112th Session **Judgment No. 3058**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr P. A. against the European Patent Organisation (EPO) on 24 July 2009 and corrected on 9 September, the EPO's reply of 21 December 2009, the complainant's rejoinder dated 13 January 2010, the Organisation's surrejoinder of 20 April 2010, the complainant's additional submissions of 5 October 2011 and the EPO's final comments of 28 October 2011;

Considering the twelfth complaint filed by the complainant against the EPO on 21 September 2009 and corrected on 25 November 2009, the EPO's reply of 15 March 2010, the complainant's rejoinder of 29 March, the Organisation's surrejoinder of 5 July 2010, the complainant's additional submissions of 5 October 2011 and the EPO's final comments of 28 October 2011;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case are to be found in Judgments 2580, 2795 and 2816 concerning the complainant's fourth, fifth and sixth

complaints, respectively, and in Judgment 3056, also delivered this day, concerning his seventh complaint.

It may be recalled that, after a Medical Committee had determined in November 2005 that the complainant was permanently unable to perform his duties but that his invalidity did not result from an occupational disease, the President of the Office decided that with effect from 1 December 2005 he would cease to perform his duties and would receive an invalidity pension under Article 14(1) of the Pension Scheme Regulations of the European Patent Office.

On 7 February 2006 the complainant lodged an internal appeal against that decision, alleging inter alia bullying, including on the part of the Director of Personnel, breach of the Organisation's duty of care, mistakes in the calculation of his sick leave and irregularities in the procedure before the Medical Committee. He requested inter alia that the Office take measures against the Medical Adviser and the Director of Personnel for their respective roles in the decision to separate him from service on invalidity grounds, moral damages and costs. In the event that his requests were not granted, he asked that his letter be treated as an internal appeal. By a letter of 21 March 2006 he was informed that, after an initial examination, the President had decided not to accede to his requests and to refer his case to the Internal Appeals Committee under reference number RI/17/06.

On 20 April 2007 the complainant wrote to the President requesting in particular a medical examination to verify whether he had not ceased to satisfy the conditions for entitlement to an invalidity pension. He asked that the examination be carried out by a newly constituted Medical Committee in which none of the members of the earlier Committee would be allowed to participate. In the event that his requests were not granted, he asked that his letter be treated as an internal appeal. By a letter of 31 May 2007 the complainant was informed that, as he had recently retired on invalidity grounds, the President considered that there was no need to submit his case to a Medical Committee and he had therefore decided to refer the matter to the Internal Appeals Committee under reference number RI/66/07. By an e-mail of 12 July 2009 the complainant forwarded to the President a

copy of a medical certificate attesting to his recovery and requested her to reconsider the decision that he should retire on invalidity grounds. He stated that, if he did not receive a response within a week, he would bring the matter directly before the Tribunal. On 15 July 2009 the Director of Personnel replied that only upon receipt of the original certificate would the Office be in a position to initiate a procedure before the Medical Committee.

On 21 January 2010 the Internal Appeals Committee rendered its opinion on appeals RI/17/06 and RI/66/07, recommending unanimously that they both be rejected as unfounded. It also considered that appeal RI/17/06 was irreceivable in part. By a letter of 11 March 2010 the complainant was notified of the Administration's decision to endorse the Committee's recommendation. Prior to that, on 24 July and 21 September 2009 respectively, he had filed his tenth and twelfth complaints with the Tribunal. In his tenth complaint he intends to impugn a decision dated 20 April 2007 and in his twelfth complaint he intends to challenge the Administration's failure to take a decision on a claim he notified to the Organisation on 7 February 2006.

B. The complainant submits that EPO employees have no access to an effective legal remedy for employment grievances. He points out that the existing remedies do not provide a two-tier system, as the internal appeal procedure is not impartial and does not satisfy the standard of first instance judicial review, and that there is no possibility of recourse to the European Court of Human Rights. In effect, the Tribunal is the sole judicial remedy open to EPO employees. However, in his view, the procedure before the Tribunal does not conform to due process requirements, in particular because the Tribunal does not hold hearings.

The complainant revisits the circumstances which led to his separation on invalidity grounds and reiterates that his health problems were the result of workplace bullying and mobbing and that he was forced to retire on invalidity grounds through a flawed procedure. He asserts that the Office's Medical Adviser acted in the Administration's interest and manipulated the procedure before the Medical Committee with a view to bringing about his separation on invalidity grounds, and

that the Director of Personnel was his accomplice in that undertaking. He argues that the Tribunal has still not ruled on the question of whether he indeed suffered bullying and mobbing. He explains that he has fully recovered and he produces evidence which, according to him, refutes the Medical Committee's conclusion that he suffered definitive and permanent invalidity.

He asks the Tribunal to order his reinstatement, although he acknowledges that reinstatement may not be advisable due to the "broken relationship" between himself and the Office. He seeks compensation equivalent to the difference between the invalidity pension which he received as from 1 December 2005 and the salary which he would have received had he remained in active employment. He also claims material and moral damages and costs, together with interest.

C. In its replies the EPO argues that the tenth complaint is irreceivable to the extent that the complainant asserts anew that he was the victim of workplace mobbing and bullying and raises a fresh challenge to the procedure before the Medical Committee and its finding of invalidity. It submits that these matters have already been dealt with by the Tribunal and are therefore *res judicata*. It adds that, if the decision impugned in the tenth complaint is indeed dated 20 April 2007, the complaint is also time-barred. However, it considers that in his tenth complaint the complainant is in fact impugning the decision of 15 July 2009, in which case it is prepared to accept that the complaint is receivable, but only with respect to his claims concerning the legal remedies open to EPO employees and his request for a review of the Medical Committee's finding of permanent invalidity. With regard to the twelfth complaint, the defendant argues that it is receivable only to the extent that the complainant alleges bullying on the part of the Director of Personnel and claims moral damages and costs.

On the merits, the Organisation submits that both its internal dispute resolution system and the procedure before the Tribunal fully satisfy the requirements of due process and that the means of redress open to EPO employees are therefore comparable to those guaranteed

under Article 6 of the European Convention on Human Rights (ECHR). It explains that, according to its Rules, the Tribunal has the power to order hearings and it points out that there is no general principle of law that a proper remedy must consist of a two-tier court procedure. It adds that, pursuant to the Tribunal's well-established case law, the EPO, although not strictly bound by the ECHR, is required to observe general principles of law and the law of human rights in its relations with staff.

The defendant considers that, in the light of Judgments 2580, 2795 and 2816, the complainant is no longer entitled to challenge the procedure before the Medical Committee or to seek a ruling by the Tribunal as to whether he suffered workplace bullying. It describes some of the complainant's remarks regarding the Tribunal as disrespectful and states that it has already initiated a new Medical Committee procedure through which the complainant's state of health will be assessed with a view to determining whether or not he has ceased to satisfy the conditions for an invalidity allowance.

D. In his rejoinders the complainant asserts that his tenth and twelfth complaints are receivable. He accuses the EPO of unacceptable delays in dealing with his appeals and points out that only when he seised the Tribunal did the Administration initiate the internal appeal procedure leading to his twelfth complaint. He considers that in those circumstances he is authorised to file a complaint without awaiting a final decision on his appeals. He reiterates that the Tribunal has not yet ruled on the key issue of his allegations of bullying or the nature of his invalidity, notwithstanding the abundant evidence which he has submitted in that respect. He emphasises that these issues are at the heart of his complaints before the Tribunal, even though each of them deals with a different aspect thereof.

E. In its surrejoinders the Organisation maintains in full its position on the receivability and the merits of the complaints.

F. In his additional submissions the complainant produces a letter dated 28 September 2011 informing him of the President's decision,

taken on the basis of an opinion of the Medical Committee, to reintegrate him into active status with effect from 1 October 2011. He also produces a number of documents which, according to him, prove that in 2004 he was placed on compulsory sick leave, which eventually led to a procedure before the Medical Committee and the decision to separate him from service on invalidity grounds.

G. In its final comments the EPO argues that the complainant's additional submissions contain no element liable to modify its position. It explains that the outcome of the new procedure before the Medical Committee was that a majority of the Committee's members found the complainant fit to work again and, accordingly, the President decided that he should be reintegrated.

CONSIDERATIONS

1. The present complaints, in both of which the complainant seeks reinstatement, were filed before the complainant was notified of the President's decision to reintegrate him within the EPO with effect from 1 October 2011. The decision impugned by the complainant in his tenth complaint is identified as a decision bearing the date of 20 April 2007. In his twelfth complaint it is indicated that no express decision was taken on a claim dated 7 February 2006. Neither the decision impugned by the complainant in his tenth complaint nor the claim by reference to which his twelfth complaint has been lodged are further identified. However, on 20 April 2007 the complainant initiated an internal appeal in which he requested, amongst other things, that he be medically re-examined to determine whether he was still entitled to an invalidity pension. Later, on 12 July 2009, he forwarded a copy of a certificate from his doctor stating that he had recovered his health. In his rejoinder in the matter initiated by his twelfth complaint, he identifies his claim as "related to my internal appeal concerning the misuse of the Invalidity Committee for sacking a permanent employee and lodged on 7 February 2006". The internal appeals lodged on 7 February 2006 and 20 April 2007 were the subject of a single opinion of the Internal Appeals Committee recommending

that both appeals be rejected. In a single decision dated 11 March 2010, the Vice-President in charge of Administration rejected both appeals. Although both complaints were filed prior to that decision, the EPO raises no objection to their being treated as directed to it. Both complaints traverse the questions whether the complainant's invalidity was the result of workplace bullying and whether the procedure before the Medical Committee was tainted by abuse. As well, the complainant questions the sufficiency of the legal remedies available to EPO staff members in each of the complaints. In these circumstances, and although the issues are not precisely the same, it is convenient that the two complaints be joined.

2. Oral hearings are sought in each of the complaints presently under consideration. As the outcome depends mainly on questions of law and the facts relevant to those issues are not in dispute, the applications for oral hearings are rejected.

3. It is convenient to deal first with the complainant's claim that his invalidity was the result of workplace bullying. In Judgment 3056, also delivered this day, the Tribunal has ordered that the question whether the complainant's invalidity was occupational in nature, which is essentially the same question as whether it was the result of bullying, be referred to a differently constituted Medical Committee and that that Committee provide its report on that question within six months. Thereafter, the Tribunal will consider whether and, if so, to what extent the complainant is entitled to the relief claimed in those proceedings. It is well established that the same question cannot be the subject of more than one proceeding between the same parties. Accordingly, to the extent that these complaints raise the very same issue raised in the proceedings in respect of which the Tribunal has issued Judgment 3056, that aspect of the present complaints must be struck out.

4. So far as the complainant's claim to reinstatement is based on the procedure before the Medical Committee, it is to be noted that in Judgment 2580 the Tribunal ruled that there was no reviewable error in

the Committee's determination, at that stage, that he was permanently unable to perform his duties nor in the President's subsequent decision that he cease duty with effect from 1 December 2005. In the internal appeals which provide the foundation for these complaints and, also, in these complaints, the complainant has raised two issues concerning the procedure before the Medical Committee that were not raised in the proceedings that led to Judgment 2580. The first is a claim that the Office's Medical Adviser was biased in favour of the Administration and conspired with it to bring about the complainant's invalidity other than on occupational grounds. The second is that the Director of Personnel, whom the complainant also accuses of harassment, misused the invalidity procedure to exclude him from active service.

5. The new claims with respect to the procedure before the Medical Committee constitute a direct challenge to the finality of Judgment 2580. It is a fundamental principle that a person cannot, in separate proceedings, challenge a judgment to which he was a party by raising issues that could have been raised in the earlier proceedings. There is nothing to suggest that the matters now raised could not have been raised in the proceedings leading to Judgment 2580. Accordingly, the claims now made with respect to the procedure before the Medical Committee must be dismissed.

6. Before turning to the claim for reinstatement based on the complainant's recovery, it is convenient to refer to his criticism of the legal remedies available to EPO staff members. The complainant is entitled to his views on this matter. However, the Tribunal must apply the relevant rules and regulations and those general principles of law that govern the relationship between international organisations and their staff members. Although the complainant challenges the impartiality of the Internal Appeals Committee, he provides nothing to suggest that it was not constituted and/or did not proceed in accordance with the relevant Service Regulations or that its members, or any of them, were in any way disqualified from hearing his appeals. Accordingly, his arguments in this regard provide no ground for

challenging the decision of 11 March 2010 rejecting his internal appeals RI/17/06 and RI/66/07.

7. As already indicated, on 20 April 2007 the complainant asked that he be medically examined to determine whether he was entitled to an invalidity pension and, at the same time, introduced an internal appeal with respect to that question. He did not then produce any material to suggest that he had recovered his health. That evidence was only provided some two years later, on 12 July 2009. The President of the Office did not act on that evidence immediately, apparently because the complainant had provided a copy of his doctor's certificate and not the original. Although it is not clear why the President required the original certificate, it is clear that she was under no obligation to convene the Medical Committee before she was provided with evidence of the complainant's recovery. That evidence was not provided until after the complainant initiated his internal appeal. Thus, there was no error in the decision rejecting the complainant's internal appeal RI/66/07.

8. Although the complainant's arguments must be dismissed, it is convenient to note that, before rejecting the two internal appeals mentioned above, the Administration decided, on 3 February 2010, to convene a Medical Committee to consider whether the complainant had recovered his health. In the result, the complainant was informed that the President had decided to reintegrate him into active status with effect from 1 October 2011. Thus, to that extent, the present complaints are now moot.

DECISION

For the above reasons,

1. The complainant's claim that his invalidity resulted from workplace bullying is struck out.
2. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 10 November 2011, 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 8 February 2012.

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