117th Session **Judgment No. 3306**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr W. A. against the European Patent Organisation (EPO) on 14 July 2010, the EPO's reply of 27 October, the complainant's rejoinder dated 10 December 2010 and the EPO's surrejoinder of 12 January 2011;

Considering the sixth complaint filed by the complainant against the EPO on 11 November 2010, the EPO's reply of 22 February 2011, the complainant's rejoinder of 9 April and the EPO's surrejoinder of 6 May 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to these cases are to be found in Judgment 2789, delivered on 4 February 2009, concerning the complainant's first complaint, and in Judgment 2947, delivered on 8 July 2010, concerning the complainant's second and third complaints. Suffice it to recall that in August 2007 the complainant was informed by the Administration that he had exhausted his entitlement to sick leave on full pay.

Following an opinion by a medical committee, he resumed his duties at 50 per cent for the period from 1 November 2007 until 15 June 2008. Having requested parental leave, he was subsequently placed on parental leave on a half-time basis for the period from 10 March to 15 June 2008. Between 16 June and 29 August 2008 he was on full-time parental leave.

The complainant made a series of requests under Article 56 of the Service Regulations for Permanent Employees of the European Patent Office and Circular No. 34 Rev. 2 to work 50 per cent for "health reasons". He consequently worked half-time from 1 September 2008 to 31 August 2010. During this period he was also on sick leave on several occasions. As a result, a medical committee was convened in September 2009 to examine his case. The Committee, which comprised two medical practitioners, one appointed by the President of the EPO, the other by the complainant, issued an opinion in April 2010 in which it was stated that the complainant's sick leave had ended on "13 September 2009, since then [he was] fit to work (50% part-time)".

In a letter to the complainant of 5 May 2010 the Administration explained that the Medical Committee had confirmed that he was fit to work as from 13 September 2009 and thus, it had approved the 50 per cent working arrangement "applicable since then". In an e-mail of 27 May the complainant disputed that interpretation and requested that the relevant departments be notified that as from 13 September 2009 he had been working 50 per cent for medical reasons pursuant to Article 62(9) of the Service Regulations. He also asked to be informed as to the administrative consequences of this new arrangement, in particular with respect to his working hours, salary and leave entitlements. In an e-mail to the complainant of 2 June 2010 the Administration reiterated its explanation of the Medical Committee's opinion which had been notified to him in the letter of 5 May. It further stated that the Committee had not reviewed his half-time working arrangement under Article 56 of the Service Regulations. Rather, the Committee had commented on the possibility of a follow-up meeting pursuant to Article 62 in the event of additional

absences on his part due to illness. That is the decision the complainant impugns in his fifth complaint.

Following an exchange of e-mails regarding his half-time working arrangement, in a letter to the Administration of 27 August 2010 the complainant referred to what he characterised as a doctor's certificate in the form of the Medical Committee's report of April 2010 and he indicated that he would be on sick leave, on a 50 per cent basis, with effect from 1 September 2010. He also indicated that his working hours remained unchanged pursuant to a previous request to work half-time.

In a letter to the complainant of 13 September 2010 the Administration again reiterated that the Medical Committee had found him fully fit for work as from 13 September 2009. It explained that the Committee's opinion was not a notification of sick leave within the meaning of Article 62(2) of the Service Regulations. In addition, his arrangement to work 50 per cent had expired on 31 August 2010; if he wished to continue that arrangement he was required to submit a further request under Circular No. 34. He was notified that as from the receipt of the letter he was required to resume work on a full-time basis. That is the decision the complainant impugns in his sixth complaint. On 21 September the complainant requested to work 50 per cent for the period from 15 November 2010 to 31 October 2011. He indicated that the request was made "without prejudice" to a ruling by the Tribunal on his fifth complaint or on a new complaint regarding the interpretation of the disputed Medical Committee opinion.

B. In his fifth complaint the complainant contends that the Medical Committee reduced his working hours to 50 per cent for medical reasons and thus took a decision under Article 62(9) of the Service Regulations. Consequently, since 13 September 2009 he has been entitled to paid sick leave for 50 per cent of his normal working hours.

In his sixth complaint he asserts that the decision impugned in that complaint violates Article 62 of the Service Regulations. In his view, pursuant to the Medical Committee's opinion of April 2010, he is entitled under Article 62(1) to paid sick leave for 50 per cent of his normal working hours.

In each of his complaints he asks the Tribunal to annul the impugned decision. He seeks payment of his salary pursuant to Article 62(9) and payment of the difference – with effect from 13 September 2009 in his fifth complaint and with effect from 1 September 2010 in his sixth complaint –, between the amount of salary he actually received and that to which he was entitled under Article 62(9), plus interest at 8 per cent per annum on all amounts owed. He also claims 2,000 euros in costs.

C. In its reply to his sixth complaint the EPO requests that the complainant's fifth and sixth complaints be joined. It submits that as the complainant's sixth complaint is not directed at an act adversely affecting him and concerns the same matter as his fifth complaint, it is irreceivable.

On the merits, the EPO contends that the Medical Committee's opinion of April 2010 confirmed that the complainant's sick leave had ended on 13 September 2009 and that as from that date he was fit to work. The Committee merely pointed out that he was currently working on a half-time basis at his own request under Article 56 of the Service Regulations. It did not decide that he was to work reduced hours on medical grounds pursuant to Article 62(9). The EPO points to an e-mail from the medical practitioner appointed to the Committee by the President and it states that the practitioner has confirmed the EPO's interpretation of the Committee's opinion. In the absence of a request to work part time under Article 56 of the Service Regulations, the complainant should be working on a full-time basis.

D. In his rejoinders the complainant maintains his pleas. He asserts that his sixth complaint is receivable and states that the decision impugned in that complaint has adversely affected him because the EPO has refused to place him on sick leave. He challenges the evidence provided by the medical practitioner appointed by the President.

E. In its surrejoinders the EPO maintains its position in full. It submits that it also asked the medical practitioner appointed to the Medical Committee by the complainant to provide further clarification regarding the Committee's opinion, but he declined to do so.

CONSIDERATIONS

1. In a letter to the complainant, dated 5 May 2010, a representative from the Administration stated: "You were recently sent the Medical Committee's report confirming that you have been fit to work since 13 September 2009, approving the 50% part-time working arrangement applicable since then and offering you the Occupational Health Service's assistance. The Committee will hold a follow-up meeting in the event of new absences due to illness." The complainant received an e-mail from a member of the Administration on 2 June 2010 with the subject "Re: Part-time working arrangement specified in Medical Committee report". Commenting only on the Medical Committee matters, she wrote: "According to the Committee's report of 22 April 2010, your sick leave ended on 13 September 2009 and a 50% part-time working arrangement (Article 56) has applied since then. We informed you of this in a letter dated 5 May 2010. The handwritten remark in point 1.5 of the Committee's report does not concern a review of the working time arrangement under Article 56, but rather the possibility of a follow-up meeting in the event of new absences due to illness (Article 62)." The complainant impugns this decision in his fifth complaint before the Tribunal. He interprets the Medical Committee's opinion, and the subsequent explanation of that opinion contained in the letter of 5 May 2010, to mean that it had been decided that he should work at 50 per cent on medical grounds, pursuant to Article 62(9) of the Service Regulations. Article 62(9) relevantly provides that: "The Medical Committee may decide that a permanent employee on extended sick leave must resume his duties subject to a reduction in his working hours for medical reasons."

2. The complainant first requested to work at 50 per cent part time, under Article 56 of the Service Regulations and Circular No. 34 Rev. 2, for the period 1 September 2008 to 28 February 2009. He requested the same arrangement for the period 1 March 2009 to 28 February 2010, and again for the periods 1 March to 31 August 2010 and 15 November 2010 to 31 October 2011.

3. In his sixth complaint, he impugns the decision, dated 13 September 2010, which reiterated the EPO's interpretation of the April 2010 Medical Committee opinion, and informed him that he should be working at 100 per cent as his part-time working arrangement under Article 56 of the Service Regulations had expired on 31 August 2010. He was informed that if he wished to work at 50 per cent he would have to make a new request to work part time pursuant to Article 56 and Circular No. 34. He did so on 21 September 2010 stating that it was without prejudice to any findings by the Tribunal regarding his fifth complaint or on a new complaint related to the administrative consequences of the Medical Committee's opinion of April 2010.

4. As the complaints contain similar claims and rest on the same underlying facts, i.e. the Medical Committee's opinion of April 2010, the Tribunal finds it appropriate that they be joined (see Judgments 2861, under 6, 2944, under 19, and 3103, under 5). As the complaints are unfounded on the merits, the Tribunal shall not examine any question of receivability.

5. According to Article 62(8) of the Service Regulations, in cases where the maximum period of sick leave or of extended sick leave expires, "the sick leave shall be extended by a period to be fixed by the Medical Committee". This case turns on the interpretation of the Medical Committee's opinion, specifically, the handwritten note in section 1.1 which indicates that the complainant's sick leave ended on "13 September 2009, since then fit to work (50% part-time)". The handwritten note in section 1.5 of the opinion indicates that the next

follow-up meeting of the Medical Committee would be scheduled "in the event of new absences". Section 2.1 indicates that "[t]he permanent employee is not suffering from invalidity". The Tribunal notes that section 1.2, which provides for the extension of sick leave, is left blank. Following previous opinions by the Medical Committee, one in which the complainant's sick leave was extended and another in which his sick leave was not extended, both times the complainant was notified first by the Medical Committee Secretariat and then by the Administration whether or not his sick leave had been extended, and if so, until when, and under what conditions. As in those cases, in this case the complainant was properly notified following the 2010 Medical Committee opinion. He was not given any extended period for sick leave, nor was a date for a follow-up meeting of the Medical Committee established.

6. The EPO contacted the two doctors who comprised the Medical Committee to request clarification on the handwritten comments in the 2010 report. The doctor appointed by the complainant declined to respond. The doctor appointed by the EPO stated inter alia "I herewith certify that the doctors on the Medical Committee of [the complainant] have, during their extensive deliberations […] explicitly discussed the working capability of [the complainant]. The findings on the Report of the Medical Committee duly signed by both doctors in unanimity are crystal clear: Under point 1.1 the Medical Committee confirms that the sick leave had ended already on 13 September 2009. The [Medical Committee] confirms under the same point that fitness to perform his duties exists. The doctors wanted to confirm clearly against the claim of [the complainant] that the[re] is no medical argument for a reduction of the working time for medical reasons. They did so in adding (50% part-time) to point 1.1 to demonstrate that they had taken note of the fact that [the complainant], on his own initiative, had requested to work part-time 50% as of 13 September 2009."

7. Considering the above, the Tribunal concludes that there is nothing to support the complainant's arguments that, according to the

Medical Committee's opinion, he should have been put on 50 per cent sick leave pursuant to Article 62 of the Service Regulations. The Tribunal is of the opinion that the Medical Committee's opinion clearly indicated that there was no extension of his sick leave, and the EPO's explanations were also clear and specific. Consequently the complaints must be considered as unfounded and are therefore, dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