NINETY-SEVENTH SESSION

Judgment No. 2341

The Administrative Tribunal,

Considering the complaint filed by Mr R. F. against the European Patent Organisation (EPO) on 16 September 2003 and corrected on 11 October 2003, the EPO's reply of 19 January 2004, the complainant's rejoinder of 20 February, and the Organisation's surrejoinder of 29 March 2004;

Considering Article II, paragraph 5, 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 is of German nationality and was born in 1949. He entered the service of the European Patent Office – the EPO's secretariat - in 1985 as an examiner at grade A3. He is currently a member of a board of appeal in Directorate-General 3.

On 28 June 2001, at its 85th meeting, the Administrative Council approved a decision (CA/D 12/01) introducing provisions for long-term care (LTC) insurance, as well as the relevant implementing rules, into the Service Regulations for permanent employees of the European Patent Office. By that decision LTC insurance was introduced into the Office's social security scheme with effect from 1 July 2001.The measures were brought to the notice of staff by a circular issued on 2 July 2001. At that stage, staff had not been informed individually how much their contributions to the insurance scheme would be.The circular explained that for technical reasons, pending the implementation of new software, a provisional contribution would be levied. The amount due for the insurance of spouses, former spouses and other dependants was to be adjusted during 2002.

On 28 September 2001 the complainant lodged an appeal with the Appeals Committee of the Administrative Council against the Council's decision of 28 June 2001, and more particularly against the implementing rules referred to above. At the time when he filed his appeal, there were no staff representatives on the Administrative Council's Appeals Committee. By a decision of 11 October 2000, taken following Judgment 1896 rendered by the Tribunal in February 2000, the Council had amended Article 37 of the Service Regulations, which specified the bodies on which staff are represented. As a result of an amendment to Article 37(c) there were to be staff representatives only on the Appeals Committee dealing with appeals against decisions taken by the President of the Office.

On 18 March 2002 the complainant requested a suspension of the appeal proceedings. His request was refused. On 26 November 2002 he was heard by the Council's Appeals Committee, which found that the appeal lacked foundation and unanimously recommended rejecting it. The Administrative Council followed that recommendation and rejected his appeal. By a letter of 10 June 2003 the Chairman of the Administrative Council notified that decision to the complainant. That is the impugned decision.

By Judgment 2244, delivered on 16 July 2003, the Tribunal ruled on a case brought by three complainants who argued in favour of having staff representatives on the Appeals Committee of the Administrative Council. They appealed against the amendment to Article 37(c). In Judgment 2244, the Tribunal ruled that "the discrimination introduced by the amendment of Article 37 of the Service Regulations is unjustified and must therefore be deplored". The present complainant was an intervener in that case and on 16 September 2003 lodged this complaint with the Tribunal.

On 30 October 2003 the Administrative Council adopted decision CA/D 14/03 amending both Articles 37(c) and

110 of the Service Regulations in order to provide for staff representation on its Appeals Committee.

B. The complainant argues that the decision of 10 June 2003 rejecting his internal appeal relating to long-term care insurance cannot stand, because the procedure by which it was arrived at was fundamentally flawed. It was based on the opinion of an incorrectly composed Appeals Committee, since there were no staff representatives on the Committee that heard his case. All its members had been unilaterally appointed by the Council itself, resulting in a one-sided composition. He submits that the rulings of the Tribunal in both Judgments 1896 and 2244 confirm that a balanced composition of the Appeals Committee is a fundamental right of EPO employees, and he was denied that right. It is therefore clear that the decision rejecting his appeal was taken in breach of due process. On that basis, the decision should be set aside, and, in order to safeguard his right to the internal means of appeal, the proceedings must be conducted by a correctly composed Committee. Furthermore, as he was an intervener in the case that led to Judgment 2244, he says that the benefit of that judgment should be extended to him.

He considers that he was "denied his fundamental right to a fair trial" and that crucial parts of his pleas were not taken into account. First, he had requested a suspension of the internal appeal proceedings given that the case that led to Judgment 2244 was pending before the Tribunal, but his request was turned down without reasons being given. Secondly, in writing and again at the hearing, he had objected to the "incorrect" and "unilateral" composition of the Appeals Committee, but the Committee failed to take proper account of that in its opinion. Thirdly, no representative of the Administrative Council – the defendant in his internal appeal – was present at the hearing before the Appeals Committee. However, it is clear from Article 6(2) of the Committee's Rules of Procedure that the Chairman "shall invite the parties in writing to hearings", but this was not complied with.

