109th Session **Judgment No. 2923**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr W. H. against the European Patent Organisation (EPO) on 25 November 2008 and corrected on 5 December 2008, the EPO's reply of 7 April 2009, the complainant's rejoinder of 16 April and the Organisation's surrejoinder of 25 May 2009;

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, a Belgian national born in 1944, joined the International Patent Institute in 1972 as a patent examiner. He became a permanent employee of the European Patent Office – the EPO's secretariat – in 1978 when the Institute was integrated into the Office. In a report drawn up in July 2002 an Invalidity Committee unanimously found that he was no longer able to perform his duties, but that his invalidity was not due to an occupational disease. Consequently, the complainant separated from service on 1 August 2002 and began to receive an invalidity pension in accordance with the rules then in force. He also received a tax adjustment to compensate

for the fact that he was liable to income tax on his invalidity pension in his country of residence.

The rules governing invalidity pensions were modified with effect from 1 January 2008 pursuant to Administrative Council decision CA/D 30/07 of 14 December 2007. This decision provided that employees who retired on grounds of invalidity before having reached the statutory retirement age of 65 would not become pensioners immediately but would be considered as employees with non-active status. As such, they would receive an invalidity allowance instead of an invalidity pension and, except where their invalidity was due to an occupational disease, they would continue to contribute to the pension fund. When they reached the age of 65, their contributions to the pension fund would cease and they would begin to draw a retirement pension. A tax adjustment would be payable in respect of the retirement pension, but not in respect of the invalidity allowance, as this allowance would be exempt from national income tax. In order to ensure that these measures would not result in any loss of benefits for employees who, on 1 January 2008, were already drawing an invalidity pension but had not yet reached the age of 65, a transitional compensation mechanism was provided for.

The complainant was notified by letter of 14 January 2008 of the changes to his situation resulting from decision CA/D 30/07. As he had not yet reached the statutory retirement age, his invalidity pension was replaced by an invalidity allowance and he ceased to receive the tax adjustment to which he had previously been entitled. Furthermore, monthly pension contributions were deducted from his invalidity allowance. Attached to the letter was a table showing a comparison of his benefits before and after 1 January 2008. The table indicated that, based on this comparison, he was not eligible for the above-mentioned transitional compensation.

By e-mails of 24 and 25 February 2008 the complainant informed the President of the Office that this change of status was causing him serious financial problems. Not only had his monthly income been reduced by some 3,300 euros as a result of the loss of his tax adjustment, but he was now having to pay approximately 700 euros per

month in pension contributions. Noting that he would not have to pay these contributions if his invalidity were due to an occupational disease, he requested that his 2002 invalidity report be reviewed and that he be recognised as suffering from an occupational disease as from 1 January 2008. With regard to the loss of his tax adjustment, he stated that this change had ruined his financial planning as he had been informed of it too late. He requested that the President grant him an advance of 4,000 euros per month for a period of 18 months as from 1 January 2008, which he proposed to reimburse in 18 monthly instalments beginning in 2010, if not earlier. However, in the event that he was recognised as suffering from an occupational disease, he would not reimburse part of that sum, namely an amount equal to the pension contributions paid during the said period. He asked the President to treat his e-mails as an internal appeal if she decided not to grant his request.

On 12 April 2008 the complainant forwarded to the President a revised report in which two of the members of the Invalidity Committee, which had examined his case in 2002, stated that they now considered him to be suffering from an occupational disease. They indicated that it had been impossible for them to contact the third Committee member. In light of this report, the complainant requested that the matter be referred to an expert for occupational diseases. He also requested that the pension contributions he had paid since 1 January 2008 be reimbursed, that interest be paid to him if such reimbursement were delayed and that no further pension contributions be deducted. In the event that these claims were not granted, he asked that his letter be treated as an internal appeal.

