118th Session **Judgment No. 3354**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr L. P. against the European Patent Organisation (EPO) on 28 January 2010 and corrected on 19 April, the EPO's reply dated 2 August, the complainant's rejoinder dated 11 October 2010 and the EPO's surrejoinder of 25 January 2011, corrected on 14 June 2011;

Considering the *amicus curiae* brief submitted by Mr A. P. on 27 September 2010 and the EPO's comments thereon of 25 January 2011;

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

Having examined the written submissions and decided not to hold 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. The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, which he joined in 2000. Between 2003 and 2006 he submitted several claims to the insurance broker responsible for the day-to-day administration of the EPO's collective medical insurance contract (CIC), seeking reimbursement of the cost of a product and treatment prescribed for him by his physician. The

insurance broker refused these claims on the grounds that the prescription for the product did not indicate a diagnosis and that the cost of the treatment was reimbursable only when prescribed for a certain condition, for which the complainant did not provide proof of diagnosis. The insurance broker also stated that there was a lack of consensus in the medical world regarding the therapeutic effects of the treatment, and that it had been reimbursed in the past solely by error.

In a letter of 22 November 2006 the complainant contended that the insurance broker's refusal to reimburse him for the product and treatment prescribed by his physician was contrary to Article 20 of the CIC and the Service Regulations for Permanent Employees of the EPO. He asked the President of the Office to arrange for him to be reimbursed by the Office. In the event that his request was not met, the complainant indicated that his letter was to be regarded as an internal appeal, in which case he would also be claiming moral damages and costs. He added that, in his view, the Internal Appeals Committee (IAC) rather than the Medical Committee was the competent organ to rule on his appeal, as his case involved a legal issue rather than a medical one.

By a letter of 18 January 2007 the complainant was informed that the President considered the insurance broker's position to be justified and that his internal appeal had therefore been referred to the IAC. In its opinion of 21 September 2009 the IAC recommended by a majority that the complainant's appeal should be rejected as unfounded, but that he should nevertheless be awarded costs, as the legal position with respect to the matters raised in his appeal was far from clear. The complainant was informed by a letter of 11 November 2009, which constitutes the impugned decision, that the President of the Office had decided to follow the majority opinion and to dismiss his appeal as unfounded, but to award him costs.

B. The complainant contends that his right to be heard was violated, as one of the members of the IAC did not sign the opinion, because he was incapacitated following an accident. Instead the opinion was signed by an alternate member who was not present during the hearing

and, therefore, did not possess a full knowledge of the case. The complainant submits that this procedural irregularity breached his due process rights.

He alleges that the "practice" or interpretative guidelines agreed between the insurance broker and the EPO, on which the Office relied in rejecting his claims, add conditions that do not appear in the CIC. In his view, the insurance broker does not have the authority to limit the scope of Article 20(b)(2) of the CIC, which simply provides that medicines are reimbursed at the rate of 80 per cent if they are prescribed by a doctor. By applying additional criteria which have never been published and which have not been the subject of a proper consultation process, the EPO breached its duty of care.

Moreover, the "practice" on which the Office relies cannot override the plain meaning of Article 20(b)(2). If there is any ambiguity in the text of the article, it should be construed in favour of the staff member in accordance with the *contra proferentem* principle. In the absence of proof that the CIC was properly amended by the introduction of the interpretative guidelines or "practice", and given that neither the CIC, nor the relevant implementing regulations, nor the Service Regulations define the term "medicines", it should be understood in its broadest sense, in conformity with the *tu patere legem quam ipse fecisti* principle.

The complainant also contends that the impugned decision is arbitrary, in that the justifications put forward to deny reimbursement of his medical expenses are contradictory. The insurance broker's refusal to reimburse the cost of the product prescribed by his physician on the grounds that the prescription did not mention a diagnosis is both spurious and premature. Indeed, that requirement breaches medical confidentiality and, in any case, the insurance broker failed to ask his physician for additional information. Moreover, he had already been reimbursed on several occasions for this product, without being asked for a diagnosis. As regards the treatment, the complainant submits that it is not up to the insurance broker to determine whether there is a lack of consensus in the medical world concerning its therapeutic effects, which he denies.

