The Administrative Tribunal,

Considering the second complaint filed by Mr C. T. against the European Patent Organisation (EPO) on 15 February 2005 and corrected on 24 March, the EPO's reply of 20 June, the complainant's rejoinder of 27 August and the Organisation's surrejoinder of 15 November 2005;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Information about the complainant's career with the EPO and his illness is to be found in Judgment 2541, also delivered this day, on the complainant's first complaint.

In a report signed on 1, 2 and 9 October 2002 the Invalidity Committee that had previously dealt with the issue of the complainant's fitness for work and extended sick leave prescribed a three-week spa cure as being medically necessary. However, on 11 October 2002 the Head of Administration at the Berlin sub-office informed the complainant that the decision of the Invalidity Committee would not be implemented. The complainant appealed against the Head of Administration's decision the same day and the appeal was subsequently registered under the reference RI/57/02. Also on 11 October, he submitted a formal request for a three-week cure.

On 14 October 2002 the Head of Administration informed the members of the Invalidity Committee that their fees would not be paid because the Committee had not been "empowered" to act as it did, the Committee's mandate having tacitly expired after it had been decided that the complainant was fit to return to work on 1 January 2002. He added that sole competence for questions relating to spa cures rested with the Office's medical adviser.

Further to his request of 11 October, the complainant was examined by the medical adviser on 1 November 2002 and his cure was then approved; it took place from 12 November to 4 December. The complainant having exhausted his entitlement to sick leave under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office, the Office informed him by a letter of 21 November 2002 that his sick leave was extended for the duration of the cure. In a fax of 26 November 2002 the Head of Administration informed the members of the Invalidity Committee that, since the medical adviser had come to the same conclusion as the Committee concerning the complainant's need for a cure, and since it would subsequently have been necessary to convene a new Committee to consider the issue of extended sick leave, payment of their fees had been "exceptionally" approved. However, the position conveyed to them on 14 October was otherwise maintained.

The complainant informed the Vice-President in charge of Directorate-General 4 in a letter of 13 February 2003 that the Invalidity Committee's decision on his extended sick leave had not yet been communicated to him as required under Article 92(2) of the Service Regulations; in the event that the Berlin Administration failed to transmit the requested decision, he asked for his letter to be treated as an internal appeal. The Head of Administration sent him the requested report on 28 February 2003 and pointed out that he considered that all matters had been so settled. The Office wrote to the complainant on 3 April 2003 noting that since he had not confirmed that he was withdrawing this appeal it would be heard concurrently with the appeal registered as RI/57/02.

In its report dated 14 September 2004 the Appeals Committee considered that the complainant had ultimately received satisfaction, as the Office had recognised by way of exception "the vote of the Invalidity Committee regarding the extension of his sick leave and the finding of serious illness". Nevertheless, it considered that he had suffered injury because the start of the cure had been delayed by an initial withholding of approval and by the fact that an examination by the medical adviser had been required. In its view "a conclusive case" had been made for a claim of moral injury and therefore it unanimously recommended that the appeal be allowed and that damages be

paid in an amount left to the President's discretion. In a letter dated 17 November 2004 the complainant was informed by the Director of Personnel Management and Systems that, although the President of the Office had decided "as a gesture of goodwill" to grant him a "gratuity payment" of 500 euros, he did not adopt the Appeals Committee's reasoning and the Office did not accept liability "for any moral damage suffered". That is the impugned decision. On 10 December 2004 the same official wrote to the complainant on the President's behalf to provide him with "some additional information as to the reasons underlying the President's decision to reject [the] Appeal[s] Committee's recommendation".

B. The complainant submits that even though his cure had been approved by the medical adviser prior to the time he left for it, this had not resolved the issue of his extended sick leave. Thus he ran the risk of having to forfeit annual leave or to face disciplinary action for unauthorised absence. The cure's delay as well as the uncertainty surrounding its approval caused him physical and moral injury. He notes that the Appeals Committee concluded that he was entitled to damages on this ground.

The complainant argues that at all material times the Invalidity Committee was validly constituted. Furthermore, any medical adviser who is not also a member of such a Committee is nevertheless bound by the latter's decisions. He points out that the "medical adviser" referred to in the Collective Insurance Contract is not competent to authorise extended sick leave. This means, according to him, that the medical adviser is subordinate to the Committee and does not have the authority to review its decisions. Furthermore, the Collective Insurance Contract does not form part of his employment contract. It limits neither the EPO's duty of care nor its obligation to provide adequate medical insurance coverage. Where an Invalidity Committee has already determined that treatment is medically indicated it is not necessary for the employee to obtain the agreement of the medical adviser or to be examined by the latter in order to establish the extent of the entitlement to insurance coverage.

He contends that the internal appeals procedure breaches the rule "*nemo judex in causa sua*", and he submits that the impugned decision was defective in form because the President failed to explain adequately the reasons underlying it.

The complainant asks the Tribunal for a declaration that the EPO's action, "to remove" the Invalidity Committee while his cumulative sick leave exceeded the limit set out in the Service Regulations, was unlawful; a declaration that the medical practitioner appointed by the EPO did not have the power to overturn the decision of the Invalidity Committee; a declaration that the Organisation's duty of care is not limited by the terms of its Collective Insurance Contract and that the procedure in this case, if valid, renders the insurance provided inadequate; and a declaration that the decision of the EPO not to recognise the Invalidity Committee's decision was unlawful and is therefore set aside. He also claims damages in the amount of 5,000 euros as well as costs.

C. In its reply the EPO concedes that the Invalidity Committee's mandate does not expire as long as the maximum period of sick leave continues to be exceeded, but it insists that the Committee cannot be consulted or convened without the President's knowledge. As the Committee was so convened, it was legitimate for the Organisation not to accept its report of October 2002 prescribing the spa cure. Since the complainant's situation was "exceptional and without precedent", he should have consulted the Berlin Administration as to how to proceed. Rather than waste time reconstituting the Committee with the medical adviser as a member, the EPO confined itself to sending the complainant to the medical adviser to seek confirmation of the Invalidity Committee's opinion as to the necessity of the spa cure.

The Organisation considers that in cases such as this, in order to reconcile the Service Regulations with the Collective Insurance Contract, the appropriate solution is to replace its appointee to the Invalidity Committee with its medical adviser. Nonetheless, the complainant is bound by the provisions of the Collective Insurance Contract, since they form part of the Service Regulations. The Invalidity Committee had overstepped the limits of its mandate because the medical adviser must be consulted before a spa cure can be taken.

The EPO contends that the delay in the complainant's cure was due to a procedural error, namely that its medical adviser was not a member of the Invalidity Committee, that could have been avoided if the President had been notified from the outset that the Committee would have to be reconvened. In any event, it tried to rectify the situation as quickly as possible when it was made aware of it, therefore there is no merit to the allegation that it was responsible for the delay in the start of the cure. The defendant points out that no proof has been presented that it was imperative for the complainant to start the cure on a particular day, and it denies that the delay caused him any injury.

Concerning his argument that the President's decision was flawed for want of reasons, it submits that this flaw was rectified by the second letter in which these were included.

The Organisation does not object to the complainant's first claim, provided that the President is informed before an Invalidity Committee is consulted. It considers his other claims to be without merit.

D. In his rejoinder the complainant argues that the EPO has given the medical adviser an effective right of veto over the Invalidity Committee, but such a right cannot be supported by any reasonable interpretation of the Service Regulations. Since the Committee was not *functus officio* at the relevant time, it was "entitled and obliged", under the Service Regulations, to give instructions on the complainant's cure. He denies that the EPO attempted to remedy its errors and submits that the Organisation compounded these by wrongfully requiring him to undergo an unnecessary second medical examination.

He submits that the pleadings and annexes thereto show how he was in pain and adequately support his claim for damages.

E. In its surrejoinder the EPO contends that the fact that one of the members of the Invalidity Committee is appointed by the President does not release the complainant from his obligation to inform the President of any "referral" to the Committee. It denies that this obligation breaches the Service Regulations. In having the complainant examined by the medical adviser it was not attempting to give the latter any "right of veto" but rather to rectify procedural defects.

CONSIDERATIONS

1. The facts underlying the complainant's second complaint slightly antedate those of his first complaint which is disposed of concurrently herewith (see Judgment 2541). As in that complaint, he seeks damages stemming from irregularities in proceedings before the Invalidity Committee.

2. In its February 2002 report the Invalidity Committee determined that the complainant was fit to return to full-time work as from 1 January 2002, but that he had a severe enduring illness that would require future treatment to mitigate pain and preserve the knee joint. In October 2002 the Committee found that a three-week spa cure was absolutely medically necessary. But the Head of Administration at the Berlin sub-office informed the complainant on 11 October 2002 that the Administration would not implement the Committee's decision. In a faxed letter dated 14 October 2002 to the members of the Invalidity Committee he further stated that the Committee had not had the power to make the decision it rendered in October 2002. The letter indicated that the Committee had ceased to have a mandate since its decision that the complainant could return to work full-time earlier that year and that any question relating to cures was subject to the sole discretion of the Office's medical adviser. On these grounds the EPO initially declined to pay the medical fees incurred for participation in the Committee, although these eventually were paid.

3. The complainant filed an application for a three-week cure. He underwent an additional medical examination by the medical adviser, who found on 1 November 2002 that the cure was absolutely necessary and signed the request.

4. The complainant started his spa cure on 12 November 2002, despite not having received a formal agreement from the EPO. The complainant alleges that he consequently took the risk that he would lose his annual leave or face disciplinary action for unauthorised absence.

5. The EPO gave its permission for extended sick leave for the period of the cure on 21 November 2002. The EPO's letter states that the medical adviser does not have the authority to grant extended sick leave, but that the EPO exceptionally agreed to grant the leave in this case since the opinions of its adviser and the Committee were consistent.

6. The complainant alleges that as a result of the above his cure was needlessly delayed by 32 days, and he consequently suffered pain, injury, loss and damage. He claims that he suffered unnecessary personal distress and anxiety, and underwent an additional unnecessary medical examination. The complainant submits that the EPO's actions left him uncertain as to whether the Office would accept his cure as absolutely medically necessary, as to

whether the costs would be covered, as to whether his extended sick leave would be recognised, and as to whether doctors' fees would be paid in full. The complainant also alleges that the lack of a mandate for the Committee caused him distress since he feared he would not be granted sick leave for any reason until a Committee was re-established.

7. The Appeals Committee recommended that the complainant's claim for damages stemming from delay should be allowed, but left the amount of damages at the President's discretion. By a letter dated 17 November 2004 the complainant was informed that the President of the Office had refused to adopt the Appeals Committee's recommendations but added that he was prepared to pay him a gratuity payment of 500 euros. That is the impugned decision. By a further letter dated 10 December 2004, the EPO provided detailed reasons for the President's decision.

8. Much of the parties' pleadings in this file is taken up with discussing an issue which is no longer lively, namely whether or not the mandate of the Invalidity Committee survived the Committee's determination in early 2002 that the complainant was fit to return to work. Not only has the EPO now effectively conceded the point, but the Tribunal has settled it by Judgment 2541.

9. The EPO argues that the complainant was not entitled to consult the Invalidity Committee without the President's knowledge. It explains that it is standard practice for the President to refer issues to the Committee, or for the employee to request that a matter be addressed by the Committee after submitting such a request to the President. It contends that since the Committee prescribed a spa cure without first informing the President that it was convening, it was open to the President not to accept its report. The Organisation also contends that it could not accept the report since its medical adviser was not consulted as required by the Collective Insurance Contract in Article 20, paragraph 4.8(a). The EPO argues that its decision to replace the Invalidity Committee member appointed by the President of the Office with the medical adviser was logical and intended to reconcile the Service Regulations and the Collective Insurance Contract. It submits that its suggested action would comply with the principle that a party may replace its appointed Committee member when there are important reasons for doing so. The EPO also argues that it is not required to assign the Committee member and medical adviser positions to the same person.

10. In the Tribunal's view, the complainant was quite entitled to submit his request to the Invalidity Committee and no rule or practice has been shown to the effect that only the President can convene the Committee. Likewise, the Invalidity Committee as a professional medical body is called on to give its opinion on purely medical questions and when such a question is referred to it, as happened in this case, there is no requirement that the President be notified other than through his representation by his own appointee on the Committee.

11. The EPO argues that the delay in the cure was due to the procedural error of not having the medical adviser on the Committee. That is solely the EPO's responsibility and it is up to it to see that the persons it has appointed to Invalidity Committees occupy appropriate positions in its own hierarchy.