Furthermore, he is still suffering as a result of the delay regarding a proper decision on the matter of the legality of the high level of contributions for long-term care insurance which are being deducted from his salary every month.

The complainant seeks the quashing of the decision of 10 June 2003. He wants his internal appeal to be remitted to the Administrative Council for it to take a decision on his appeal on the basis of an opinion obtained from a "correctly composed" Appeals Committee. He seeks an award of 1,000 euros in moral damages, as well as 2,000 euros in costs.

C. The Organisation submits that the complainant's pleas are unfounded and that the decision of 10 June 2003 is not open to criticism. The decision was taken on the basis of the opinion of an Appeals Committee that was properly constituted according to the rules then in force. At that time there was no provision for staff representatives on the Appeals Committee of the Administrative Council. The Committee that heard the complainant's appeal of 28 September 2001 was composed in accordance with Article 110(3) of the Service Regulations, which made no provision for staff representatives. In the version then in force that article provided as follows: "In respect of appeals against decisions of the Administrative Council, the Chairman and full members of the Committee shall be appointed by the Administrative Council each year." The situation changed only after Judgment 2244 was rendered in July 2003. And as is clear from the Tribunal's case law, the Tribunal will review a decision "in the context of fact and law that obtained when it was taken".

The Organisation does not accept the complainant's plea that he was denied "a fair trial".It is clear from the Appeals Committee's report that the Administrative Council explained in detail its view on his appeal, and he too had the opportunity to develop his arguments in writing, and orally during the hearing. It explains that the Administrative Council itself had not requested a hearing,but one was nonetheless organised in line with the Appeals Committee's Rules of Procedure. With regard to his request for a suspension of the appeal proceedings, it was turned down on formal grounds because such a request could only come from the Administrative Council, and not from the appellant. His request was also considered to be devoid of merit because, as the law stood, the Committee's composition was lawful.

The Organisation notes that the issue of contributions to the long term care insurance scheme is only indirectly addressed by the complainant, and responds to the arguments put forward by the complainant in his internal appeal.

D. In his rejoinder the complainant expands on his pleas. He points out that in Judgment 2244 the Tribunal set aside the decision by which the Administrative Council established a one sided composition of its Appeals Committee, and that under point 5 of its ruling it stated that the benefit of that judgment should be extended to the interveners. He wants point 5 of the ruling to be "put into effect" in the present proceedings.

With respect to the procedural issues regarding the hearing before the Appeals Committee, he contends that according to the Rules of Procedure that applied, the Committee's Chairman should have invited the Council's representative to the hearings even though the Council itself had not requested hearings.

E. In its surrejoinder the Organisation asserts that Judgment 2244 applies only *ex nunc* and not with retroactive effect.

It reiterates that both parties in the internal appeal expressed their views in writing and the right to be heard of each party was thus respected.

CONSIDERATIONS

1. On 28 June 2001 the EPO's Administrative Council approved a decision introducing long-term care (LTC) insurance into the Office's social security scheme. The practical arrangements for setting up the scheme were embodied in a circular issued by the Vice-President of Directorate General 4 on 2 July 2001.

2. On 28 September 2001 the complainant filed an internal appeal against the Council's decision of 28 June 2001. The appeal was heard by the Council's Appeals Committee on 26 November 2002. In the opinion it issued, the Committee unanimously recommended that the appeal be rejected for lack of foundation. On the basis of that opinion, the Administrative Council decided to reject the appeal and the Council's Chairman informed the complainant of this decision on 10 June 2003.

3. The complainant impugns that decision on the grounds that it was based on the opinion of an incorrectly composed Committee which was, therefore, not in a position to deliver a valid opinion. In his complaint he asks that the Tribunal set aside the decision taken by the Administrative Council on his appeal, and that the appeal be remitted to the Council for it to take a decision only after having obtained an opinion by a "correctly composed" Appeals Committee. Furthermore, he seeks moral damages, and costs.

4. The complainant contends that all the members of the Appeals Committee that gave an opinion on his appeal had been unilaterally appointed by the Council itself, with no staff representatives. In Judgment 2244, delivered on 16 July 2003, the Tribunal held such a one-sided composition of the Committee to be discriminatory and set aside the Council's decision by which it had amended Article 37 of the Service Regulations.