Lastly, the complainant argues that the IAC's opinion is tainted with an error of law. In his view, the finding that the insurance broker is entitled to reimburse only those treatments which it deems medically reasonable lacks any legal basis. While he does not contest that the insurance broker is entitled to verify that a particular treatment is within what the medical community considers reasonable, he submits that it is not competent to decide what constitutes a reasonable treatment.

The complainant asks the Tribunal to quash the impugned decision and to order that the cost of the prescribed product and treatment be reimbursed, including for the period after the lodging of his internal appeal. He seeks moral damages, as well as costs in the amount of 1,000 euros.

C. The EPO submits that the complaint is receivable only with respect to the issue of whether the insurance broker correctly applied the CIC. It considers that the question of whether a particular product or therapy forms part of an appropriate course of treatment for a specific illness must be answered by the Medical Committee under Article 90 of the Service Regulations, as it constitutes "a dispute relating to medical opinions".

On the merits, the EPO denies that the complainant's right to be heard was breached during the internal appeal proceedings. Replacing a member of the IAC who had been in an accident and was not able to fulfil his duty in the internal appeal proceedings was necessary and was in accordance with Article 2(3) of the Committee's Rules of Procedure and the Service Regulations. The alternate member participated, on behalf of the full member, in the second internal discussions, after which the opinion was issued. The alternate member was thus fully informed about the circumstances of the case and he in fact submitted an opinion in the complainant's favour. Hence, the replacement of the full member did not place the complainant at a disadvantage.

The EPO explains that when the insurance broker receives a claim for reimbursement, pursuant to Article 16 of the CIC it must

examine whether the product has been prescribed by a medically qualified person as a medical treatment in connection with an illness, an accident, pregnancy or confinement. Further, Circular No. 236, entitled "Reimbursement of medical expenses", states that "the fact that expenses have been incurred on prescription by medically qualified persons does not in itself mean they are reimbursable", and it is up to the insurance broker "to make sure that they really are covered by the insurance contract". For this reason, even though the complainant was indeed given a prescription by a medically qualified person, he is not automatically entitled to reimbursement. It is the insurance broker who decides, based on the relevant special circumstances of each individual case, whether or not to grant reimbursement. In this respect the EPO explains that, since the medical advisers of the Office and of the insurance broker have arrived at a "consensus" regarding the definition of medicines within the meaning of Article 20(b)(2) of the CIC, the reimbursement of some products and treatments, including those prescribed for the complainant, is possible only if they fulfil the conditions contained in the consensus.

Further, the reason why the consensus, whose guidelines appear on the insurance broker's website under the "Frequently asked questions" section, is not contained in the Service Regulations or the CIC is precisely because its aim is not to amend the Service Regulations by introducing additional criteria, but rather to define the term "medicines" in order to avoid arbitrary decisions by the insurance broker and to ensure just and equal treatment of staff members. For that same reason, a formal consultation of the General Advisory Committee (GAC) on this matter was not necessary.

The EPO submits that the insurance broker's decision not to reimburse the cost of the treatment prescribed by the complainant's doctor was taken with due care, after careful examination of the diagnosis and after concluding that the treatment in question was not recommended for the complainant's disease. As regards the product, the EPO points out that, contrary to the complainant's allegations, the insurance broker did ask him for further information about the

diagnosis, which he was unwilling to provide. In its view, the insurance broker is entitled to ask for the diagnosis in order to establish whether the medical treatment prescribed is appropriate and reimbursable. This does not breach medical confidentiality, as the insurance broker is bound under the CIC to maintain the strictest secrecy regarding any information it may obtain. Consequently, there was no violation of the provisions of the CIC.

Lastly, the EPO rejects the argument that, because the complainant was mistakenly reimbursed in the past, he must continue to obtain reimbursement in accordance with the *contra proferentem* rule, as this would lead to unequal treatment of other employees making similar claims.

D. In his rejoinder the complainant presses his pleas. He maintains that under Article 20(b)(2) of the CIC no diagnosis is required for the product prescribed by his physician and that, in the circumstances of his case, the EPO's insistence on obtaining a diagnosis is vexatious. He submits that, had the insurance broker and the EPO's Medical Adviser exercised due care in dealing with his case, it would have been submitted to the Medical Committee and not "summarily" dismissed. In his view, the fact that the EPO is now calling for a Medical Committee to determine whether the treatment prescribed by his physician is appropriate is evidence of its bad faith.

E. In its surrejoinder the EPO maintains its position in full. It points out that, as the applicable provisions clearly state and as the Organisation suggested to the complainant, he was entitled to request a decision from the Medical Committee, and this would have been the appropriate procedure for challenging the insurance broker's refusal to reimburse the product and treatment in his case. However, it was the complainant who refused to refer the dispute to the Medical Committee.

F. In his *amicus curiae* brief, Mr P., the member of the IAC who was replaced by an alternate member following an accident, submits that the procedure followed was in breach of the Staff Regulations and

of the complainant's right to be heard, because the composition of the IAC had changed between the time when the hearing was held and the time when the IAC's opinion was issued.

CONSIDERATIONS

1. The complainant is an employee of the European Patent Office. He is entitled to certain benefits under a collective insurance contract (CIC) concluded by the EPO under Article 83 of the Service Regulations. In 2006 the complainant was purchasing a product and undergoing a treatment (which he had been receiving since 2003). He sought reimbursement for the cost of the product and the treatment under the CIC but his claim was rejected by the insurance broker responsible for the day-to-day administration of the CIC. The purchases made and treatment undergone at that time were the subject matter of an internal appeal lodged on 22 November 2006 and, ultimately, the subject matter of the complaint to this Tribunal. However the complainant has made further purchases and undergone further treatment since his internal appeal commenced.

2. The internal appeal took several years to resolve. The IAC published its opinion on 21 September 2009. While the IAC were unanimous in accepting only part of the appeal as receivable, there was a division of opinion about the rejection of the complainant's claims by the insurance broker. Three members of the IAC recommended the appeal be dismissed as unfounded, while a minority of two members dissented from this opinion. For reasons that emerge shortly, it is unnecessary to discuss in detail the reasons of either the majority or minority. The complainant was informed by a letter dated 11 November 2009 that the President had rejected his appeal as unfounded. This is the impugned decision.

3. The complainant's complaint, together with the supporting brief, were filed on 28 January 2010. The EPO's reply is dated 2 August 2010. The complainant's rejoinder is dated 11 October 2010 and the EPO's surrejoinder is dated 25 January 2011 though it was

amended by a submission dated 14 June 2011. A submission dated 27 September 2010 was made by an individual who had been a member of the IAC when it commenced the hearing of the complainant's appeal but was not (because of illness resulting from a serious accident) at the time the IAC rendered its opinion to the President. This individual describes himself as an *amicus curiae* but it is unnecessary to consider whether this is a correct characterisation of his role (see Judgment 2420, under 7).

4. These dates are important because since the pleas concluded, the Tribunal has given judgment in a case that addresses two issues similar in character to the substantive issues raised in the pleas. The first issue raised by the complainant was whether he had been afforded due process having regard to the fact that the membership of the IAC changed between the time he lodged his appeal in November 2006 and the time the IAC rendered its opinion in September 2009. This occurred after the IAC had conducted a hearing of the appeal on 1 April 2009.

