

The Administrative Tribunal,

Considering the complaint filed by Mr Joaquín Infante against the European Patent Organisation (EPO) on 23 September 2000 and corrected on 6 November 2000, the EPO's reply of 29 January 2001, the complainant's rejoinder of 31 March, and the Organisation's surrejoinder of 20 June 2001;

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

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant is of Spanish nationality and was born in 1955. He joined the staff of the European Patent Office, secretariat of the EPO, on 1 May 1989 as a formalities officer at grade B4, and was assigned to Directorate-General 2 (DG2) in Munich.

Article 45 of the Service Regulations provides for unpaid leave "on personal grounds". The first two paragraphs state:

"(1) A permanent employee may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds.

(2) ... the duration of such leave shall not exceed one year. Such leave may be extended for two further periods of not more than one year each."

On 29 July 1996 the complainant applied for unpaid leave with effect from 15 September 1996 in order to move to Spain because of family circumstances. In a letter of 1 August 1996 the Director of Personnel Management informed him that his unpaid leave was authorised for one year, that no further extension would be possible and that he could return to his position of formalities officer on 15 September 1997. During his leave he was employed by the Office for Harmonization in the Internal Market (OHIM) in Alicante.

Prior to the expiry of his leave the complainant sought a one-year extension. His request was refused. He did not resume work in Munich on 15 September 1997. In a fax of 19 September he said he wished to start back on 29 September. The EPO did not agree to the deferral. In a letter of 29 September, citing Circular No. 242 of 11 December 1996, he asked for additional unpaid leave for one month on "private grounds". He said that in the event of that leave not being possible he wished to resign with retroactive effect from 15 September 1997. His resignation was accepted the same day.

On 13 October and 4 December 1997 he wrote to the President of the Office expressing the wish to return to his post. He received no reply. By a letter of 12 December 1997 he filed an internal appeal against the implied rejection of his request. The matter went to the Appeals Committee. By a letter of 18 December 1998 the Organisation offered him a retroactive extension of his leave from 15 September 1997 until 31 March 1999 on the understanding that he would withdraw his internal appeal. He accepted the offer and was due to return to the EPO on 6 April. On 18 March he requested an extension to 1 July 1999. That request was denied, as was a request for "one additional" month's leave contained in a fax sent to the Organisation on 30 March 1999.

The Vice-President in charge of Administration told him in a letter of 25 May 1999 that his absence from 6 April was unauthorised and that disciplinary proceedings were being initiated against him. He also said that during such absence the complainant was covered by the Office's social security schemes and would have to pay back both the employee's and the employer's part of the contributions that the Office was paying on his behalf.

In its report of 27 August 1999 the Disciplinary Committee unanimously recommended dismissing the complainant. It also took the view that the complainant was liable for the totality of the contributions paid on his behalf by the Office during his unauthorised absence. The President endorsed the Committee's opinion. On 21 September the Director of Personnel Management notified the complainant of the President's decision to dismiss him from 1 October 1999.

The complainant filed an internal appeal against that decision on 13 October, claiming reinstatement. In its report of 14 April 2000 the Appeals Committee found that dismissal was justified as was the reimbursement of the social security contributions. It was of the opinion however that the complainant was under no obligation to pay pension contributions during his unauthorised absence. In a decision of 4 July 2000, which the complainant impugns, the President upheld his dismissal. He confirmed that the complainant had to reimburse the social security payments at issue and that he would lose accrual of entitlements under the pension scheme unless he paid the relevant amount relating to the employee's and employer's contributions by 1 August 2000.

B. The complainant notes that his dismissal was based on the "repeated infringement" of absence without permission. The first "infringement" was however the subject of his first internal appeal which was resolved in his favour by the extension of his leave. His dismissal was thus based on a fact that had been rendered "extinct". He questions the legality of taking the first alleged infringement into account in the subsequent internal proceeding.

He contends that the Disciplinary Committee and Appeals Committee disregarded essential facts. Although the Organisation affirms otherwise, he did provide valid reasons for wanting his leave extended. There were factors that hindered him from acting "freely and in time". His presence was required in Spain because of health problems of close relatives but the EPO repeatedly ignored the "social" reasons preventing him from leaving Spain. He rebuts any suggestion that he showed lack of interest in returning to Munich; it is clear from his correspondence with the Office that it was his "firm intention to return". He draws attention to Circular 242 which says that leave on "purely private grounds" can be granted "once within a three-year period". He says he was "repeatedly" deprived of his right to be granted leave for one month under that circular, and yet it would have facilitated his return. Likewise, he was denied the benefit of Article 63, relating to unauthorised absence, inasmuch as by the terms of that article his ten-day supposed absence in September 1997 could have been deducted from his annual leave.

Moreover, he claims that the EPO has applied Article 45 of the Service Regulations in an arbitrary manner. It discriminated against him. By way of evidence, he cites the case of another EPO colleague who, like him, took unpaid leave but was allowed two extensions.

The complainant claims the quashing of the impugned decision and reinstatement in his post with retroactive effect to 15 September 1997, with the corresponding increase in salary step. He also seeks an opinion from the Tribunal as to whether he is obliged to pay back social security contributions to the EPO, particularly since in a letter of 31 May 1999 he informed the Office that he was covered by a different scheme and did not want it to pay any contributions on his behalf. He wants his pension rights restored from 15 September 1997 and claims moral damages.

C. The Organisation contends in its reply that the complaint is irreceivable in part and devoid of merit. It points out that in his internal appeal the complainant claimed reinstatement from 1 October 1999, the date at which he ceased to be a staff member. He cannot now claim reinstatement from September 1997 for by accepting the Organisation's offer to extend his unpaid leave to 31 March 1999 he remained a staff member, albeit on non-active status. His claim to reinstatement from September 1997 therefore constitutes an unacceptable extension of his appeal, and as such is irreceivable. He did not ask for moral damages in his internal appeal and so that claim too is irreceivable for failure to exhaust internal remedies.

Contrary to what the complainant appears to suggest, the Organisation did not violate the principle of *non bis in idem*. The Disciplinary Committee was entitled to take the complainant's overall conduct into account and to recommend dismissal for his having "twice failed" to meet his obligation to resume work at the EPO.

The Organisation states that Article 45 was properly applied. It is clear from the wording of that article that the granting of the initial unpaid leave and any subsequent extension falls within the discretionary authority of the President of the Office. The complainant's allegation of discrimination is unfounded; his colleague and he were not

in like situation. In the interests of the smooth running of the Office the EPO could not wait indefinitely for the complainant to come to a decision. Nor did he have any entitlement to a further month's leave on "purely private grounds". When he asked for additional leave on 30 March 1999 he had already benefited from 30.5 months' unpaid leave - a longer period than that allowed in the circular he refers to.

It contests the complainant's allegation that the Disciplinary Committee and Appeals Committee came to erroneous conclusions by disregarding essential facts. The fault lay with the complainant inasmuch as he did not unequivocally show his resolve to resume work in Munich. Instead, he repeatedly requested extensions of his unpaid leave and did not resume work when he was expected to do so. His conduct showed indecision and lack of reliability which "irretrievably destroyed" the confidence the Organisation had placed in him.

With regard to contributions to the social security schemes the EPO takes the view that given its duty of care, it was obliged under the Service Regulations to ensure that the complainant was covered by the schemes while on unauthorised absence. Only the complainant's resignation could have released it from that obligation.

D. In his rejoinder the complainant presses his pleas. By no means can his requests for one month's additional leave be construed as lack of interest in taking up work again at the EPO. Depending on a favourable outcome of his personal difficulties such leave would have given him an opportunity to resume his duties. If his conduct showed evidence of indecision it was because of the pressures of his personal and social circumstances. By applying the relevant rules in an arbitrary manner the Organisation deprived him of his rights and itself hampered his return to Munich. It is thus liable for the moral injury he suffered.

He believes that under the wording of Article 45(2) he is entitled to up to thirty-six months of unpaid leave, as well as a one-month period as leave on "purely private grounds" under Circular 242.

E. In its surrejoinder the Organisation maintains that it did take the complainant's social situation into account as evidenced by the fact that it allowed him an extension of his leave to 31 March 1999. It notes that the complainant seems to want the Tribunal to rule that it had violated his alleged right to an extension of his unpaid leave, even though he clearly had no wish to return to work at the EPO. The complainant, it argues, was not automatically entitled to the three years of leave mentioned in Article 45(2). The Organisation's power of discretion was properly exercised and he was dismissed because he had twice failed to resume work. It disclaims any liability for moral damages.

CONSIDERATIONS

1. The complainant requested and was granted unpaid leave on personal grounds for one year - from 15 September 1996 until 14 September 1997 - under Article 45 of the Service Regulations of the European Patent Office so that his wife could look after her ailing mother. During his leave he was working for the Office for Harmonization in the Internal Market (OHIM) in Alicante, Spain.
2. On 16 July 1997 the complainant applied for an extension of his unpaid leave for another period of one year, basing his application on Article 45(2) of the Service Regulations which states that "the duration of [unpaid leave on personal grounds] shall not exceed one year. Such leave may be extended for two further periods of not more than one year each".
3. In his reply of 28 July 1997 the Director of Personnel Management reaffirmed what he had said in his letter of 1 August 1996 when he approved the first request i.e. that no extension to the period already granted was possible. He asked the complainant whether he wished to return to his position of formalities officer on 15 September 1997 or resign.
4. The complainant did not return to work on 15 September. Instead, on 19 September 1997 he sent a faxed letter to the EPO stating that he had felt unable to take a decision in time with respect to his possible return to his previous post in Munich. Aware that his unpaid leave had expired, he asked if he could start later, if possible not before 29 September 1997 since "some days would be absolutely necessary in order to arrange obvious preparations".
5. His request for a postponement of his return was refused and he was told that his failure to report for duty on 15 September was being interpreted as a wish not to return to the Office. He was then asked to submit a letter of