5. An explanatory note by way of background is called for. Article 110 of the Service Regulations, is headed "Composition of the Appeals Committee". At the material time, paragraph 1 of that article specified that the Appeals Committee "shall consist of a Chairman and four full members". Paragraph 3, concerning appeals against decisions taken by the Administrative Council, provided that: "the Chairman and full members of the [Appeals] Committee shall be appointed by the Administrative Council each year". Paragraph 4, concerning appeals against decisions taken by the President of the Office, stated that: "the President shall each year […] appoint a Chairman and two full members of the Committee". Unlike paragraph 3, paragraph 4 additionally stated that: "The Staff Committee shall at the same time appoint two full members of the Committee".

6. When the Appeals Committee of the Administrative Council was set up for the first time in 1996, Article 37 of the Service Regulations provided, inter alia, that:

"The staff shall be represented on the following bodies:

[…]

c) the Appeals Committees".

7. In a complaint filed before the Tribunal in 1998, four EPO staff members challenged the Administrative Council's rejection of a request made by the Central Staff Committee to have staff representatives sit also on the Council's Appeals Committee, and not only on the President's Appeals Committee. In support of their claim they cited Article 37(c) which provided that the staff shall be represented on "the Appeals Committee<u>s</u>" (in plural form). In Judgment 1896, delivered on 3 February 2000, the Tribunal set aside the decision of the Council challenged by the complainants and sent the case back to the EPO, leaving it up to the Organisation to find a solution to ensure staff representation on both Appeals Committees.

8. By way of complying with the Tribunal's ruling, the Administrative Council, on 11 October 2000, amended Article 37 of the Service Regulations to read:

"The staff shall be represented on the following bodies:

[…]

c) the Appeals Committee referred to in Article 110, paragraph 4".

In effect, the amendment merely reiterated Article 110(4) so that staff representatives would sit only on the Committee hearing appeals against decisions of the President of the Office. It did not provide for staff representation on the Appeals Committee handling appeals against decisions of the Administrative Council.

9. The legality of the new rule was addressed by the Tribunal in Judgment 2244, delivered on 16 July 2003. The discrimination introduced by the amendment of Article 37 of the Service Regulations was declared unjustified inasmuch as the amendment did not allow officials in the same circumstances to be treated in the same way. No objective considerations were shown by the Organisation which would justify a different treatment between those whose appeals are against decisions of the President and those whose appeals are against decisions of the Administrative Council. As in Judgment 1896, the Tribunal refrained from issuing instructions regarding modifications to be introduced in Article 110(3) inasmuch as it was for the Organisation to take whatever steps were necessary to comply with the Tribunal's ruling. Hence, the impugned decision was set aside and the case sent back to the EPO.

10. In the present case, the EPO submits that the complainant's internal appeal was lodged on 28 September 2001, and the Administrative Council's adverse decision was notified to him on 10 June 2003, and that at both those dates the Appeals Committees were still constituted according to the laws then in force. The situation changed only after the publication of Judgment 2244. That judgment, under whose terms the complainant seeks to benefit, being one of the interveners in that case, was delivered only on 16 July 2003. In the Organisation's view, to hold that the Appeals Committee which heard the complainant's case was improperly constituted would be to apply retroactively the 16 July 2003 decision of the Tribunal, which would be contrary to the fundamental legal principle against retroactivity. This is a false argument: the Tribunal's declaration in Judgment 2244 to the effect that the Appeals Committee was improperly constituted was not merely applicable to those committees which came into being after the date of that judgment. On the contrary, it applied to all committees improperly constituted according to the reasoning set forth in the judgment. A declaration of invalidity is necessarily retrospective and includes the Appeals Committee which heard the complainant's case. Since the impugned decision is based on that Committee's recommendation, it is fatally flawed and must be set aside. The matter must be returned to the Administrative Council for a new decision after a new hearing before a properly constituted Appeals Committee.

11. It is not necessary to take up the complainant's other pleas, nor to consider his claim for damages which is necessarily dependent upon the validity of his claim on the merits. He is, however, entitled to his costs which the Tribunal sets at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The case is sent back to the Administrative Council for a new decision after a new hearing before a properly constituted Appeals Committee.

3. The EPO shall pay the complainant costs in the amount of 2,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.