110th Session **Judgment No. 2994**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. O. A. T. against the European Patent Organisation (EPO) on 23 July 2008, the EPO's reply of 22 December 2008, the complainant's rejoinder of 27 March 2009 and the Organisation's surrejoinder of 10 August 2009;

Considering the application to intervene filed by Mr I. C. T. on 2 September 2010 and the EPO's comments thereon of 16 September 2010;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant, an Italian national born in 1950, joined the European Patent Office – the EPO's secretariat – in July 1990 as an examiner. He currently holds grade A4.

In November 2007 the President of the Office proposed to the EPO's Administrative Council a set of measures aimed at curbing the

Office's increasing expenditure on sickness insurance. These measures, which concerned the conditions of insurance applicable to employees' spouses, involved amending Article 83 of the Service Regulations for Permanent Employees of the European Patent Office as well as the Implementing Rule thereto. The necessary amendments were approved by the Council on 14 December 2007 in decisions CA/D 29/07 and CA/D 30/07 with effect from 1 January 2008.

Prior to the amendment of Article 83, employees' spouses were automatically covered by the Office's sickness insurance scheme at no extra cost, regardless of their income and of whether or not they were also covered by another scheme, such as a compulsory national health insurance scheme. Under the new version of Article 83, however, a contribution is payable in respect of spouses gainfully employed outside the Office if they are exempted by national law from affiliation to a compulsory sickness insurance scheme and if they have no other primary sickness insurance cover, except where their earnings fall below a defined threshold. Furthermore, gainfully employed spouses who are entitled to reimbursement of their medical expenses under another primary sickness insurance scheme are now obliged to seek reimbursement from that scheme in the first instance, before claiming the balance of their medical expenses, if any, from the Office's scheme. Thus, they are entitled only to complementary cover under the Office's scheme, except where the primary cover restricts the choice of medical provider. These measures and the corresponding contribution levels were announced to the staff in Circular No. 304 of 21 December 2007.

The amendment also affected the situation of divorced spouses. When an employee or pensioner of the Office divorces, the former spouse ceases to be covered by the Office's sickness insurance scheme. Under the old rules, the former spouse's cover would resume in the event that he or she became entitled to a survivor's pension following the death of the employee or pensioner. Under the new rules, surviving former spouses are excluded from cover under the Office's scheme.

The complainant's payslip for February 2008 showed a deduction of 166.12 euros representing the contribution for his spouse's sickness

insurance. On 10 March 2008 he lodged an appeal with the President of the Office in which he sought the quashing of the amendment to Article 83, moral damages and costs. He also lodged his appeal with the Chairman of the Administrative Council. On 13 March the Director of Employment Law informed all staff by means of an intranet publication that a number of appeals had been lodged against the amendment of Article 83 and that, following an initial examination of those appeals, the President had decided that they could not be allowed. Consequently, the appeals had been referred to the Internal Appeals Committee for opinion and the appellants would be informed in due course of the detailed reasons for the President's decision. This communication was written in French. On 4 April it was published on the intranet in the two other official languages of the Office, namely English and German.

On 17 April 2008 the Director of the Internal Appeals Committee sent an e-mail to the complainant, confirming that his appeal had been registered under the reference RI/08/08. He notified the complainant that, in view of the large number of appeals that had been filed against the sickness insurance contribution for working spouses, the Committee intended to resort to "test-appeal" procedures: the appeals of several "test-appellants" would be examined, and the remaining appeals would be suspended until the Committee had issued an opinion on the "test-appeals"; that opinion, as well as the President's final decision on the "test-appeals", would be communicated to the other appellants, who could then decide whether or not they wished to pursue their individual appeals. The complainant was invited to indicate by 30 May 2008 whether he wished to be a "test-appellant", but he did not avail himself of that option. A similar e-mail was sent simultaneously to each of the other appellants.

By a letter of 30 June 2008 the Director of Employment Law informed the complainant that the appeal he had lodged with the Administrative Council had been referred by the Council to

the President of the Office, who had in turn referred it to the Internal Appeals Committee, which had registered it under the reference RI/08/08.

