118th Session **Judgment No. 3375**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr R. R. against the European Patent Organisation (EPO) on 28 January 2011, the EPO's reply of 5 May, the complainant's rejoinder of 14 July and the EPO's surrejoinder of 27 October 2011;

Considering the applications to intervene filed by Mr A. K. and Mr P. T. on 29 July and the EPO's comments thereon dated 24 September 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. As explained in Judgment 3056, the EPO rules governing invalidity pensions were amended pursuant to Administrative Council decision CA/D 30/07 with effect from 1 January 2008. As from that date, employees who retired on grounds of invalidity before having reached the statutory retirement age of 65 would not become pensioners immediately but would be considered as employees with non-active status. As such, they would receive an invalidity allowance

instead of an invalidity pension and, except where their invalidity was due to an occupational disease, they would continue to contribute to the pension fund. When they reached the age of 65, their contributions to the pension fund would cease and they would begin to draw a retirement pension. A tax adjustment would be payable in respect of the retirement pension, but not in respect of the invalidity allowance, as this allowance would be exempt from national income tax. Transitional measures would ensure that no loss would be suffered by employees already receiving an invalidity pension.

The complainant is a former permanent employee of the European Patent Office, the secretariat of the EPO. In January 2007 he was informed that, as he was about to reach 250 working days of sick leave, a Medical Committee needed to be established, consisting of two medical practitioners, one appointed by himself, the other by the President of the Office, in accordance with Article 89(1) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations"). On 6 February 2007 the complainant appointed his medical practitioner, who submitted his medical report to the EPO on 5 March 2007. The President appointed the EPO's Medical Adviser, who examined the complainant on 15 March. The two-member Medical Committee held its first meeting on 16 March and decided to extend the complainant's sick leave period until 30 September 2007.

Following the exhaustion of the complainant's extended sick leave period, the EPO's Medical Adviser asked the complainant's medical practitioner to submit a new medical report on the complainant's health status, which he did on 31 October 2007. After conducting a second medical examination in November, the Medical Adviser and the complainant's medical practitioner met again on 13 November 2007. As they could not reach an agreement on the measures to be taken, they appointed a third medical practitioner in accordance with Article 89(3) of the Service Regulations. The complainant was informed of this on 19 November 2007. The complainant was examined by the third medical practitioner on 19 December 2007 and the three-member Medical Committee met on

25 January 2008. It determined that the complainant met the definition of invalidity laid down in Article 62a of the Service Regulations, which had entered into force on 1 January 2008. As from 1 February 2008 the complainant, who had not yet reached the statutory retirement age, was therefore placed on non-active status on grounds of invalidity and, under the rules in force since 1 January 2008, he became entitled to an invalidity allowance.

On 22 February the complainant received a statement containing a calculation of his entitlements under the new invalidity rules. This showed that he was required to pay a monthly contribution of 643.89 euros to the pension scheme. By a letter of 3 April 2008, he requested that the former regulations on invalidity pensions be applied to him, arguing that the Office had caused unacceptable delays in treating his case, as a result of which he had been prevented from benefiting from the old rules governing invalidity. He was informed by a letter of 3 June 2008 that the President considered that the relevant rules had been applied correctly and had therefore referred the matter to the Internal Appeals Committee (IAC) for an opinion.

In its opinion of 6 September 2010 the IAC, by a majority, recommended that the appeal be rejected as entirely unfounded. The minority, however, took the view that the Medical Adviser had been negligent and that procedural irregularities had occurred, and that the complainant ought therefore to be placed in the position that would have been applicable if his invalidity had been determined in the course of 2007 under the previous rules. The President, by a letter of 5 November 2010, decided to follow the majority's opinion and to dismiss the complainant's appeal as entirely unfounded. That is the impugned decision.

B. The complainant contends that the EPO did not inform him in due time of the consequences of being placed under the new invalidity allowance regime, in breach of its duty of care. He adds that the EPO was aware that he suffered from a serious stress-related disease, and that his condition was aggravated by the excessive length of the invalidity procedure and his subsequent internal appeal.