resignation.

6. The complainant forthwith filed his resignation wanting it to take effect on 15 September 1997, the date on which his unpaid leave had expired. It was accepted the same day.

7. On 13 October and 4 December 1997 he asked the President of the Office to allow him to return to his previous post. He received no reply. He wrote again on 12 December asking that his letter be treated as an internal appeal against the implied rejection of his request to return to his post. By a letter of 16 December 1997 he was informed that since his resignation had become effective on 15 September 1997 he could no longer resume his previous duties. This was reiterated in a further letter of 9 March 1998 in which he was informed that the President had referred the matter to the Appeals Committee for an opinion.

8. Following an exchange of correspondence between the complainant and the Administration, on 18 December 1998 the complainant was offered, conditional upon withdrawal of his internal appeal, a retroactive extension of leave on personal grounds. It was to end on 31 March 1999. It was also a condition that he should refund to the Office the sums received in respect of his pension contributions and severance grant in October 1997, plus interest. He accepted the offer on 15 January 1999. It was later agreed that he would resume work on 6 April 1999.

9. Due to a change in his personal circumstances, the complainant explained in March 1999 that he could not start on 6 April. He sought a three-month extension of his leave or, failing that, one additional month. This request was denied and he was again asked in a letter of 8 April to submit his resignation as soon as possible.

10. This letter having remained unanswered, the Vice-President in charge of Administration informed the complainant in a letter of 25 May 1999 that his absence since 6 April was unauthorised. Accordingly, disciplinary proceedings would be initiated against him. He was reminded that during such absence, he was covered by the EPO's social security schemes and that, pursuant to Article 25 of the Service Regulations, he would be liable to make good in full the employee's and employer's part of the contributions the Office had been paying on his behalf. However, the President of the Office was prepared to withdraw the disciplinary procedure on the double condition that he resign in accordance with Article 51(1) of the Service Regulations and make good the contributions referred to.

11. The Disciplinary Committee unanimously found on 27 August 1999 that it was appropriate to dismiss the complainant because he had "twice infringed" Article 63 of the Service Regulations. Article 63 provides that "Except in case of sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior ...". Furthermore, the Committee considered it justified that he should have to refund the contributions that the Office made on his behalf to the social security system during his unauthorised absence.

12. By a letter of 8 September 1999, the Director of Personnel Management informed the complainant that the President intended to follow the Disciplinary Committee's opinion and that his decision would take effect on 1 October 1999. However, before the decision became final the complainant would be given the opportunity to be heard and could submit any comments he wished to make.

13. In comments submitted on 16 September 1999, the complainant asked if the President would reconsider the facts and reinstate him in his previous post.

14. By a letter dated 21 September the Director of Personnel Management informed the complainant of the President's decision to dismiss him with effect from 1 October and asked him to reimburse to the EPO the contributions it had made on his behalf to the social security system.

15. The complainant appealed against that decision on 13 October 1999.

16. In its opinion of 14 April 2000, the Appeals Committee unanimously recommended that "the appeal against dismissal and recovery of social security contributions be dismissed" and that "the appeal against the recovery of pension contributions be allowed to the extent set out in this opinion".

17. In a letter of 4 July 2000 the President informed the complainant that he had decided to adopt the findings and recommendations of the Appeals Committee on those issues. He told him that the accrual of entitlements under the Pension Scheme Regulations was dependent on him having paid both the employee's and the employer's contributions and that the relevant accrual of rights would be lost if he had not paid the appropriate amount by

1 August 2000 at the latest.

18. The complainant challenges that decision and asks the Tribunal to quash it. He seeks reinstatement with effect from 15 September 1997, with the corresponding within-grade step and pension rights as from that date; and an award of moral damages.

19. The complainant disputes the alleged "repeated infringement" of absence without permission and charges the Administration with exercising its discretion regarding in particular his requests for leave extensions, in an arbitrary and discriminatory way. He repeatedly stresses that the EPO has overlooked essential facts, not only concerning the application of the regulations but also regarding the gravity of his personal circumstances that he has constantly explained.