On 23 July 2008 the complainant filed a complaint with the Tribunal, in which he impugns the implied rejection of his appeal dated 10 March 2008.

B. The complainant contends that his complaint is receivable under Article VII, paragraph 3, of the Statute of the Tribunal because he did not receive "a proper legally valid communication about a President's decision" within sixty days of the date on which he lodged his appeal. In his view, a decision on his appeal should have been sent to him by the President herself, and in a form requiring acknowledgement of receipt, but neither the intranet publications of 13 March and 4 April nor the e-mail of 17 April from the Director of the Internal Appeals Committee satisfy those requirements. The complainant argues that the President failed to take a decision on some of his claims within the above-mentioned period. He points out that his appeal concerned not only the contribution levied in respect of working spouses, but also the shift from primary to complementary insurance and the exclusion from the Office's scheme of former spouses in receipt of a survivor's pension, yet the communications of 13 March, 4 April and 17 April refer only to the first of these issues. Lastly, he submits that, in addition to being contrary to the Service Regulations, the unilateral decision to suspend his appeal pending the outcome of the "test-appeals" leaves him no means of resisting the Administration's decisions and also prevents their timely review.

On the merits, the complainant argues that the disputed amendments constitute an infringement of his acquired rights. Referring to the Tribunal's case law on this matter, he asserts that the sickness insurance scheme as a whole was crucial to his decision to accept the Office's offer of employment and that he has an acquired right to the insurance conditions embodied in the provisions of Article 83 as they stood at the time of his appointment. He acknowledges that

the Administrative Council has the power to amend the Service Regulations, provided that it respects the acquired rights of staff members. In his opinion, the Office is entitled to change the conditions of its sickness insurance for future staff members, but not for serving employees. He also stresses that, in view of the "huge profit" generated by the EPO, the reason for the changes in question, namely to save money, does not justify breaching the acquired rights of staff members. According to the complainant, decisions CA/D 29/07 and CA/D 30/07 are based on insufficient and incorrect information, and they belong to a series of decisions taken in recent years which tend to erode his conditions of employment.

The complainant asks the Tribunal to quash decisions CA/D 29/07 and CA/D 30/07 *ab initio* and to order the EPO to reimburse all deductions made from his salary in respect of his spouse's sickness insurance and to refrain from making such deductions in the future. He claims 9,000 euros in moral damages and 2,000 euros in costs, and he requests an oral hearing.

C. In its reply the EPO submits that the complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal for failure to exhaust internal remedies. It explains that, according to the case law, a decision whereby an internal appeal is provisionally rejected and referred to the Internal Appeals Committee constitutes indeed a decision, which precludes the application of Article VII, paragraph 3, of the Tribunal's Statute. In this case, such a decision was communicated to the complainant, first by the Director of Employment Law in his intranet publications of 13 March and 4 April 2008 and then by the Director of the Internal Appeals Committee in his e-mail of 17 April, i.e. within sixty days of the filing of his appeal. The defendant adds that the complainant is well aware, having already been a party to an internal appeal procedure, that the authority to convey such a decision to him has been validly delegated to the Director of Employment Law and that both e-mail and – in the case of a mass appeal – the intranet are valid means of communicating the

decision. Dismissing the complainant's argument that the President did not take a decision on all of his claims, the Organisation states that the reference in the communications of 13 March and 4 April 2008 to the "spouse's additional sickness insurance contribution" was made for the sake of "convenience and increased understanding", since that was the main issue raised in the appeals. Regarding the legality of the "test-appeal" procedure, it argues that the Internal Appeals Committee must be allowed to adapt its normal procedure when faced with mass appeals, and that this is in the interest of the staff concerned insofar as it avoids undue delays. Lastly, the EPO asserts that the complainant's claims relating to the primary use of other insurance schemes and the exclusion of surviving former spouses from the Office's scheme are irreceivable because he has no cause of action with respect to these matters.