The complainant also contends that the impugned decision is tainted with three procedural flaws. First, he alleges that the EPO's Medical Adviser failed to examine him within the period prescribed by Article 89(3) of the Service Regulations. Secondly, he alleges that during a telephone conference on 16 March 2007 the two original members of the Medical Committee disagreed concerning the measures to be taken, and they should have appointed a third member within one month of that disagreement. Thirdly, he submits that the Medical Adviser's negligence in handling his case caused further delays after the expiration of his extended sick leave on 30 September 2007. In particular, the Medical Adviser only invited him for a new medical examination on 17 October, and it was only then that he requested a new report from his medical practitioner, whereas the Medical Committee had called for a follow-up examination to be held in August 2007. As a result of these excessive delays, he was prevented from benefiting from the old invalidity pension regime.

According to the complainant, the invalidity allowance regime was not in fact justified by budgetary reasons, as publicly announced, but by political considerations. He considers that the reform of the EPO pension scheme put him at a disadvantage without good reason and was therefore arbitrary. Moreover, the application of the new rules in his case constitutes a breach of his acquired rights, as he had a reasonable expectation to benefit from the invalidity pension regime in force until 31 December 2007, since it had been a factor in his acceptance of employment with the EPO.

The complainant asks that the Tribunal order the EPO to grant him the benefit of the invalidity pension regime in force until 31 December 2007. Alternatively, he asks to be awarded financial compensation for the material injury caused by the application of the new invalidity allowance regime to him. He seeks moral damages, as well as costs, including travel costs incurred in connection with the internal appeal proceedings.

C. In its reply, the EPO submits that since there was uncertainty with regard to both his invalidity status and the adoption of the new

regulations by the Administrative Council, it could not have provided him with any certain information at an earlier date. Indeed, the outcome of the medical examination conducted by the Medical Committee was open and the fact that the procedure had been set in motion could not guarantee that he would be assigned to invalidity status. In these circumstances, the EPO cannot be held to have breached its duty of care.

The EPO maintains that the procedure was followed with all due care. The complainant has produced no evidence of an abuse of procedure or of gross negligence. The duration of the procedure before the Medical Committee was within the norm. There was no disagreement between the two members of the Medical Committee at their meeting in March 2007, and consequently there was no need to appoint a third Committee member or to conduct a further medical examination at that time. In fact, it was the complainant's failure to contact the EPO at the expiration of his sick leave and his failure to present a new medical certificate that triggered the Medical Adviser's request for a new medical report from his medical practitioner as well as a new examination.

The EPO argues that the amended provisions do not concern terms of employment of a fundamental and essential nature. Referring to the criteria established by the case law to determine whether a violation of an acquired right can be established, it submits that none of the criteria is satisfied in the present case. The possibility of obtaining an invalidity benefit is an essentially remote and contingent right, which cannot be seen as a reason for accepting an appointment. Moreover, there were lawful budgetary reasons for the amendments made to the EPO pension scheme, which were intended to ensure the long-term viability and equilibrium of its social security cover. The main difference from the previous system is that a contribution to the pension scheme has to be paid until the age of retirement. According to the EPO, this change does not entail any significant material loss for the complainant. As the complainant had never received invalidity benefits under the invalidity pension scheme in force until 31 December 2007, he had no legitimate expectation that

the previous system would apply to him. Lastly, the EPO points out that the complainant did not request reimbursement of his costs during the internal appeal procedure.

D. In his rejoinder the complainant presses his pleas. He maintains that the invalidity pension scheme was an essential term of his employment contract and points out that the application of the invalidity allowance scheme entails a reduction of 9.1 per cent in his net income.

E. In its surrejoinder the EPO maintains its position in full. Concerning the argument on acquired rights, it points out that there is a distinction between the invalidity scheme as an entitlement that the EPO is obliged to provide to its staff members, and the modalities of implementation, which cannot be said to be an essential term which induced the complainant to accept an appointment with the EPO.

CONSIDERATIONS

1. The essential question in this matter is whether the complainant has an acquired right to an invalidity pension under the EPO's prior invalidity pension scheme, which was replaced by an invalidity allowance under a new scheme that took effect on 1 January 2008. The new scheme brought the EPO's invalidity arrangements into line with those of the European Union.

