113th Session **Judgment No. 3105**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P.F.J K. against the European Patent Organisation (EPO) on 30 October 2009, the EPO's reply of 1 March 2010, the complainant's rejoinder of 25 March and the Organisation's surrejoinder of 5 July 2010;

Considering the complaint filed by Mr J.B. S. against the EPO on 29 October 2009, the EPO's reply of 12 February 2010, the complainant's rejoinder of 10 March and the Organisation's surrejoinder of 17 June 2010;

Considering the complaint filed by Mr S.J.J. v. O. against the EPO on 29 October 2009, the EPO's reply of 17 February 2010, the complainant's rejoinder of 24 March and the Organisation's surrejoinder of 20 July 2010;

Considering the application to intervene filed by Mr P. M. on 8 December 2009 and the EPO's letter of 11 January 2010 informing the Registrar of the Tribunal that it had no comment to make on this application;

Considering Article II, paragraph 5, 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 complainants are Dutch nationals who are permanent employees of the European Patent Office – the secretariat of the EPO – serving at the Office's branch in The Hague (Netherlands). At the time of their recruitment, relations between the EPO and the Netherlands were governed by a Seat Agreement of 19 October 1977. In 2000 the EPO began negotiations with the host State with a view to modifying the Seat Agreement, because employees in The Hague were encountering a number of difficulties in their day-to-day relations with the Dutch authorities, particularly with respect to residence rights, identity cards, taxation and the right for members of an employee's family to engage in gainful employment. For several years, little progress was made, but in April 2005 the Government of the Netherlands adopted a new policy on attracting and hosting international organisations, one of the aims of which was to iron out certain differences in treatment that existed between similar categories of employees working for different international organisations established in the Netherlands. It presented its new policy to the organisations concerned in a document published in June 2005, which indicated, inter alia, that there would be "a full streamlining according to categories of employees", that "most senior employees of an international organisation w[ould] be placed on a par with diplomats with equal rank of an embassy, […] in line with the Vienna Convention on Diplomatic Relations (1961)", and that this "therefore concern[ed] persons who [we]re not Dutch nationals and [we]re working at an international organisation and persons who [we]re not permanent residents in the Netherlands".

The negotiations continued on that basis and on 27 June 2006 the EPO and the Government of the Netherlands signed a revised Seat Agreement which entered into force that same day. Article 10 of the revised Seat Agreement, entitled "Privileges and immunities of the employees of the Office", relevantly provides:

> "(1) Employees of the Office exercising their functions in the Netherlands,
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> (a) having the professional grade of A5 and above, or
>
> (b) having the professional grade of A4, provided they have been in that grade for more than two years and have had a basic

> salary not lower than A5 step 1, from the first of January following the year in which both requirements were fulfilled
>
> shall enjoy the same privileges and immunities as the Netherlands accords to diplomatic agents of the diplomatic missions established in the Netherlands in accordance with the Vienna Convention […].
>
> […]
>
> (6) This Article shall not apply to nationals or permanent residents of the Netherlands."

On 22 September 2006 Mr K. sent a letter to the President of the Office in which he pointed out that the revised Seat Agreement had created a considerable difference in purchasing power between employees who were Dutch nationals or permanent residents of the Netherlands on the one hand, and their non-Dutch counterparts who were not permanent residents on the other. He asserted that the latter group of employees already received adequate compensation, in the form of an expatriation allowance, for the difficulties associated with their relocation to a foreign country, yet they were now benefiting from various additional financial advantages of a different kind. As a result, the principle of equal pay for equal work was no longer being respected. He also argued that the granting of these privileges was not consistent with Article 19 of the Protocol on Privileges and Immunities of the European Patent Organisation (hereinafter "the PPI"), according to which the privileges granted to employees of the Office are designed, not to give personal advantage to the employees concerned, but solely to ensure the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded. He asked the President to establish a compensation procedure for Dutch employees and non-Dutch employees who are permanent residents of the Netherlands which would guarantee not only equal remuneration, but also equal purchasing power for employees performing the same work. Failing this, he requested that his letter be treated as an internal appeal.

On 25 September 2006 Messrs S. and v. O. sent similar letters to the President. By 5 October, a total of 175 appeals disputing the financial consequences stemming from the revised Seat Agreement had been filed. On 15 November an intranet communication from the

Employment Law Directorate informed staff that, following an initial examination of the appeals, the President considered them to be unfounded and had therefore referred them to the Internal Appeals Committee for an opinion. The appeals were all registered under the reference 129/06 and six of them, including those of the present complainants, were examined by the Committee as a test case.

In its opinion dated 19 June 2009 the Committee recommended that two of the test case appeals should be dismissed as inadmissible in part and unfounded in all other respects, and that the remaining four should be dismissed as unfounded. The Committee found that the difference in treatment resulting from the revised Seat Agreement was lawful and that the signing of the agreement involved no breach of the Office's duty of care. It recalled that privileges and immunities are granted at the discretion of the host State, which is under no obligation to grant its own nationals and permanent residents the same privileges and immunities as it grants to nationals of other States who are not permanent residents. The Committee rejected the argument that the granting of privileges under Article 10 of the revised Seat Agreement was contrary to Article 19 of the PPI. These privileges were granted in the interest of the Organisation, and employees could benefit from them only accessorily. In any case, the Office had a legitimate interest in being an attractive employer. As for the alleged breach of the principle of equal pay for equal work, the Committee considered it to be irrelevant in this context, on the grounds that an increase in purchasing power resulting indirectly from tax exemptions could not be regarded as "pay" within the meaning of that principle.

By letters dated 5 August 2009 the Director of Regulations and Change Management informed each complainant that, for the reasons put forward by the Office during the appeal proceedings and in accordance with the Committee's unanimous opinion, the President had decided to reject their respective appeals as unfounded. The appeals of Messrs S. and v. O. were also considered to be partly irreceivable. The complainants impugn the decision contained in these letters.

B. The complainants all consider that, to the extent that the revised Seat Agreement introduces privileges for staff in the higher grades, except for those who are Dutch nationals or permanent residents of the Netherlands, it discriminates against them unlawfully on the basis of their nationality. They explain that the privileges at issue result in an inequality of purchasing power because those on whom they are bestowed enjoy exemption from certain taxes, including the so-called "Box 3" tax on income from savings and investments, tax on the purchase of motor vehicles and various local taxes. This, they say, leads to a situation in which the fundamental principle of equal pay for equal work is not respected. They also consider that in signing an agreement which left one category of employees at an obvious disadvantage in relation to another without there being any legitimate reason justifying a difference in treatment, the President of the Office failed to honour the duty of care that he owed to them as employees of the Office.

Mr K. points out that employees of international organisations are not in the same situation as staff of diplomatic missions, and that the rationale for granting privileges to the latter is not readily applicable to employees of the Office. He argues that Dutch employees are in the same situation as their foreign colleagues vis-à-vis the Dutch authorities since, contrary to the finding of the Internal Appeals Committee, they do not enjoy any special protection in their own State, given that they are excluded from the State pension scheme, from unemployment benefits and from Dutch labour law. He rejects the Committee's finding that the granting of the privileges in question serves the interest of the Office. In his view, there is nothing to suggest that those who now enjoy these privileges needed to have them in order to perform their work. Indeed, this would imply that employees who do not enjoy such privileges are, by definition, unable to perform satisfactorily. As for the Office's interest in being an attractive employer, he observes that only a small minority of the Office's staff can benefit from the privileges provided for in Article 10 and that most employees would have to serve for decades before becoming entitled to them. He therefore considers it most

unlikely that these privileges are a significant factor in attracting potential recruits. Lastly, he denounces the Committee's narrow interpretation of the principle of equal pay for equal work which, in his view, is meant to guarantee equal reward for equal work and hence extends to equality of purchasing power. He asks the Tribunal to set aside the impugned decision and to award him moral damages as well as financial compensation for the loss of purchasing power resulting from the denial of fiscal privileges.