5. In Judgment 3158, delivered in public on 6 February 2013, another case involving the EPO, the Tribunal considered whether a complainant had been denied due process as a result of a change in membership of the IAC. The Tribunal decided, at consideration 4, that the complainant had been denied due process and the hearing process had not been transparent. That was because the complainant, in that matter, had not been informed of the change at the time it was made and therefore had not been in a position to contest the composition. In fact, that complainant became aware of the substitution only when he received a copy of the IAC's opinion. But the Tribunal also noted that the alternate member (who rendered an opinion in favour of the complainant) had not attended and participated in the hearing, whereas his participation could have changed or influenced the IAC's final opinion. In the present case, the complainant was informed of the change at the time it was made and had the opportunity to contest the composition. But the alternate member, in the present case, did not participate in the hearing and was only subsequently provided with the

papers though he did participate in an internal discussion on 20 August 2009 with the other members of the IAC. The issue thus becomes whether the fact that the alternate member did not participate in the hearing, involved a lack of due process or transparency. Probably it did. A hearing of any internal appeal body provides an opportunity for the parties to articulate more fully their case and to answer questions from the members of the appeal body. However, for reasons that emerge shortly, it is unnecessary to resolve this issue conclusively.

6. The second issue is slightly more complex. Article 83 of the EPO Service Regulations provided, at the relevant time, that a permanent employee, amongst others, "shall be insured against expenditure incurred in case of sickness, accident, pregnancy and confinement". The implied obligation of the EPO to effect such insurance was met by the EPO, which has taken out insurance through an insurance broker. The policy is expressed to cover "expenditure […] in respect of medical treatment, prescribed by medically qualified persons, as a result of illness, accident, pregnancy and confinement". On 20 October 2000 the broker wrote to the EPO setting out criteria it would use to assess claims under the policy.

7. In the impugned decision, the President noted that: "[the insurance broker] determined correctly that the product and treatment concerned did not fit all the criteria for reimbursement". This was a reference to the criteria in the letter of 20 October 2000. In the context of discussing whether that letter should have been published, the President said it "constitutes an interpretive guideline which concerns the definition of a medication and when the latter can be reimbursed".

8. In Judgment 3031, consideration 14 (a judgment delivered publicly on 6 July 2011 after the pleas in this matter had been completed), the Tribunal observed:

> "It is clear that the insurance broker's decisions to reject the complainant's claims were based on the unpublished agreement entered into between the medical advisers of the EPO and of the insurance broker

> whereby the cost of the medicine at issue would only be reimbursed for two medical indications. However, the CIC provides that reimbursement will be made if the medical treatment is prescribed by a medically qualified person and is the result of one of the four circumstances enumerated in the CIC. In refusing the claims on the basis of the agreement, the insurance broker acted outside the scope of its authority."

9. This passage was quoted by the Tribunal in Judgment 3158. In this latter judgment, the Tribunal said that the explanatory note of 20 October 2000 should not be considered as binding, since it merely establishes guidelines interpreting the term "medicines" as contained in the CIC. The Tribunal also said that the conditions listed in the explanatory note involved an interpretation of expressions used in it ("generally accepted medical treatment" and "proven therapeutic effects") and that such interpretations implied a medical opinion which, in that case, should have been referred to the Medical Committee.

10. In the present case, there has been no determination by a Medical Committee whether the product and the treatment are "medicines" and "medical treatment" for the purposes of the CIC. While in these proceedings the complainant has argued that this question is a legal one and did not require the opinion of the Medical Committee, this argument was made without the benefit of the Tribunal's observations in Judgment 3158. But, more importantly, the President should not have, as she did in the impugned decision, dismissed out of hand the complainant's appeal against the rejection of his claim for reimbursement for the product and the treatment. The matter should have been considered by the Medical Committee before such action was taken, if it accorded with the opinion of the Medical Committee. Accordingly, the impugned decision is flawed and should be set aside. Orders similar in terms to those made in Judgment 3158 should be made in this matter. Damages and costs in a similar amount as determined in that judgment, for the same reasons, should be awarded.

DECISION

For the above reasons,

1. The decision of the President of the Office of 11 November 2009 is set aside and the case is remitted to the EPO for a redetermination as detailed under 9 of Judgment 3158.

2. The EPO shall pay the complainant moral damages in the amount of 700 euros.

3. It shall also pay him 600 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, Ms Dolores M. Hansen, Judge presiding the meeting, 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 9 July 2014.

DOLORES M. HANSEN
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