12. The EPO acted improperly by requiring the complainant to undergo a second medical assessment before finally accepting the recommendation that he receive a spa cure. It concedes in its surrejoinder that the complainant's additional medical examination was "merely a formal step taken in order to rectify the defects in the procedure". If that is so, and the formal defect being in no way of the complainant's making and the medical adviser not having any authority to overrule the Invalidity Committee, there was no need to carry out an additional examination and it would have been enough for the medical adviser to act on the basis of the Committee's report. As was found by the Appeals Committee, the medical adviser was bound by the vote of the Invalidity Committee. The Appeals Committee determined that the Invalidity Committee has the sole competence to determine whether to extend sick leave beyond the maximum prescribed period, and that it is authorised to prescribe a spa cure in order to restore a staff member's fitness for work.

13. The EPO's reliance on the Collective Insurance Contract is misplaced. Not only is the complainant not a party to that contract, but a careful reading of Article 20, paragraph 4.8, reveals that it provides for the reimbursement of spa cures "[i]n case of absolute medical necessity and after advance agreement has been given by the Office's medical adviser". The Collective Insurance Contract therefore only requires that the medical adviser give advance agreement. It does not require that the latter conduct a medical examination. This suggests that the medical adviser could have provided the "formal step" desired by the EPO by agreeing to the report of the Invalidity Committee without conducting an independent additional medical examination.

14. The President of the Office denied that any error on the part of the EPO gave rise to damages. On 17 November 2004 the Director of Personnel Management and Systems wrote to the complainant on the President's behalf to inform him that the reasoning of the Appeals Committee would not be adopted. In a letter dated 10 December 2004, the same Director provided detailed reasons for the President's decision to reject the Appeals Committee's recommendation. He indicated that the President disagreed with the Appeals Committee's assumption that the spa cure was delayed by the EPO's actions as there was no evidence as to the possible date for the commencement of the cure, nor any evidence that the additional medical examination led to a postponement of the starting date of the treatment. The letter reaffirms the Office's position that it attempted to process the complainant's application for a cure rapidly, and sought to avoid causing him needless distress. There was also no evidence that the complainant's health was prejudiced due to the involvement of the medical adviser.

15. The complainant contests this decision by stating that the President violated the *nemo judex* principle, by arguing that the President failed to provide adequate reasons for his refusal to accept the Appeals Committee's recommendation, and by submitting that he did in fact suffer injury. The *nemo judex* principle is not applicable to the President's decision of 17 November 2004 because that decision is not a judicial decision. As the Tribunal stated in Judgment 2339, "[t]he President is acting in a quasi-judicial capacity and he must be, and be seen to be, objective and impartial". The quasi-judicial designation means that the Office cannot engage in judicial decision-making if it is also a party to a dispute. The quasi-judicial designation also means that the President's decision is not a binding, judicial decision, but rather is the final stage of internal efforts to resolve a dispute between the EPO and a complainant.

16. The complainant's submission that the President failed to provide timely reasons for rejecting the Appeals Committee's recommendation must also be rejected. Although the letter providing reasons was sent after the initial letter notifying the complainant that the Organisation would not accept the recommendation, the interval was short and there is no suggestion that the reasons were a mere afterthought added after it had become known that a complaint to the Tribunal had been brought. The complainant could have suffered no prejudice from the short delay.

17. The remaining issue is whether the Tribunal should find that the complainant suffered injury that could be compensated by damages. The letter of 10 December 2004 clearly summarises the assumptions made by the Appeals Committee in determining that the complainant suffered injury. Although the Appeals Committee drew certain inferences in finding that the start of the cure was delayed by the initial unwarranted withholding of approval and the improper requirement for further examination by the medical adviser, this was inherent to the Committee's fact-finding role and entirely reasonable under the circumstances. The complainant alleged that his treatment was delayed by 32 days and while the record is somewhat ambiguous as to when the clock should have started to run, and when it stopped, the EPO's bureaucratic and obstructive attitude, its refusal to accept the Invalidity Committee's findings, its insistence on the complainant undergoing a second medical examination, and the time that it took the EPO to forward the second medical report to the complainant, no doubt delayed the complainant's ability to begin his spa cure. Those delays caused him anxiety and distress and justify his claim for moral damages which the Tribunal assesses at 1,000 euros. He is also entitled to costs of 2,000 euros.

18. As in his first complaint, the complainant's claims for declarations as to the state of the law are not receivable and must be dismissed.

DECISION

For the above reasons,

1. The impugned decision is set aside to the extent that it rejects the complainant's appeal.

2. The EPO shall pay the complainant damages of 1,000 euros in addition to any "gratuity" payment already paid.

3. It shall pay him costs of 2,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.