Mr S. objects to the fact that the Internal Appeals Committee ignored the argument that the revised Seat Agreement actually took away certain privileges provided for under the PPI. He argues that, by defending the decision of the Dutch Government to exclude Dutch nationals and permanent residents from the privileges conferred under Article 10 of the Seat Agreement, the Committee introduced new subject matter which was not the subject of the appeal as filed. Indeed, the question raised in the appeal was not whether the Dutch Government acted lawfully in proposing such an agreement, but whether the EPO acted lawfully in accepting it. He seeks the quashing of the impugned decision and compensation for the "financial differences" flowing from the adoption of the revised Seat Agreement. Such compensation, he submits, should include at least the amount of "Box 3" tax paid by the employee, calculated on an individual basis, as well as a fixed monthly amount, depending on the grade of the employee, to compensate for "the other differences".

Mr v. O. likewise argues that the proceedings before the Internal Appeals Committee were tainted with procedural irregularities insofar as the Committee overlooked certain arguments and referred in its opinion to new issues on which he had not been able to comment. He submits that prior to the signing of the revised Seat Agreement there was no difference in fact between the situation of Dutch nationals or permanent residents and that of other employees. He acknowledges that there was a difference in law, in that certain provisions of the PPI did not apply to Dutch nationals and permanent residents, but in his view that difference does not justify the unequal treatment under the revised Seat Agreement. He criticises the Committee for having

completely disregarded that inequality of treatment and contends that the host State's discretion to grant privileges and immunities is subject to the limit that these privileges and immunities must not result in unlawful differences in treatment, especially within the European Union, where States have an obligation to comply with European Union law, which prohibits discrimination based on nationality. He asks the Tribunal to set aside the impugned decision and to award him material or moral damages in an amount equal to 35 per cent of his net salary, 9,000 euros in moral damages for the delay in the internal appeal proceedings and 1,000 euros in costs.

C. In its replies the EPO recalls that, according to Article 19 of the PPI, the aim of the privileges granted under the revised Seat Agreement is to ensure the unhindered functioning of the Organisation and the complete independence of the persons to whom they are accorded. From this it infers, on the one hand, that the only limit for the host State in granting such privileges is that they should not run counter to this aim and, on the other hand, that the privileges in question are, by definition, related to work. It submits that the argument that, despite being Dutch nationals, some employees do not enjoy special protection in their country, is irrelevant, since their employment relationship is governed by the Service Regulations of the EPO and international civil service law, which do provide proper legal protection.

Regarding the rationale for exempting its employees from national taxes, the Organisation explains that this aims at guaranteeing their independence. It points out that, like their colleagues of other nationalities, the complainants are exempted from paying income tax on the remuneration that they receive from the Office, whereas Dutch nationals not employed by an international organisation do not enjoy that privilege. Mr K.'s reasoning would imply that this privilege should likewise be abolished.

The EPO argues that, contrary to the view put forward by Mr K., the existence of the privileges provided for in Article 10 of the revised Seat Agreement does have an impact on its attractiveness as

an employer. Indeed, many of the high-ranking employees who are eligible for these privileges are in fact recruited externally, and not after having served for many years within the Office.

It rejects the allegation that it breached its duty of care in signing the revised Seat Agreement for several reasons. It emphasises that the negotiations with the host State were not confined to the fiscal privileges but concerned many more important issues, such as the right to gainful employment for family members. Furthermore, following the decision of the Dutch Government to streamline the position of employees in the various international organisations present in the Netherlands, there was no longer any room for negotiations regarding fiscal privileges. In deciding to accept the agreement proposed to it by the Government, the Organisation took into account the interests of the majority of its employees, as well as its own interests.

Referring to Judgment 1000, the EPO asserts that there has been no breach of the principle of equal pay for equal work, since tax exemptions of the kind at issue in the present case need not be taken into account for the purpose of salary comparisons or calculations of purchasing power.

According to the defendant, the Internal Appeals Committee did consider the argument that the revised Seat Agreement takes away certain privileges and immunities granted under the PPI, though it did not need to examine this argument in detail once it had established that the differentiation criteria provided for in Article 10, paragraph 6, of the revised Seat Agreement, namely Dutch nationality and permanent residency, were legitimate. It adds that, in any case, there was no change in this respect between the previous Seat Agreement and the revised text adopted in 2006, both of which comply with the PPI. As for the allegation that the Committee introduced new subject matter, the Organisation considers that the Committee's reasoning was in line with the arguments put forward by the complainants and that the Committee is, in any case, at liberty to refer to arguments not raised by the parties in order to substantiate its reasoning on the issues raised in an appeal.