2. The complainant first received his invalidity allowance in February 2008 after a Medical Committee found on 25 January 2008 that he fulfilled the conditions for invalidity under Article 62a of the EPO's Service Regulations. The new scheme, which was then in effect, required the complainant to pay a monthly contribution of 643.89 euros to the pension scheme. This sum has been deducted from his invalidity allowance.

3. The complainant objects to the application of the new scheme to him. He contends that he was only caught by the new

scheme because of the inordinate delay in his invalidity proceedings, which took about one year when the relevant rules provide for a process of about 250 days. He insists that it was that delay that caused the EPO to decide that he met the conditions for invalidity benefits under the new 2008 scheme rather than under the prior arrangements. He insists that a timely resolution of his invalidity process would have obviated the monthly deduction of 643.89 euros, which is not payable by persons who fell under the prior scheme by virtue of the principle of acquired rights.

4. A majority of the IAC recommended the dismissal of the complainant's internal appeal. In the letter dated 5 November 2010, the President of the Office accepted the majority opinion and rejected the appeal as unfounded. That is the impugned decision.

5. Mr A. K. and Mr P. T., who are serving permanent employees of the EPO, have applied to intervene in this case. Article 13(1) of the Rules of the Tribunal permits any person to whom the Tribunal is open under Article II of the Statute to intervene in a complaint, provided that the ruling which the Tribunal is to make may affect her or him. The EPO objects to the applications. The EPO submits, in effect, that the ruling on this complaint is not likely to affect the applicants. This, it states, is because as active and not retired staff members who do not receive an invalidity allowance, they are not in the same or a similar situation as the complainant. The Tribunal's case law states, in Judgment 366, under 1, for example, that other officials of an organisation are entitled to join in proceedings as interveners insofar as their factual and legal position is identical or at least similar to that of the complainant. The Tribunal dismisses the applications to intervene. This is because, in the capacities in which the applicants filed them, their factual and legal positions are neither identical nor similar to those of the complainant.

6. The complainant challenges the impugned decision on three main grounds. One ground, which is substantive, is that he reasonably expected to benefit from the invalidity pension under the prior scheme

because it was a basis on which he accepted his employment with the EPO, and, accordingly, is an acquired right. He questions the lawfulness of the change to the new scheme in relation to him. A second ground is that the EPO breached its duty of care to him by not acting in good faith towards him. In the third place, he alleges that there were various flaws in the procedures before the Medical Committee which established his invalidity, which occasioned delays and careless management in his invalidity proceedings.

7. The complainant seeks an order that the EPO put him into the same position that would have applied to him by the application of the prior invalidity scheme that was in force until 31 December 2007. He also seeks reimbursement of the costs of his travel from Vienna to Munich to attend the meetings and prepare his internal appeal and his complaint. He also seeks moral damages. The EPO contends that the complaint is unfounded.

8. The following statement by the Tribunal in Judgment 1392, under 34, in which the EPO was the defendant, presents a helpful perspective from which to consider the question whether the complainant had an acquired right in the application of the pre-2008 invalidity provisions:

> "whereas [the] right to a pension is no doubt inviolable, a pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits."

9. This statement recognizes, in the first place, that it is within an organisation's discretion to amend its Service Regulations. Article 33(2)(b) and (c) of the European Patent Convention, the EPO's founding Treaty, specifically permits it to amend its Service Regulations and its Pension Scheme Regulations. In accepting this, however, the Tribunal stresses that the EPO should strike a balance

between the mutual obligations of the Organisation and its employees and the main or fundamental conditions of its employees' appointment (see Judgment 832, under 15).

10. Had he been found to fulfil the conditions for invalidity prior to 31 December 2007, the complainant would have been entitled to the pre-2008 invalidity pension, which was not subject to the deduction of a pension contribution. In a narrow sense, however, the actual right to that invalidity pension would not have accrued to the complainant or any staff member of the EPO unless or until the contingency of invalidity materialised. Indeed, that contingency only comes to fruition when the Medical Committee that is established under Article 89 of the Service Regulations of the EPO determines, pursuant to Article 90(1) of the Service Regulations, whether a permanent employee of the Organisation meets the conditions of invalidity laid down in Article 13 of the Pension Scheme Regulations. That determination was made on 25 January 2008 when the new invalidity allowance with the provision for the deduction of the pension contribution was already in effect. The right to an invalidity pension under the pre-2008 provisions had not accrued to the complainant.

11. However, the complainant has invited the Tribunal to consider his argument that he had a vested right under the pre-2008 provisions, in a wider sense. He submits that this is because he could reasonably be expected to benefit from the prior scheme as it was a factor in his acceptance of employment with the EPO. Seen from this perspective, the question is whether the new scheme altered the complainant's terms of employment in a manner that was fundamental, within the meaning of Judgment 832.

12. In Judgment 832, under 14, the Tribunal established that this determination depends upon: (1) the nature of the term that is altered; (2) the reason for the change; and (3) the consequences of allowing or disallowing an acquired right (see also Judgment 2089, under 12).

13. By its nature as a remote and contingent right, the benefit to an invalidity pension arises only under conditions of invalidity to cover a risk that rarely occurs. This is not a fundamental term which could be said to have reasonably induced the complainant or any staff member of the EPO to enter into the contract of employment with the Organisation so as to preclude the Organisation from altering its terms as it did by the new arrangements (see, for example, Judgment 2682, under 6).

14. Moreover, the Tribunal is satisfied that the change in the invalidity benefits to include the payment of the pension contribution was made on a sound actuarial basis. In this regard, the Tribunal notes that the President of the EPO established an Actuarial Advisory Group in 1992. In Judgment 1392, under 38, the Tribunal endorsed its work as a sound basis for changes which the EPO made to its pension scheme. The genesis of the new invalidity benefits scheme with the provision for the pension contribution deduction came out of the study and recommendations which the Actuarial Advisory Group made. The President of the Office requested the study in 2006 on the future service contribution requirements and the equilibrium of the EPO's pension scheme balance sheet.

15. The Tribunal sees nothing to suggest that the Actuarial Advisory Group's Report, which is contained in document CA/66/06 of 15 September 2006, is an unsound and incomplete study. Its recommendations provided the basis on which the President issued document CA/159/07 Rev. 2 of 19 November 2007. These in turn provided the bases for the decisions of the Administrative Council of the EPO of 14 December 2007, which are contained in document CA/D 30/07, for the implementation of Article 62a of the Service Regulations.

16. Against the background of these exercises, the change that required the payment of the pension contribution with effect from 1 January 2008 was not arbitrary. It was made on dispassionate actuarial and financial management considerations. It was intended to

ensure the long-term viability of the social security cover that is itself an essential and fundamental term or condition of employment of the complainant and other employees of the EPO. This is in the longer term interest of staff members, as well as in the interest of the EPO's obligation to continue to provide invalidity allowances to its employees.

17. The change to the invalidity allowance left the Organisation's pension scheme, including the invalidity aspect, basically in the form in which it was known and administered. It seems to have achieved the balance which the Tribunal's case law requires where such changes are made. On the one hand, the overall intention is to maintain certainty and continuity in the EPO's pension regime, in the interests of the staff who subscribed to it on joining the Organisation. On the other hand, it is to support the Organisation's interest to maintain the viability of its pension scheme as adjustments are made to changing needs. These are the wider consequences of the change.

18. As regards the more personal consequences, by introducing the contribution to the EPO's pension scheme, the EPO requires a person who receives the invalidity allowance to continue to contribute to the pension scheme from which the person will benefit on attaining the age of 65. The sum of 643.89 euros which was deducted from the complainant's first invalidity allowance in February 2008, and continuing, is 9.1 per cent of the 7,075.73 euros. The complainant received a substantial lump-sum payment. In the circumstances, the Tribunal finds that the consequences of paying the contribution to the pension scheme are not so significant or adverse to the complainant to warrant its discontinuance.

19. In the foregoing premises, the complaint is unfounded on the ground that it violates the complainant's acquired rights. Additionally, there is no principle on which the Tribunal could accommodate the complainant's request to back-date his invalidity to a date prior to

January 2008 to permit him to have the benefits of the pre-2008 scheme.

20. It is trite principle that an international organisation owes its staff members a general duty of care not to cause them undue hardships. Accordingly, the relations between an organisation and a staff member must be governed by good faith (see, for example, Judgments 2116, under 5, and 1526, under 3).

21. The complainant contends that the EPO breached its duty of care towards him in that, while he was away from the office on sick leave, it did not make him aware that the change, which would have led to the deduction of the pension contribution from his invalidity allowance, was imminent. He states that, out of its duty of care to him, the EPO should have accelerated his invalidity process as it was well aware of the financial losses that he would have incurred if the process was delayed into 2008. He states that the duty of care was even more critical in his case because the Organisation was aware that he suffered from a stress-related illness. He insists that the duty of care was breached by a number of procedural violations by the EPO's Medical Adviser which led to excessively lengthy invalidity proceedings.

22. Articles 62 and 62a of the Service Regulations set out the procedures that are to be followed in the event of sick leave that culminates in invalidity. Article 62(7) entitles a permanent employee to a maximum of 250 days' paid sick leave within any three consecutive years. The complainant's sick leave commenced on 9 March 2006. Under Article 62(8), where an employee is unable to perform his duties on the expiry of the 250 days' sick leave the Medical Committee shall extend the period of sick leave. The Medical Committee may also commence proceedings to determine whether the employee fulfils the conditions of invalidity as defined in Article 62(1) of the Service Regulations. The complainant's apparent suggestion is that he was entitled to the invalidity pension under the pre-2008 scheme because his own doctor had declared his invalidity

since 5 March 2007. This contention is unsustainable as a finding of invalidity is within the purview of the Medical Committee.

23. The complainant contends that the Medical Committee committed a procedural violation when it failed to examine him within the 250 days plus one month of the commencement of his sick leave. According to the complainant, this expired on 6 February 2007. He notes that the medical practitioner whom he selected under Article 89(2) of the Service Regulations examined him within that time and produced the report on 5 March 2007 recommending invalidity, but the EPO's Medical Adviser examined him only on 15 March 2007. The Tribunal notes that the Service Regulations do not set a specific time for that type of examination. It must however be done in a reasonable time. The Tribunal concludes that the examination by the Medical Adviser was done within a reasonable time. The complainant also contends that the Medical Adviser breached his duty of care towards him because of inactivity in the invalidity process between March and November 2007.

24. Article 90(1) of the Service Regulations gives purview to the Medical Committee to determine what action should be taken on the expiry of the 250 days maximum period of sick leave. The complainant's evidence is that on 13 April 2007 he was sent for clinical treatment, which was scheduled to last for six weeks. These actions do not support the complainant's submission that the duty of care was violated because of inaction and unwarranted delay in the invalidity proceedings from mid-March 2007 until November 2007.

25. Moreover, the Tribunal notes that on 16 March 2007, the two-member Medical Committee, which was appointed under Article 89(1) of the Service Regulations, agreed to extend the complainant's sick leave period until 30 September 2007. Additionally, in their opinion of April 2007, they asked for a follow-up examination of the complainant in August 2007. It was only at the Medical Committee's second meeting held on 13 November 2007,

following the exhaustion of the complainant's extended sick leave period, that the two members did not reach agreement on the complainant's invalidity and were required to choose a third medical practitioner in accordance with Article 89(3) of the Service Regulations. The appointment of the third member of the Medical Committee was confirmed on 19 November 2007. Against this background, there is no authority that supports the complainant's suggestion that, pursuant to Article 89(3) of Service Regulations, the EPO breached its duty of care to him when the third person was not appointed to the Medical Committee within three months of March 2007.

26. The complainant further contends that the Medical Adviser breached his duty of care to him, when the medical examination that was scheduled for August 2007 was delayed. He insists that, had the examination taken place then rather than on 13 November 2007, he would have had the benefit of the refund of the pension contribution under the transitional arrangements. He also contends that the Medical Adviser breached his duty of care to him when, notwithstanding that his sick leave was extended to 30 September 2007, the Medical Adviser did not seek an updated medical report from his (the complainant's) medical practitioner until 17 October 2007. The Medical Adviser stated that the delay was caused by a heavy workload. This is understandable. In any event, it does not appear that there was an unreasonable delay in the invalidity process to ground a breach of duty of care by the Medical Adviser or by the EPO by extension.

27. In the foregoing premises, the complaint is unfounded and accordingly must be dismissed.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 9 May 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 9 July 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