20. He asks the Tribunal to consider whether, in the light of the circumstances, he is liable to make good the contributions made by the Office on his behalf to the social security schemes.

21. He accuses the Organisation of causing him serious moral injury by informing the OHIM Administration of the disciplinary proceedings against him and the intention to dismiss him.

22. Lastly, he contends that the Organisation has caused "serious moral (educational) damages" to his children by its refusal to allow him to return to Munich.

23. The Organisation argues that the complaint is unfounded; that the granting of unpaid leave is a discretionary matter for the EPO; that the complainant did not honour his commitments to resume work on the dates agreed upon; and that it is not liable for the alleged moral injury he has suffered.

24. The Organisation's decision to dismiss the complainant was mainly based on the fact that he twice failed to return to work upon the expiration of unpaid leave without giving reasons that were sufficient to justify an exception being made to the applicable rules.

25. A close examination of the facts shows that his first application for unpaid leave on personal grounds was granted for the period from 15 September 1996 until 14 September 1997 based on Article 45(1) of the Service Regulations. The letter of 1 August 1996 from the Director of Personnel Management granting authorisation explicitly stated that the one-year period could not be extended. However, the Organisation granted the complainant a retroactive extension of his leave until 31 March 1999.

26. At this stage, the complainant had already been granted 30.5 months of unpaid leave on personal grounds.

27. The Tribunal considers that in twice refusing to grant the complainant extensions of his unpaid leave under the prevailing rules (and with no justification having been provided by him to warrant an exception being made) the Organisation properly exercised its discretion.

28. The Tribunal will not review the substance of discretionary administrative decisions, but it does have the power to review the process leading to such decisions and to look into questions such as abuse of authority, incomplete consideration of the facts or failure to respect elementary principles of justice. (See for example Judgment 1729, *in re Sardo Infirri*, under 10.)

29. When a discretionary decision has been taken, the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. (See for example Judgment 1969, *in re Wacker*, under 7, and Judgment 525, *in re Hakin*, under 4.)

The complainant having failed to prove the existence of any of the aforementioned circumstances, the Tribunal will not substitute its view for that of the President of the Office.

30. In citing the case of a colleague who was granted by the Organisation two extensions of her leave, the complainant erred, for the facts and circumstances of each case differ.

31. Having regard to the facts of the case there are no grounds for the complainant's allegation that the

Organisation's decision to refuse to extend his leave was arbitrary and discriminatory. Accordingly, there is no basis for quashing the impugned decision of the President to dismiss the complainant.

32. As for the complainant's claim for reinstatement, it must be borne in mind that, after he resigned with effect from 15 September 1997, he twice requested to return to his previous post - on 13 October and 4 December 1997. By a letter of 16 December 1997, he was reminded that his resignation had become effective on 15 September and a return was no longer possible.

33. However, an agreement ensued which extended his leave retroactively from 15 September 1997 until 31 March 1999. In effect, his employment at the EPO had not been interrupted even though he was on unpaid leave.

34. As the complainant stated himself he had been a permanent staff member of the OHIM from June 1998 to 31 March 1999, during which time he was still a staff member of the EPO, although on leave. It was only from 1 October 1999, the date of his dismissal, that the complainant ceased to be an employee of the EPO. This being so, his claim for reinstatement is receivable only from 1 October 1999.

35. The Organisation, however, has stated that it was the complainant's conduct in not honouring his commitments, his indecisiveness and lack of reliability, and the resulting "irretrievable breakdown of the relation of confidence" which made his reintegration impossible.

36. As regards entitlements, since the complainant remained an employee of the Organisation after 15 September 1997, the following ruling applies: "An official who is granted leave for any reason remains bound by all professional obligations but one - for that is what leave means - the performance of duties." (See Judgment 1363, *in re* Popineau Nos. 6, 7 and 8, under 25.)

37. As an employee, he was entitled to enjoy the protection of the EPO's social security schemes set in place by the Collective Insurance Contract, i.e. sickness insurance, permanent invalidity, death. Under the Service Regulations, the EPO is obliged to guarantee this cover even when the employee is on unauthorised absence, otherwise the protective cover becomes interrupted. Hence, the Office has a right to demand that the complainant reimburses the contributions it has made on his behalf.

38. However, as regards pension rights, since the complainant lost his right to claim his salary during the period of unauthorised absence, there was no obligation on his part to make pension contributions. Accrual of entitlements under the Pension Scheme Regulations would be subject to the complainant having paid contributions.

39. With respect to the claim for moral damages, since it was not included in the complainant's claim before the Appeals Committee, it is irreceivable under Article VII(1) of the Tribunal's Statute.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.