110th Session **Judgment No. 2976**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. R. K. against the European Patent Organisation (EPO) on 7 January 2009 and corrected on 15 February, the EPO's reply of 28 May, the complainant's rejoinder of 7 September and the Organisation's surrejoinder of 17 December 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. In addition to its ordinary medical insurance, the EPO has a long-term care insurance which is intended, according to Article 83a of the Service Regulations for Permanent Employees of the European Patent Office, "to provide a fixed amount of financial support to defray some of the expenses incurred if an insured person's autonomy becomes seriously impaired on a long-term basis and he therefore requires help to carry out everyday activities". Under paragraph 10 of the

Implementing Rules to Article 83a, the fixed amount of financial support is provided in the form of a monthly benefit for which there are three levels, depending on the degree of reliance on long-term care. The highest, level III, corresponds to 100 per cent of the monthly basic salary for grade C1, step 1. The President of the Office may, nevertheless, exceptionally grant a benefit exceeding level III and up to a maximum of 150 per cent of the reference salary. Circular No. 266 of 14 November 2001 specifies the criteria to be applied for assessing the degree of reliance on long-term care, identifying different activities or abilities by reference to which the assessment is to be made.

The complainant, a British national born in 1948, joined the European Patent Office, the EPO's secretariat, in 1990. With effect from 20 August 2006 he was granted the level III long-term care benefit in respect of his wife who suffers from complete paralysis below the arms.

On 23 February and 19 March 2007 the complainant asked Van Breda – the insurance brokers responsible for the day-to-day administration of the Collective Insurance Contract concluded by the EPO – to approve under the ordinary medical insurance scheme the purchase of certain care equipment items for his wife, namely ceiling and immersion bath lifters and environmental control equipment. Van Breda replied that the request could not be approved because the equipment items in question did not qualify as orthopaedic appliances and were thus not covered by his insurance plan. It pointed out, however, that the benefit the complainant received under the long-term care insurance could be used to cover the cost of such equipment. Having received confirmation from the Office that Van Breda's position was in line with the Organisation's long-standing practice, the complainant lodged an internal appeal on 15 June 2007 against the refusal to approve the purchase of the aforementioned equipment. He argued in particular that the level III long-term care benefit that he received was sufficient to cover only half of the expenses associated with his wife's care. By a letter of 2 November 2007 he was informed

that a Medical Committee had been convened, in accordance with Article 89 *et seq.* of the Service Regulations, to give an opinion as to whether Van Breda's refusal of his request was justified and whether its definition of an "orthopaedic appliance" was sound from a medical point of view.

Prior to that, on 14 May 2007, the complainant had applied for the exceptional long-term care benefit provided for in paragraph 10 of the Implementing Rules to Article 83a. He asserted that the degree of his wife's reliance on long-term care exceeded that required under Circular No. 266 for the granting of the long-term care benefit at level III, and that he should therefore be granted the said benefit at the maximum level, i.e. 150 per cent of the monthly basic salary for grade C1, step 1. On 20 June he submitted an estimate of the monthly costs for his wife's care. The Office acknowledged receipt of that estimate and advised him that, if he wished to make a request under Article 87 of the Service Regulations, which enables employees who are in a particularly difficult situation, as a result inter alia of serious or protracted illness, to receive loans or advances, he should provide a breakdown of his monthly income and expenditure. The complainant did not submit a request under Article 87, but he did provide details of his monthly income and expenditure on 11 December 2007. By a letter of 6 February 2008 the Director of the Compensation and Benefit Systems Department advised him that his request for the exceptional long-term care benefit could not be granted. He stated that under Article 83a the long-term care insurance was not intended as a direct reimbursement or as a means to cover the costs of adapting the home, but rather as "financial support to defray some of the expenses incurred", and that his salary and the level III long-term care benefit paid to him were more than enough to cover nursing and household costs.

The Medical Committee issued its opinion on 5 March 2008. It held that, with the exception of the environmental control equipment, Van Breda was justified in refusing to refund the cost of the equipment for which the complainant had sought approval. It

nevertheless recommended that the complainant's case be recognised and treated as a "Hardship Case" under paragraph 10 of the Implementing Rules to Article 83a.

On 6 May 2008 the complainant lodged an internal appeal against the decision of 6 February 2008 – this appeal was subsequently referred to the Internal Appeals Committee – and also requested that the President of the Office take a decision on the recommendation made by the Medical Committee. By a letter dated 9 October 2008 he was informed that the President had decided not to endorse the recommendation of the Medical Committee on the grounds that it was beyond its competence. That is the impugned decision.

B. The complainant contends that the Organisation's decision to deny him the exceptional long-term care benefit is flawed, particularly because it failed to take into account the medical aspects identifying the degree of his wife's reliance on long-term care, and also because it contravened the Medical Committee's recommendation that his wife's case be treated as a "Hardship Case" under paragraph 10 of the Implementing Rules to Article 83a.

He takes issue with the reasons given by the Administration for its refusal to grant him the requested benefit. Referring to the argument put forward in the impugned decision, namely that the Medical Committee acted beyond its competence, he points out that Article 90(1) of the Service Regulations provides that the Committee is competent to decide upon all disputes relating to medical opinions expressed for the purposes of the Service Regulations. Regarding the explanations provided in the letter of 6 February 2008, he notes that Article 83a does not prescribe any particular manner in which the financial support offered under the long-term care insurance ought to be used. He adds that, contrary to what the Administration asserted in the said letter, Van Breda itself confirmed that the long-term care benefit could be used for the purchase of care equipment items.

The complainant asserts that the level III long-term care benefit that he is currently receiving is not sufficient to cover the expenses of

his wife's care and that this has put his family under emotional and financial strain. He criticises the EPO for the absence of a specific procedure regarding applications for the exceptional benefit granted under Article 83a which, in his view, led to considerable delays in the Administration's dealing with his request.

He asks that the impugned decision be quashed and that the EPO be ordered to pay him the exceptional long-term care benefit provided for in paragraph 10 of the Implementing Rules to Article 83a of the Service Regulations in the amount of 150 per cent of the monthly basic salary for grade C1, step 1, with retroactive effect in accordance with part II, paragraph 13, of Circular No. 266.

C. In its reply the Organisation concedes that the complaint is receivable in respect of the President's decision not to endorse the opinion of the Medical Committee and invites the Tribunal to consider it receivable also in respect of the decision of 6 February 2008 rejecting the complainant's request for the exceptional long-term care benefit, in view of the time that has elapsed since the filing of the complainant's appeal against that decision, which is still pending.

On the merits, the EPO submits that the complaint is unfounded. It explains that in the absence of a particular procedure to be followed in respect of applications for the exceptional benefit under paragraph 10 of the Implementing Rules to Article 83a, the general rule of Article 106(2) of the Service Regulations shall apply. It notes that the complainant was informed of the reasons for its refusal to grant him the requested benefit, namely that the long-term care insurance was not aimed at reimbursing costs incurred but rather at defraying part of them, and that it was not intended for covering home-adapting costs but rather nursing and household costs. It adds that it took account of the complainant's total earnings and expenses prior to reaching the conclusion that his monthly remuneration, together with the long-tem care benefit he is receiving, are sufficient to cover his wife's nursing costs. It recalls that, although the complainant was offered the option of obtaining supplementary financial support under Article 87 of the Service Regulations, he did not make use of that possibility.

The defendant considers that, by concluding that the complainant's case should be treated as a "Hardship Case", the Medical Committee overstepped its competence, as defined in Article 90(1), because it gave an opinion on a matter which had not been submitted for its consideration. It points out that under Circular No. 266 it is for the external manager of the insurance – Van Breda in the present case – and not for the Medical Committee to determine the level at which the long-term care benefit should be granted.

D. In his rejoinder the complainant asserts that, as the degree of reliance on long-term care is determined on the basis of a medical assessment, the Medical Committee is the body competent to decide on a request for the exceptional long-term care benefit. Moreover, the insured person's financial circumstances should not be considered relevant. He notes that, apart from defining a maximum benefit, the applicable rules do not provide any instructions on how to assess the degree of loss of autonomy beyond that of level III, or on how to identify which cases qualify for the exceptional long-term care benefit. This, together with the Organisation's reluctance to provide guidance, he argues, resulted in serious irregularities in the handling of his case. He asks the Tribunal not to refer his case back to the EPO but to award him the requested relief and to order the Organisation to pay him arrears as from 14 May 2007.

E. In its surrejoinder the EPO reiterates that the Medical Committee exceeded its competence. It relies on paragraph 9 of the Implementing Rules to Article 83a, which stipulates that entitlement to long-term care benefits shall be decided by the President of the Office on a proposal from the external manager of the scheme. It explains that a request for the exceptional benefit is determined on the basis of non-medical aspects and that level III is the highest level at which the long-term care benefit may be granted on the basis of medical considerations. It otherwise maintains its position.

CONSIDERATIONS

1. The EPO maintains a long-term care insurance scheme for its permanent employees, their spouses and certain of their dependants in accordance with Article 83a of its Service Regulations. The Implementing Rules relevantly provide:

> "(9) Entitlement to long-term care benefits shall be decided by the President of the Office, on a proposal from the external manager of the scheme. The decision shall identify the degree of reliance on long-term care of the insured person concerned.
>
> […]
>
> (10) Depending on the degree of reliance on long-term care identified, the monthly benefit paid shall correspond to the following percentages of the monthly basic salary for step 1 in grade C1 of the salary scale applicable to the recipient concerned:
>
> - level I 50%
> - level II 75%
> - level III 100%
>
> By way of exception and on a reasoned decision of the President of the Office, the amount of the benefit may exceed that in level III, to a maximum, however, of no more than 150% of the aforementioned basic salary."

2. Part III of Circular No. 266 specifies the criteria to be applied in assessing the degree of reliance on long-term care, identifying seven different activities or abilities in different categories by reference to which the assessment is to be made. So far as is presently relevant, to be assessed as level III, the insured person must "require[…] help in connection with at least five of the seven activities and abilities" and "[t]he total amount of time allocated [for assistance, help or care] shall amount to at least 300 minutes a day (equalling 180 hours a month)".

3. The complainant's wife suffers from complete paralysis below the arms. In consequence, the complainant was granted lifelong level III benefits with respect to her from 20 August 2006. As at

May 2009, those benefits amounted to 2,514.05 euros per month. In early 2007 the complainant unsuccessfully sought approval under the EPO health plan for the purchase of ceiling and immersion bath lifters and environmental control equipment for his wife. That approval was refused on 19 March 2007. Questions relating to that refusal were ultimately referred to a Medical Committee. In the meantime, on 14 May 2007, the complainant requested an exceptional benefit under paragraph 10 of the Implementing Rules to Article 83a, pointing out that his wife required assistance for periods in excess of those referred to in Circular No. 266, that the costs associated with her care were "well in excess" of the benefit paid, and that, when refusing approval for the purchase of equipment, Van Breda had said that the purchase of that equipment could be paid for with the long-term care benefit.

4. In June 2007 the complainant provided the EPO with a detailed estimate of the monthly care costs for his wife in the amount of 4,394 euros. At or about the same time, it was suggested to him that he could apply for assistance under Article 87 of the Service Regulations and that, if he were to do so, he should provide a breakdown of his monthly income and expenditure. In the event, no such application was made but on 11 December the complainant provided those details, indicating that he had incurred expense in modifying his home and in purchasing a ceiling lifter and that he would incur further expense for a bathroom lifter, a suitable motor vehicle and a lifter for the vehicle.

5. On 6 February 2008 the complainant was informed that the exceptional long-term care benefit could not be paid to him under Article 83a of the Service Regulations. The reasons given were:

- The long-term care benefit "is intended to provide a fixed amount of financial support to defray some of the expenses incurred" and is not a direct reimbursement of expenses.
- The benefit is intended to help cover the costs of nursing care and not the costs of adapting the home.

- The complainant's salary and long-term care benefit, together, were more than enough to cover household help and nursing care.

The complainant sought review of that decision on 6 May 2008 and he was informed by a letter of 7 July that the matter had been referred to the Internal Appeals Committee. The appeal is still pending. In the meantime, on 5 March 2008, the Medical Committee found that, save for environmental control equipment, Van Breda was justified in refusing to refund the cost of the equipment for which the complainant had sought approval. However, it recommended that the complainant's wife be treated as a "Hardship Case" under the Implementing Rules to Article 83a of the Service Regulations.

6. The complainant was informed on 9 October 2008 that the President of the Office had decided not to follow the Medical Committee's recommendation that his wife be treated as a "Hardship Case" as that recommendation was beyond its competence. That is the decision impugned in the present complaint by which the complainant seeks, amongst other relief, the retroactive award of an exceptional long-term care benefit of 150 per cent of the salary specified in paragraph 10 of the Implementing Rules to Article 83a. The EPO accepts that the complaint is receivable with respect to the decision of 9 October 2008. However, it also invites the Tribunal to treat the complaint as impugning the decision of 6 February 2008 rejecting the complainant's request for the exceptional long-term care benefit, conceding that, in view of the time that has elapsed, it is reasonable to view internal remedies as exhausted. That is a convenient course and is not opposed by the complainant. The Tribunal will proceed accordingly.

7. In view of the EPO's invitation to treat the complaint as directed against the decision of 6 February 2008, it is unnecessary to consider whether or not the Medical Committee was competent to make the recommendation rejected by the decision of 9 October 2008. Instead, it is possible to proceed directly to the merits of the case.

8. It should at once be noted that the question whether something should be granted as an "exceptional" measure is one that invites a value judgement akin to that involved in a discretionary decision. As such, it is subject to only limited review. However, it may be reviewed on the grounds, amongst others, that it involves an error of law and/or that it overlooks some material fact (see, for example, Judgments 1281, under 2, and 2514, under 13).

9. Insofar as they were relied upon for the decision that an exceptional long-term care benefit could not be granted, each of the reasons advanced in the decision of 6 February 2008 involved an error of law. Although Article 83a stipulates that long-term care insurance is intended "to provide a fixed amount of financial support to defray some of the expenses incurred if an insured person's autonomy becomes seriously impaired on a long-term basis and he therefore requires help to carry out everyday activities", that stipulation would direct a refusal of an exceptional benefit only if the benefit already paid was sufficient to meet the expenses involved. The evidence in the present case is that the level III benefit is not sufficient to cover those expenses. Further, as the complainant was not seeking reimbursement of expenses, whether for nursing and associated care or for equipment or home modifications, the consideration that the benefit was not intended as a direct reimbursement was irrelevant and, thus, involved an error of law.

10. The second reason for refusing an exceptional benefit, namely, that the long-term care benefit is not intended to cover the cost of adapting the home, does not find expression in Article 83a. That article refers to insurance "against expenditure arising from reliance on long-term care". That expression is apt to include expenditure on equipment and on home and vehicle modifications to facilitate the provision of care and/or limit the extent of the care needed. In this regard, it is convenient to note that in Judgment 2533 the Tribunal observed that compensation for injury properly included "past and future adaptations to the complainant's house and car" and

that those expenses were "on no different footing than other necessary expenses incurred as a consequence of [...] service related injury". Given the breadth of the expression "expenditure arising from reliance on long-term care", no different approach is warranted in the context of insurance. Moreover, Article 83a specifically excludes "expenditure on medical fees associated with the treatment of an illness or resulting from pregnancy or an accident". Given that specific exclusion, there is no basis for reading other limitations into the expression "expenditure arising from reliance on long-term care".

11. The third reason advanced for the decision of 6 February 2008 was that the complainant's salary and the level III long-term care benefit he received, together, were more than enough to cover household help and nursing care. That is not a matter that precludes the grant of an exceptional benefit, particularly in the context of an insurance scheme. The purpose of insurance is to indemnify, whether in whole or in part, and not simply to provide a social safety net. Moreover, that ground proceeds on the erroneous view that the expenses of equipment and home modifications are not to be taken into account.

12. In its pleadings the EPO also argues, by reference to the complainant's assets and income, that he is not suffering "particular hardship". It was said in paragraph 19 of the document prepared in support of the introduction of long-term care insurance that:

> "In cases of particular hardship [...] it is proposed that an exceptional benefit be paid of up to a maximum of 150% of the basic salary at grade C1/1".

However, there is no reference to "particular hardship" in Article 83a, in the Implementing Rules thereto or in Circular No. 266. That is not to say that hardship is not a relevant consideration in deciding whether or not to grant an exceptional benefit. Hardship must be assessed not only by reference to the cost of nursing care and other assistance, but also by reference to other expenditure involved in facilitating that care and assistance or in limiting the need for it. Further, hardship is only one of

a number of factors relevant to the question whether an exceptional benefit should be granted.

13. The expression "exceptional benefit" indicates that the case in question has features that take it out of the ordinary. Those features include, for example, the severity of the condition and/or the disabilities associated with it. Additionally, it is relevant to consider whether a significantly high level of care is required, as well as whether the periods of time during which care is required significantly exceed those specified in Circular No. 266, and the cost of the care significantly exceeds the benefit paid. In this last regard and as already indicated, the cost includes the cost of equipment and modifications that facilitate that care or limit the need for it. Financial hardship is also relevant although its absence does not necessarily have the consequence that the case is not exceptional, particularly in the context of indemnity insurance. In the present case, the question of financial hardship was considered by reference to the costs of nursing and associated care but without regard to the costs of equipment and modifications that should have been taken into account. These matters to which reference has been made were not considered at all. Thus, the decision of 6 February 2008 also failed to take account of material facts.

14. It follows that the decision of 6 February 2008 must be set aside, as must the President's later decision of 9 October 2008. However, it does not follow that the Tribunal should award a retrospective exceptional benefit of 150 per cent of the salary specified in paragraph 10 of the Implementing Rules to Article 83a. An exceptional benefit may be granted at any level between 100 per cent and 150 per cent of that salary. Moreover, whether a case is or is not exceptional will ordinarily invite comparison with the general nature of other cases that have resulted in the payment of a long-term care benefit. In these circumstances, the appropriate course is for the matter to be remitted to the President for reconsideration in the light of these reasons. In view of the delay that has occurred, it is appropriate

to order that a decision be taken within 60 days of the publication of this judgment and that, if an exceptional benefit is granted, it should be made retroactive to 14 May 2007 and should carry interest at the rate of 8 per cent per annum from due dates until the date of payment. The complainant is entitled to costs in the amount of 800 euros, even though not sought in the complaint.

DECISION

For the above reasons,

1. The decision of 6 February 2008 is set aside, as is the President's later decision of 9 October 2008.

2. The matter is remitted to the President of the Office for a fresh decision to be made within 60 days of the publication of the present judgment.

3. Any exceptional benefit granted to the complainant shall be made retroactive to 14 May 2007 and shall bear interest at the rate of 8 per cent per annum from due dates until the date of payment.

4. The EPO shall pay the complainant the amount of 800 euros by way of costs.

5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 29 October 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 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen

Catherine Comtet