Subsidiarily, the defendant submits that the complaint is unfounded. It points out that the provisions concerning health insurance are statutory provisions applying to all permanent employees and that the rights derived from them cannot be considered to be contractual. According to the case law, such provisions may evolve over time and they may be altered unilaterally by the Organisation. In the EPO's view, the modalities of affiliation of employees' spouses to the Office's sickness insurance scheme cannot be seen as a decisive factor in the decision to accept employment with the Office and hence do not give rise to any acquired rights for employees.

The Organisation observes that, in accordance with the principle of sound financial management, steps had to be taken to strengthen the financial situation of the sickness insurance scheme. It emphasises that the requirement to exhaust rights under other health insurance schemes before turning to the Office's scheme already existed in Article 83(6) of the Service Regulations prior to the disputed amendments and that a contribution is only required if a spouse's earnings amount to more than 50 per cent of the basic salary of an employee in grade C1, step 3.

D. In his rejoinder the complainant maintains that his complaint is receivable and reiterates his arguments on the merits. He disputes the

Organisation's statement that the requirement to exhaust rights under other insurance schemes before turning to the Office's scheme existed prior to the amendment of Article 83.

E. In its surrejoinder the EPO states that the complainant's rejoinder introduces no argument liable to modify the position expressed in its reply, which it maintains in full.

CONSIDERATIONS

1. On 10 March 2008 the complainant lodged an internal appeal with respect to decisions amending Article 83 of the Service Regulations. He sought the "[q]uashing of the amendment of Art. 83 […] *ab initio*", stating in his covering letter:

> "This implies in particular, that there is no replacement of the EPO sickness insurance as primary sickness insurance [...], that ex-spouses continue to be included in a possible future cover [...], that no additional sickness insurance premium is introduced for family members, that the deductions already made are reimbursed and that in the future such deductions are no more made."

Slightly more than one hundred other staff members filed similar appeals.

2. The Director of Employment Law notified all staff members, by a publication on the intranet on 13 March 2008, that a number of appeals had been lodged against the application of the amendment of Article 83 "provid[ing] for the levy of an additional sickness insurance contribution for a spouse in gainful employment outside the Office". He stated in the notification that the President had examined the case and was of the view that the new measures had been correctly applied and were justified and legal. It was then said that the appeals could not be allowed and had been referred to the Internal Appeals Committee

for its opinion. The notification was in French. English and German translations were published on the intranet on 4 April 2008.

3. The complainant received an e-mail from the Director of the Internal Appeals Committee on 17 April 2008 informing him that a number of similar appeals had been lodged and that the Committee intended to follow its "test-appeal" procedures. The complainant was invited to indicate whether he wished to be a "test-appellant" but it was stated that his request in that regard might not be granted. It was also said that other appeals would be treated as suspended while the "test-appeals" were considered. Later, on 30 June 2008, the Director of Employment Law wrote to the complainant informing him that his appeal had been registered with the Internal Appeals Committee. On 23 July 2008 the present complaint was filed on the basis that no express decision had then been taken on the appeal lodged by the complainant on 10 March 2008. The EPO contends that the complaint is irreceivable.

4. Before turning to the question of receivability, it is convenient to note that the complainant seeks an oral hearing. As will shortly appear, the outcome of the present matter turns entirely on questions of law. Those questions are fully argued in the pleadings. Accordingly, there is no need for an oral hearing and the application in that regard is rejected.

5. Article 108 of the Service Regulations provides for the lodging of internal appeals. Article 109 relevantly provides:

> "(1) If the President of the Office [...] considers that a favourable reply cannot be given to the internal appeal, an Appeals Committee [...] shall be convened without delay to deliver an opinion on the matter; [...]
>
> (2) If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected. […]
>
> (3) When all the internal means of appeal have been exhausted, a permanent employee [...] may appeal to the Administrative Tribunal

> of the International Labour Organization under the conditions provided in the Statute of that Tribunal."