Lastly, it submits that in the absence of any unlawful behaviour on the part of the Organisation, there are no grounds on which moral damages may be awarded.

D. In their rejoinders the complainants press their pleas. Mr K. submits that, contrary to the impression given by the Organisation, the main problem which prompted the renegotiation of the Seat Agreement was the changed tax status of employees resulting from a fiscal reform adopted in 1998 in the Netherlands. He observes that the defendant's argument that, provided that privileges do not impede the functioning of the Organisation, they should be allowable, implies that it could have requested privileges for Dutch nationals. Mr S. emphasises that the EPO was well aware of the problem faced by all staff of the Office when they became subject to "Box 3" taxation, yet it deliberately chose to sacrifice the interests of one group of staff in order to obtain a result for another group, which clearly amounts to a breach of the principle of equal treatment. Mr v. O. maintains that the revised Seat Agreement took away privileges and immunities formerly granted under the PPI, and he argues that this would be unlawful even if the distinguishing criteria of nationality and permanent residence were legitimate. He considers that the Internal Appeals Committee violated his right to be heard and that this violation is not remedied by the fact that he now has the opportunity to argue his case before the Tribunal.

E. In its surrejoinders the EPO states that the complainants' rejoinders do not introduce any argument liable to alter its position, which it therefore maintains in full.

CONSIDERATIONS

1. These complaints arise from the revised Seat Agreement between the EPO and the Netherlands signed on 27 June 2006. Article 10 of the revised Seat Agreement provides that high-graded

EPO staff exercising their functions in the Netherlands "[shall] enjoy the same privileges and immunities as the Netherlands accords to diplomatic agents of the diplomatic missions established in the Netherlands in accordance with the Vienna Convention". This provision is expressly inapplicable to nationals and permanent residents of the Netherlands. Its most relevant impact as regards the complaints is that the Vienna Convention treatment entitles expatriate staff to certain tax exemptions.

2. One hundred and seventy-five Dutch employees working in the EPO's branch in The Hague disputed the financial consequences stemming from the incorporation of these tax exemptions into the revised Seat Agreement. The Internal Appeals Committee heard "test" appeals from six EPO employees. The complainants are drawn from that group of six. In the result, the Committee unanimously concluded that two of the appeals were inadmissible in part and that all six appeals were unfounded in their entirety and it recommended that they be dismissed. In particular, the Committee found that the disputed provisions of the revised Seat Agreement did not breach the duty of equal treatment and that the President of the Office had discharged his duty of care to the complainants in negotiating the agreement. The President accepted the Committee's recommendation and dismissed the appeals on 5 August 2009.

3. At this juncture, it is convenient to deal with some additional matters. Given that these three complaints form part of the test case considered by the Internal Appeals Committee, it is appropriate to join them. As the parties' briefs and the materials they have presented are sufficient for the Tribunal to reach an informed decision, the request for an oral hearing is denied. Lastly, Mr M. applied to intervene in the Kools complaint on the basis that he is in the same situation in fact and in law. In the absence of any objection by the EPO, the application is receivable.

4. The complainants, Dutch nationals, seek compensation for the effect of the differential tax treatment in the revised Seat Agreement between Dutch nationals and permanent residents of the Netherlands on the one hand and expatriate staff members on the other.

5. As the revised Seat Agreement is an international agreement, it is clear that the Tribunal does not have jurisdiction to examine in any way its validity. While the Tribunal does have jurisdiction to consider the correctness of the application of a provision of the revised Seat Agreement, the present claims for compensation are not based on an alleged incorrect application of the relevant article by the EPO. Rather, the complaints challenge an intended consequence of the application of a provision agreed upon by the parties to the revised Seat Agreement. Accordingly, the complaints must be dismissed as must be the application to intervene.

DECISION

For the above reasons,

The complaints together with the application to intervene are dismissed.

In witness of this judgment, adopted on 3 May 2012, Mr Seydou Ba, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Dolores M. Hansen
Patrick Frydman
Catherine Comtet