By a letter of 22 April 2008 the Administration advised the complainant that the first step in seeking a review of the medical reasons for his invalidity was to convene a Medical Committee which, in accordance with Article 90(3) of the Service Regulations for Permanent Employees of the European Patent Office, would consult an expert if it considered that his invalidity could have been caused by an occupational disease. It stated that the President had appointed the Office's Medical Adviser, Mr K., as one of the members of the

Medical Committee and he invited the complainant to nominate the second member. By letters of 23 April and 10 June 2008 the Director of the Employment Law Directorate informed the complainant that, as his requests of 24 and 25 February and 12 April could not be granted, since the Medical Committee had yet to issue its report, they had been referred to the Internal Appeals Committee for an opinion.

In a letter of 1 July 2008 to the President, the complainant objected to Mr K.'s appointment to the Medical Committee and requested his replacement and compensation for "the delay in the proceedings". He asked that his letter be treated as an internal appeal, in the event that his request was not granted. On 3 September 2008 the Director of the Employment Law Directorate wrote to inform him that the President had decided to refer the latter request to the Internal Appeals Committee for an opinion.

The Medical Committee issued its report in September 2008. It concluded by a majority that the complainant's invalidity was not to be considered as resulting from an occupational disease. The report was forwarded to the complainant under cover of a letter dated 16 October 2008. By a letter of 28 October 2008 the complainant was informed that the President's initial decision not to consider that his invalidity was the result of an occupational disease remained unchanged and he was invited to indicate whether he wished to withdraw the internal appeals he had lodged. On 19 November the complainant replied that he did not wish to withdraw his appeals and on 25 November 2008 he filed his complaint with the Tribunal.

B. The complainant submits that the Medical Committee's report of September 2008 is tainted with a number of flaws and must thus be set aside. He contends that the Committee's composition was not in line with Article 8(1) of Administrative Council decision CA/D 11/04 of 17 June 2004, according to which an Invalidity or Medical Committee shall retain its composition and powers if it had already been established when the latter decision entered into force on 1 January 2005. He also contends that the Medical Committee abused its power because, instead of referring his case to an expert as soon as it suspected that his invalidity resulted from an occupational disease, as

required by decision CA/D 30/07, it took it upon itself to decide the cause of his invalidity.

The complainant asserts that there exists a causal link between his pathology and the conditions in which he was required to perform his duties at the Office and that his invalidity should therefore be regarded as resulting from an occupational disease. In support of his assertion, he refers to the "overwhelming amount of unnecessary stress" to which he was subjected by successive superiors over many years of service. He adds that the one member of the Medical Committee specialised in his pathology found that his invalidity resulted from an occupational disease.

He asks the Tribunal to set aside the Medical Committee's report of September 2008 and to find that the composition of the Invalidity Committee in 2002 and the revised report drawn up in April 2008 by two of the members of the latter Committee were valid. In the event that none of these claims is granted, he asks that his case be referred to an expert for occupational diseases and that the EPO be ordered to pay, together with interest, his pension contributions as from 1 January 2008 and 1,000 euros in costs.

C. In its reply the EPO argues that the appropriate body to review the complainant's case and decide whether an expert should be consulted in accordance with Article 90(3) of the Service Regulations was the Medical Committee, not the Invalidity Committee set up in 2002. It explains that Article 8 of decision CA/D 11/04 was not applicable to the complainant, first, because it only applied to proceedings which were pending before the Invalidity or Medical Committee on 1 January 2005 – the complainant's case had already been closed by July 2002 – and, second, because no decision on his case was taken on the basis of an opinion given by the Invalidity or Medical Committee.

With regard to the revised report drawn up in April 2008, which the complainant claims should be considered valid, the defendant submits that it is based on outdated reports and an examination conducted by only one of the members of the Invalidity Committee set

up in 2002. It thus considers that it was issued by an unauthorised body following a flawed procedure.

The Organisation holds that the Medical Committee correctly applied Article 90(3) of the Service Regulations and the Implementing Rules thereto in concluding by a majority that the complainant's pathology did not result from an occupational disease. It rejects as unfounded the allegation that the Medical Committee abused its power, emphasising that it was fully within its competence to decide whether there was any indication on the basis of which the complainant's case should have been referred to an expert. It adds that it was almost seven years after the complainant ceased to perform his duties on the grounds of invalidity that he sought for the first time to have his pathology considered as the result of an occupational disease. Relying on the case law, according to which the Tribunal may not replace qualified medical opinion with its own, the EPO asserts that the complainant has failed to provide convincing evidence that a causal link existed between his pathology and his work environment and that consequently his invalidity resulted from an occupational disease.

D. In his rejoinder the complainant argues that the Invalidity Committee set up in 2002 was the appropriate body to review his case. Since it did not finalise its work in 2002, it should have been reconvened to determine the cause of his invalidity. He otherwise presses his pleas, asserting that, as a former Medical Adviser at the Office had confirmed, harassment at the workplace was the cause of his pathology and his subsequent invalidity.

E. In its surrejoinder the Organisation maintains its position and rejects the arguments made by the complainant in his rejoinder.

CONSIDERATIONS

1. The first issue is whether the Medical Committee convened in 2008 was the competent body to review the Invalidity Committee's 2002 report. The complainant submits that the Medical Committee was convened in violation of Article 8(1) of Administrative Council decision CA/D 11/04 of 17 June 2004. He maintains that for invalidity

determinations made prior to 1 January 2005, as in his case, the Committee that made the original determination should retain its composition and powers. The complainant also maintains that the Invalidity Committee which was set up in 2002 did not finalise its work by issuing its report. He points out that since, pursuant to Article 90(2) of the Service Regulations, the Invalidity Committee may at any time be asked to give an opinion, his case is still pending.

2. The Tribunal rejects this argument. Article 8(1) of decision CA/D 11/04, which amended in particular Article 90 of the Service Regulations, reads:

> "(1) Proceedings pending before the Invalidity or Medical Committee
>
> Where an Invalidity or Medical Committee has been established when the present decision enters into force, this committee shall retain its composition and powers. Any third medical practitioner required shall be appointed in accordance with the procedure laid down in Article 89, paragraph 3, as amended by the present decision."

3. The language of this provision is clear. Only those Invalidity and Medical Committees before which proceedings were "pending", that is, not completed at the time decision CA/D 11/04 amending the Service Regulations entered into force, retained their composition and powers. As the complainant's case was completed and the Invalidity Committee's determination became final in 2002, it was not a "pending" proceeding at the time of the amendments. Accordingly, the original Invalidity Committee did not retain any powers subsequent to decision CA/D 11/04 amending the Service Regulations. Further, Article 90 of the Service Regulations deals with the duties of a Medical Committee under the amended Service Regulations. Article 90(2) simply provides that procedurally a case may be submitted to a Medical Committee either on the initiative of the President of the Office or at the request of a permanent employee. Read in the context of Article 90, the reference to a Medical Committee in Article 90(2) is to a Medical Committee constituted under the amended Service Regulations.

4. The second issue is whether the Medical Committee erred by not referring the complainant's case to an expert for occupational diseases. The complainant contends that the new Medical Committee has a limited role. Under Article I(1) of the Implementing Rules for Article 90(3) of the Service Regulations, the Medical Committee only has to determine if there is a suspicion that the invalidity was caused by an occupational disease. The complainant argues that, as he provided proof that his disease is an occupational disease and a causal link exists between his pathology and his work at the EPO, the Medical Committee was required pursuant to Article 90(3) to refer his case to an expert.

5. Contrary to the complainant's assertion, a determination as to whether invalidity was caused by an occupational disease rests with the Medical Committee after consultation and receipt of a report from an expert for occupational diseases. However, the complainant is correct that the Medical Committee must refer the case to an expert if it "suspects" a causal connection. In the present case, the Medical Committee's finding is based on examinations conducted by each of the Committee members and other medical information. It is unclear whether this information included supplementary documentation submitted by the complainant. However, it is not established that that documentation constitutes new evidence that would undermine the original determination in 2002. Accordingly, the Tribunal accepts that the Medical Committee reviewed all of the evidence and, in consequence, was not obliged to refer the matter to an expert for occupational diseases.

6. Accordingly, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2010, Ms Mary G. Gaudron, 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 8 July 2010.

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