 3 March 2009;

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, a Belgian national born in 1971, joined the European Patent Office, the secretariat of the EPO, in March 2003 at its branch in The Hague (the Netherlands). By an e-mail dated 26 May 2005 she requested that the Office credit her with four days' annual leave, as she considered that it had wrongly deducted one full day of leave for each of the ten days of leave that she had taken during the period May to July 2004. She argued that, since she had worked part-time for medical reasons during that period, the corresponding deductions ought to have been proportionate to the number of hours

that she would have worked on each of the days in question. The Administration replied by e-mail on 7 June 2005 that her leave had been calculated correctly and explained that, although its practice had changed with effect from 1 September 2004, at the material time one eight-hour day of annual leave was deducted for employees who worked part-time for medical reasons if the employee was away for one day.

By a letter of 12 August 2005 to the then President of the Office, the complainant again requested that four days of annual leave be "restored" to her and stated that, should her request be rejected, her letter was to be treated as an internal appeal. The Director of the Employment Law Directorate replied by a letter dated 5 October 2005 that the President considered that the relevant rules had been correctly applied and that her request could not be granted. He had therefore decided to refer the case to the Internal Appeals Committee.

In its opinion dated 3 December 2007 the Committee found that the complainant's appeal was inadmissible because it was time-barred. By a letter dated 23 January 2008, which constitutes the impugned decision, the complainant was informed that the President had decided to reject her appeal as irreceivable in accordance with the unanimous opinion of the Committee.

B. The complainant submits that the Internal Appeals Committee was mistaken in finding that her appeal was time-barred. She explains that between January 2004 and April 2005 she was unable to verify her annual leave entitlement because that information was only available to her through her salary slips, which did not provide an accurate leave balance. She found out on 26 May 2005 that the EPO had incorrectly calculated her leave entitlement, but it was only upon receipt of the e-mail of 7 June that she ascertained that her leave days had not been deducted proportionally and that the rules relating to such deductions were applied differently in Munich, where proportional deductions were made in such cases. As she lodged her internal appeal within three months from receipt of the e-mail of 7 June, in her view it is receivable *ratione temporis*.

The complainant contends that the Committee is not impartial because three of its five members are appointed by the President of the Office who is a party to the case, and that the President's decision is flawed because it is based on the opinion of the Committee.

Citing the Tribunal's case law, she asserts that the EPO breached the principle of equal treatment, because its practice regarding the deduction of annual leave was more favourable for employees at the Munich duty station than for employees stationed elsewhere, without there being reasonable grounds for such a distinction. She considers that pursuant to the principle of *contra proferentem* she is entitled to benefit from the EPO's more favourable interpretation of the relevant provisions of the Service Regulations for Permanent Employees of the European Patent Office.

The complainant submits that, at the material time, under Article 62(1) of the Service Regulations, she was entitled to sick leave on the days for which she requested a proportional deduction of her annual leave, as she was working part-time for medical reasons. Furthermore, Article 62(4) of the Service Regulations provides that if, during annual leave, a permanent employee is incapacitated, subject to the production of a medical certificate, this period of incapacity shall be deemed to be sick leave and shall not be deducted from the employee's annual leave. In her view, the EPO has failed to comply with the *patere legem quam ipse fecisti* principle, according to which an authority is bound by its own rules for so long as such rules have not been amended or abrogated.

The complainant also contends that the Office has presented its arguments in bad faith. The EPO was aware that, at the material time, it was required to deduct her leave days proportionally; indeed, it amended Article 62 of the Service Regulations in 2007 in order to prohibit that practice and applied the amended article to her before it was adopted.

Lastly, she contends that the Organisation did not fulfil its duty to inform her of the different practices at The Hague and Munich duty stations regarding the deduction of annual leave. Nor did it accurately inform her of the amount of her annual leave balance.

The complainant seeks the setting aside of the impugned decision, "restoration" of four days of annual leave and "compensation for costs".

C. In its reply the EPO argues that the complaint is irreceivable as time-barred. It submits that, at the latest, the complainant was aware in October 2004 that the calculation method for annual leave had changed, but she failed to challenge the calculation of her leave within the three-month time limit prescribed by the Service Regulations. Furthermore, even if she had not been aware that the practice at The Hague and Munich duty stations differed, according to the case law, this would not affect the time limit for filing an appeal, given that the Office did not act in bad faith or mislead her in this respect.

On the merits the Organisation asserts that the Internal Appeals Committee was established in accordance with the Service Regulations, the provisions of which guarantee the independence of the Committee members. It adds that the complainant has not produced any evidence to support her arguments on this issue.

As regards her allegation of a breach of the principle of equal treatment, the defendant submits that, once it became aware that in Munich proportional deductions of annual leave were made for employees who worked part-time for medical reasons, it harmonised its practice at all duty stations.

The Organisation argues that the practice followed at duty stations other than Munich complied with Article 62(4) of the Service Regulations, which applies only where an employee falls ill while already on annual leave. Consequently, the complainant's claims regarding the principle of *patere legem quam ipse fecisti* are without substance. In addition, there is no ambiguity in Article 62 and therefore it should not be construed *contra proferentem* and in favour of the complainant.

The EPO strongly rebuts the complainant's allegations of bad faith. It asserts that she has not submitted any evidence to show that the Office acted with malicious intent. In its view, both of the practices

regarding the deduction of annual leave were compatible with the provisions of Article 62 of the Service Regulations.

Regarding its duty to inform, the defendant explains that it was, at first, unaware that two practices existed. Once it had knowledge of this fact, it responded by harmonising those practices. With respect to the complainant's allegation regarding her inability to verify her leave balance, it points out that the number of annual leave days indicated on an employee's salary slip depends upon when requests for leave are submitted and when they are recorded by the Administration. It asserts that it did record annual leave correctly, albeit with some delay at times. However, it considers that employees bear some responsibility for the accuracy of their respective leave balances and that by referring to the applicable provisions of the Service Regulations it is not difficult for them to calculate the number of annual leave days to which they are entitled.

D. In her rejoinder the complainant submits that the Organisation's assessment of the receivability of her internal appeal and complaint is tainted with bias. In addition, she argues that bias is further proven by the fact that the Internal Appeals Committee and the defendant did not comment on her arguments regarding the principle of *patere legem quam ipse fecisti*. She elaborates on her allegations that the members of the Internal Appeals Committee are not impartial.

E. In its surrejoinder the EPO maintains its position. It strongly rebuts the complainant's allegations regarding the Internal Appeals Committee.

CONSIDERATIONS

1. The complainant claims a difference of four days in the calculation of her annual leave balance for the year 2004 as a result of leave deducted for days worked part-time for medical reasons. The documents she submitted in support of her claim show that she

made her requests for leave on a monthly basis by filling out the appropriate forms, and that the Administration indicated in all payslips the remaining amount of annual leave available to her.

2. With effect from 1 September 2004 the Organisation introduced a new general criterion, more favourable to its employees as to the calculation of leave for days worked part-time for medical reasons. On 26 May 2005 the complainant requested a retroactive change in the calculation of her annual leave, which was denied. She then asked that her request be treated as an internal appeal and the case was referred to the Internal Appeals Committee, which unanimously considered that the appeal was time-barred and thus inadmissible. The President of the Office decided to endorse the Committee's opinion and to dismiss the appeal.

3. The EPO contends that as from October 2004 the complainant's requests for leave were made according to the new system, and that she was therefore aware of it quite a long time before her initial request of 26 May 2005. In her internal appeal the complainant asserted that on 25 May 2005 she "realised that there was a difference of 4 days leave when she compared her own calculations with the leave days appearing on the payslips" and that "[a]s soon as she realised, [she] contacted the Personnel Department on 26 [M]ay 2005".

4. In her rejoinder the complainant again acknowledges that she received on a monthly basis the Organisation's calculation of her leave balance, as also shown from the document she submitted in support of her complaint. Yet she claims that "none of the salary slips between January 2004 and May 2005 contains the correct leave balance". That was the position she had taken in her internal appeal. In her submissions to the Tribunal she produces her own comparative table of calculations, which do not indicate such absolute inaccuracy, but only partial discrepancies. Such alleged partial or total discrepancies do not amount to misleading information or the withholding of documents in breach of the principle of good faith.

5. The complainant does not contest that, after 1 September 2004, her request for leave was made in accordance with the new system that was introduced.

6. It is clear and well documented that the complainant was informed each month of the Organisation's calculations of her available leave days, as shown by her payslips; it is also well documented that she made her own monthly written requests for leave days for her superior's approval. Thus she was not at all unaware of the days of leave requested by her and the Administration's calculations. Even if the Administration's calculations were inaccurate, either partially or wholly, they should have been timely challenged.

7. Furthermore, her claim to have become aware only on 26 May 2005 of the difference between her calculations and those of the Administration cannot be entertained. Each month she received official notification with her payslip of the Organisation's calculation of her leave entitlement. The President was correct in determining that her claim was time-barred. It follows that the complaint is irreceivable and it is not necessary to consider the complainant's other arguments.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet