

111th Session

Judgment No. 3028

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. R. against the European Patent Organisation (EPO) on 29 April 2009 and corrected on 15 July, the Organisation's reply of 23 October 2009 and the complainant's letter of 19 April 2010 confirming to the Registrar of the Tribunal that he would enter no rejoinder;

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 German national born in 1960, joined the European Patent Office, the secretariat of the EPO, in 1991 as an examiner at grade A1. He separated from service in February 2008 as the result of invalidity.

At the material time, paragraphs 6 and 7 of Article 62 of the Service Regulations for Permanent Employees of the European Patent Office provided that staff members were entitled to paid sick leave up

to a maximum of 250 working days within three consecutive years and that, during any subsequent extended sick-leave period, they would receive 90 per cent of their basic salary for the first 250 days, 80 per cent for the next 250 days and 70 per cent thereafter.

By a letter dated 11 May 2006 the Personnel Administration Department informed the complainant that on 27 April 2006 he had exhausted his entitlement to sick leave with full pay under the Service Regulations. Consequently, as from 28 April he would be paid 90 per cent of his basic salary for periods when he was unfit for work and calculations to that effect would appear on his next payslip. In the meantime, the complainant had resumed work on a part-time basis on 28 April, his working hours being reduced to 70 per cent on medical grounds. He was subsequently absent on sick leave for various periods in July, September and October, and for the period from April to October his basic salary was reduced accordingly.

On 31 October 2006 the complainant lodged an appeal with the President of the Office, challenging the payslips he had received since May of that year. He contended that the deductions from his basic salary were unfounded because it was impossible to determine how they had been calculated.

By a letter of 19 December the Director of Employment Law informed the complainant that the President had decided to reject his appeal and accordingly the matter had been referred to the Internal Appeals Committee. On 22 December 2006 the Personnel Administration Department sent the complainant a table of calculations detailing the deductions made from his basic salary since May in respect of his sick leave and requested that he withdraw his internal appeal.

On 9 July 2008 the Tribunal delivered Judgment 2756, in which it held that, in relation to paragraphs 6 and 7 of Article 62 of the Service Regulations, sick leave that has been paid at a reduced basic salary must be disregarded in determining when the maximum period of sick leave with full pay has been exhausted. By a letter of 3 December 2008 to

the new President of the Office, the complainant requested inter alia that his salary as from April 2006 be calculated in accordance with Judgment 2756 and he claimed material and moral damages in the amount of 50,000 euros.

In its opinion of 9 January 2009 the Internal Appeals Committee unanimously recommended that the complainant's appeal be dismissed as irreceivable in part and unfounded as to the remainder. It considered that his claims regarding his payslips for the months of May, June and July were time-barred and that those concerning his payslip for May were also irreceivable because they were the subject of another appeal. On the merits, the Committee found that the Office had correctly calculated his salary for the months of August, September and October 2006, and that Judgment 2756 was not applicable as it could be distinguished on its facts.

In a letter of 14 January 2009 to the President, the complainant alleged that he had not yet received the Office's position paper on his internal appeal and he requested evidence that it had been sent to him. He pressed his claim regarding the application of Judgment 2756. In addition, he argued that the Office had erroneously determined the date upon which he had exhausted his entitlement to sick leave with full pay as it had included in its calculation days during which he had worked part-time and had been on sick leave for the remaining part of the day. He requested that the internal appeal proceedings be resumed for his appeal and he reiterated his claim for material and moral damages. In the event that his requests could not be granted he asked that his letter be treated as an internal appeal.

The complainant was informed by a letter of 11 March 2009 that, in accordance with the opinion of the Internal Appeals Committee, the President had decided to reject the appeal as partly irreceivable and unfounded for the remainder. It was noted that the complainant's letter of 14 January 2009 had been sent after the Committee had delivered its opinion and that his arguments, which could have been submitted during the appeal proceedings, were therefore inadmissible. That is the impugned decision.

Subsequently, by a letter of 8 June 2009 the Director of Regulations and Change Management, referring to two other appeals lodged by the complainant also concerning salary deductions in respect of sick leave, informed him that the President had decided to review her decision and to apply Judgment 2756 to his case. Consequently, a recalculation of his sick leave and salary deductions would be carried out, but in view of the complexity of the matter this would possibly take a few weeks.

B. The complainant submits that it is uncontested that, in its calculation of the 250-day period prescribed by the Service Regulations, the Office included not only days when he was on “full-time sick leave” but also days when he was on “part-time sick leave”. In his view this is unlawful. Relying on Judgment 2756, he submits that sick leave that was paid at a reduced basic salary must be disregarded when determining the date upon which the maximum period of sick leave with full pay has been exhausted.

He asks the Tribunal to quash the impugned decision and to order the EPO to recalculate his salary for the period from May to November 2006.

C. In its reply the EPO points out that by challenging the calculation of the first 250-day period prescribed by paragraph 6 of Article 62 of the Service Regulations the complainant is thus contesting the decision of 11 May 2006. Given that this was not the subject matter of the internal appeal underlying the present complaint, he has changed his line of argument to such an extent that it amounts to a new claim. In its view, the complaint is therefore irreceivable for failure to exhaust the internal means of redress. In addition, his claim regarding the recalculation of his salary for the period from May to July 2006 is irreceivable as time-barred and his claim concerning his salary for November is irreceivable for failure to exhaust internal remedies.

The Organisation states that the complainant was informed that he would benefit from Judgment 2756. Consequently, it has granted his requests to recalculate both his sick-leave period and the related salary deductions, and he has no further cause of action.

Subsidiarily, on the merits, the EPO submits that until 28 April 2006 the complainant's sick-leave days were paid at 100 per cent because he had not reached the maximum 250 working days of paid sick leave before that date. It asserts that he has never contested that on 27 April he had reached 250 days of sick leave over a three-year period, nor did he challenge his payslips before he went on extended sick leave.

CONSIDERATIONS

1. The complainant impugns the decision taken by the President of the Office – notified to him by a letter from the Director of Regulations and Change Management dated 11 March 2009 – endorsing the Internal Appeals Committee's recommendations to reject his appeal in the part challenging his payslips for May, June and July 2006 as irreceivable, and to reject the remaining claims challenging his payslips for August, September and October 2006 as unfounded. The Director stated in that letter that the President had considered the complainant's letter of 14 January 2009, and noted that that letter was sent after the conclusion of the appeal proceedings and the issuing of the Committee's opinion. He further stated that as the arguments raised in the complainant's letter and the request contained therein were based on Judgment 2756 they could have been brought forward during the internal appeal and thus they were considered inadmissible. In a letter from the Director, dated 8 June 2009, the complainant was notified of the President's decision to apply Judgment 2756 to his case, and that a review of the final decision regarding his appeal might be necessary. The Director added that in view of the complexity of the case, a recalculation of his sick leave and salary deductions would take a few weeks.

The complainant asks the Tribunal to annul the impugned decision and to order the EPO to recalculate his salary for the period from May to November 2006 on the basis of Article 62 of the Service Regulations as interpreted by the Tribunal in Judgment 2756.

2. Paragraphs 6 and 7 of Article 62 of the Service Regulations in the version applicable at the material time provided:

“A permanent employee shall be entitled to paid sick leave up to a maximum of 250 working days, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

If, at the expiry of the maximum period of sick leave defined in paragraph 6, or of a period of extended sick leave within the meaning of the present paragraph, the permanent employee is still unable to perform his duties, without however fulfilling the conditions for invalidity, the sick leave shall be extended by a period to be fixed by the Medical Committee. During this period, the employee shall cease to be entitled to advancement in step, annual leave and home leave, and shall be entitled to a proportion of his basic salary equal to 90% for the first 250 working days of extended sick leave, 80% for the next 250 working days and 70% thereafter. These amounts may not however be lower than 120% of basic salary at grade C1, step 3, unless this minimum would result in a basic salary higher than that payable if the permanent employee were not prevented by illness or accident from performing his duties.”

3. The Tribunal, in Judgment 2756, stated in relevant part that “sick leave that was paid at a reduced basic salary must be disregarded in determining when the maximum period of sick leave with full pay has been exhausted”. At the material time, paragraphs 6 and 7 of Article 62 of the Service Regulations specified the maximum period for sick leave with full pay as 12 months. It has since been changed to 250 days, as indicated above. Judgment 2756 is relevant in this case as, regardless of the minor changes made to paragraphs 6 and 7 of Article 62, the method of calculation for determining salary for periods of sick leave remains the same.

4. The EPO observes that the complainant has no cause of action since his requests for recalculation of his sick-leave period and his salary deductions were granted, as indicated in the letter of 8 June 2009. Subsidiarily, it submits that the complainant’s claim that his salary for the period from May to November 2006 should be recalculated is partly irreceivable inasmuch as the request is time-barred for the salary from May to July 2006 and premature with regard

to the November 2006 salary. The Organisation also submits that the complaint is unfounded insofar as it concerns the calculation of the salary for the period from August to October 2006 because the complainant's contention regarding the incorrect calculation of his first 250 days of sick leave on full pay was based on an incorrect interpretation of Judgment 2756. It also states that, regarding the calculation of extended sick leave (at a reduced salary), the complainant was informed by the letter of 8 June 2009 that the calculation method had been reviewed and that the Organisation "w[ould] proceed to recalculate his payslips in accordance with the Tribunal's ruling".

5. As there is no evidence that the Organisation has yet recalculated the complainant's entitlements in accordance with Judgment 2756, as indicated in the letter of 8 June 2009, the Tribunal considers that the complainant's request has not been satisfied and hence that he has a cause of action.

6. As the complaint challenging the salary statements for May, June and July is irreceivable because the internal appeal was not lodged within the prescribed three-month period, the Tribunal will rule only on the request for recalculation of the salary from August. The complainant's claim concerning the calculation of accumulated sick leave pursuant to paragraphs 6 and 7 of Article 62 of the Service Regulations is founded as the Organisation itself acknowledged it in the letter of 8 June 2009, in which it stated that it would apply Judgment 2756 to the complainant's case, and therefore, to vary the impugned decision. As there is no evidence that the recalculation has yet been made, the Tribunal declares that the impugned decision was varied by the letter of 8 June 2009, and will order the Organisation to proceed with the recalculation of the complainant's salary from August 2006 in accordance with the Tribunal's interpretation of the applicable rules in Judgment 2756. Considering the time that has elapsed since that letter, it is appropriate to order that the complainant's payslips be reviewed and, if necessary, his salary recalculated within three months of the delivery of this judgment. As

the complainant succeeds, he is entitled to costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is varied by the letter of 8 June 2009.
2. The EPO shall review the complainant's payslips and, if necessary, recalculate his salary from August 2006 in accordance with consideration 6 of the present judgment. The withheld salary, if any, shall carry interest at 5 per cent per annum from due dates until the date of payment.
3. It shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2011, 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 6 July 2011.

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