6. The complainant's first argument is that no decision was taken within the period of two months specified in Article 109(2) of the Service Regulations and, thus, he is entitled to proceed to the Tribunal as allowed by Article VII, paragraph 3, of its Statute. He claims that no decision was taken because he did not within two months receive "a proper legally valid communication about a President's decision". In this regard, he contends that a decision must be communicated by "the President personally or a person unequivocally acting for the President" and there must be a "proper communication of it to the person concerned". Further, he claims that no decision is taken until such time as it is properly communicated. In elaboration of these arguments, he contends, by analogy with provisions relating to proceedings before the Internal Appeals Committee, that the decision should "be despatched against acknowledgement of receipt" and, if by post, "by registered letter".

7. There is nothing in the Service Regulations specifying by whom or in what way a decision that "a favourable reply cannot be given" must be communicated. So far as is presently relevant, all that is expressly required is that the President take a decision within two months of the lodging of an internal appeal. However, and as a matter of practicality, if a decision is not communicated within two months, it will ordinarily be inferred that no decision was taken within the specified time. In the case at hand a decision was taken with respect to the various appeals lodged concerning the amendment of Article 83 of the Service Regulations and, so far as concerns the present matter, it was taken well within the period of two months. Moreover, the Director of Employment Law communicated that decision within that period by publication on the intranet. The complainant does not contend that he did not receive that communication. Further, the intranet publication specified that the decision had been taken by the President and, there being no evidence to the contrary,

the presumption of regularity applies with the consequence that the decision is to be treated as the decision of the President or her duly authorised delegate. Similarly, there is nothing in the Service Regulations to prevent a decision under Article 109(2) being communicated by a person authorised by the President in that regard and, again, there being no evidence to the contrary, the presumption of regularity applies with the consequence that the Director of Employment Law is to be taken as having been so authorised.

8. The complainant makes a further argument by reference to the description in the intranet publication of the amendment to Article 83 as "provid[ing] for the levy of an additional sickness insurance contribution for a spouse in gainful employment outside the Office". The complainant contends that the President made a decision only on this aspect of his appeal and not on his other claims. However, as the intranet publication made clear, the President's decision was with respect to the appeals that had been lodged, not the specific claims made in them. That is all that is relevantly required by Article 109(1) of the Service Regulations.

9. As the President took an express decision in accordance with Article 109(1) of the Service Regulations and within the time prescribed by Article 109(2), there is no room for deeming the complainant's appeal to have been rejected pursuant to the latter provision. Consequently, the complainant has not exhausted internal appeal procedures and, in accordance with Article VII, paragraph 1, of the Tribunal's Statute, the present complaint is not receivable as a complaint based on a deemed rejection of his internal appeal (see Judgment 2780, under 5).

10. The Tribunal's case law allows that "where a complainant does everything necessary to get a final decision but the appeal proceedings appear unlikely to end within a reasonable time, he may go to the Tribunal" (see Judgment 1243, under 16, and also

Judgments 2443, under 5, and 2912, under 6). The complainant contends that he satisfies this test as his appeal has not been included as a "test-appeal" and has, therefore, been suspended. He states that he has declined to have his appeal treated as a "test-appeal" because there is no provision allowing for the suspension of appeals save with the written consent of an appellant and, thus, the "test-appeal" procedure is unlawful. It is unnecessary to consider whether the "test-appeal" procedure adopted by the Internal Appeals Committee conforms with its Rules of Procedure and/or the Service Regulations. It is sufficient to state that, in the absence of a specified procedure or some other provision indicating to the contrary, an internal appeals body necessarily has power to determine what procedure should be followed when multiple appeals are filed with respect to the same issue. What is significant is that it cannot be assumed that the procedures that have been adopted by the Internal Appeals Committee involving the suspension of appeals that are not treated as "test-appeals" will result in the suspended appeals being unduly delayed. On the contrary, it may well be that they are resolved more quickly than would be the case if each appeal were to be dealt with separately. That being so, it cannot be said that the complainant's appeal is unlikely to be resolved within a reasonable time.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable. The application to intervene is also dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet