Registry's translation, the French text alone being authoritative.

NINETY-NINTH SESSION

Judgment No. 2440

The Administrative Tribunal,

Considering the complaint filed by Mr S.M.G. against the European Patent Organisation (EPO) on 1 May 2004, the Organisation's reply of 10 August, the complainant's rejoinder of 16 September and the EPO's surrejoinder of 17 December 2004;

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

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

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

A. The complainant, a British national born in 1966, joined the European Patent Office, the secretariat of the EPO, on 1 September 1990 as an examiner. He is currently employed in The Hague at grade A3.

At the initiative of the Staff Union of the European Patent Office (SUEPO), a plan of action was voted on 27 March 2001, calling in particular for the blocking of B84/B85 notifications, which has the effect of slowing down the processing of patent applications. In communiqué No. 74 dated 28 March, the President of the Office recalled that blocking actions, which were designed deliberately to make it difficult to identify participants, had already caused considerable damage and unrest in the course of the two previous years and added that they would no longer be tolerated in future. He referred to a communiqué of the same day issued by the Vice-Presidents in charge of Directorates-General 1, 2 and 4. This document stated, inter alia, that staff would be asked by their line managers to indicate whether they were participating in the "dossier blockage" and "B84/B85 action", and that failure to respond would be treated as "confirmation" of participation. It was added that in view of the expected loss of production, 1 per cent of basic monthly salary would be deducted for each working day of participation in either action from the following month's salary.

The blocking actions having started at the end of March, a form was sent to examiners in April asking them to state whether they were participating in the actions or not, on the understanding that their failure to respond would be interpreted as "confirmation" of their participation. On 21 May the Vice-President in charge of Directorate-General 1 (DG1) wrote to some examiners, including the complainant, urging them again to give an answer by 29 May at the latest. The complainant opted instead, on 26 May, to sign a statement, based on a model supplied by the staff representatives, in which he confirmed to his director that he was "performing [his] duties pursuant to the Service Regulations [for Permanent Employees of the European Patent Office] and the Guidelines". On the basis of the replies received by 29 May, the line managers conveyed to the Administration the names of examiners participating in the blocking actions.

The complainant left to attend training in Munich from 18 to 22 June. In a note dated 19 June, which the complainant received and examined on his return on 25 June, the Director of Personnel informed him that according to information received he had participated in the actions in April and May and that the deductions announced in the Vice-Presidents' communiqué would therefore be made from his salary for the month of June 2001. The Director of Personnel also informed line managers that no deductions had been made for days spent on training. On 26 June the complainant received an additional payslip showing the amounts withheld from his salary. On 12 July he wrote to the President to protest, stating that he had not taken part in the blocking actions. He requested immediate reimbursement of the sums withheld, plus interest of 10 per cent per annum, and various amounts in damages, failing which his letter was to be considered as an internal appeal.

Following negotiations with the staff representatives, the President informed all staff in communiqué No. 79 of 19 July 2001 that the amounts withheld would be refunded, which in the complainant's case occurred at the end of that month. The members of staff who had lodged an appeal were informed in a notice published in August in the EPO *Gazette* that since they had on the whole achieved a satisfactory outcome, unless they expressed objections, their

appeals would thenceforth be deemed to be devoid of substance and the files would be closed. The complainant, who had written on 13 August maintaining his appeal, was informed on 17 October 2001 that the President had decided to reject it and to refer the matter to the Appeals Committee. He withdrew some of his claims before the latter.

In its opinion dated 1 December 2003 the Appeals Committee recommended by a majority rejecting the appeal. By a letter of 13 February 2004, which constitutes the impugned decision, the Director of Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to reject his appeal.

B. The complainant contends that the deduction from his salary has no legal basis, since he did not at any time participate in the blocking actions of April and May 2001. This is clearly shown, in his view, by his production figures for that period, the validity of which has not been refuted. The Organisation at no point gave his case due consideration, as evidenced by the standard letter he was sent and which assumed a decrease in production on the part of all participants in the aforementioned actions. Since he was working normally and his production did not decrease, the salary deduction was imposed purely because of his failure to reply in the required manner to the question put in the EPO's form. Given that this sort of sanction for failing to respond to letters from the management is not provided for anywhere in the Service Regulations and that the Tribunal considered in Judgment 566 that special rules on salary deductions must be incorporated into the Service Regulations, the latter were breached by the salary deduction.

According to the complainant, the procedure set out in the Vice-Presidents' communiqué was not complied with. The deductions made for his alleged participation in the blocking actions in April were not made in fact until June, at the same time as those for May, which in his view constitutes a "cynical tactic" designed to cause the maximum financial distress to the staff members concerned with a view to ending the actions as quickly as possible. He states that he was thus deprived of almost a third of his monthly salary with only one day of notice, owing to the fact that he had been on a training course in Munich. He sees evidence of the Office's "cynical tactics" in the fact that in the *Gazette* of August 2001 – at a time when a large part of the staff were on leave – the latter informed staff that it considered all internal appeals as having been withdrawn. In his view, contrary to the announcement made by the Director of Personnel, his two days of training in May were withheld from his salary. He concludes that, even assuming that the legal basis for the overall deduction was valid, its amount was arbitrary.

The complainant, who states that he withdrew his claim for interest through oversight in his internal appeal, asks the Tribunal to award him interest on the amount of his salary that was withheld as well as moral damages, partly for having been incorrectly identified as a participant in the blocking actions and partly for the salary deduction procedure having been incorrectly applied. He also claims costs.

C. The Organisation submits that the complaint is irreceivable in part. Since during the internal appeal proceedings the complainant expressly waived any claim for interest on the sums withheld, his present claim in that respect is irreceivable because he has not exhausted the internal means of redress.

Subsidiarily, it contends that the complaint is devoid of merit. It considers firstly that the measures taken were legitimate and well founded in the circumstances. It had the right and indeed the duty, as the Tribunal found in Judgment 805, to take action to ensure its survival and the continuance of its work in the event of a collective dispute.

In order to identify participants in the blocking actions while avoiding the laborious task of analysing the productivity figures of hundreds of examiners – which would inevitably have precipitated a flood of disputes – it was decided to apply the principle of self-declaration by participants, appealing to the principle of good faith and relying on Article 14 of the Service Regulations whereby "[a] permanent employee shall carry out his duties and conduct himself solely with the interest of the […] Organisation […] in mind". The EPO points out that the examiners had been warned that their failure to respond would constitute a tacit admission of participation in the actions. As this was merely an assumption, staff members were given until the end of May 2001 to inform their line managers that they had not in fact participated in the collective actions and, if necessary, back up this statement with their production figures. The complainant did not, however, challenge his identification as a participant until after the deduction had been made from his salary.

The defendant contends that pursuant to Article 65(1) of the Service Regulations it was entitled to apply a salary deduction, despite the absence of an all-out cessation of work. As general legal principles must, in its view, adapt

to new strike techniques, a salary deduction was justified on the grounds that those who participated in the blocking actions, who were intentionally slowing down the drafting of search reports and the granting of patents, were not performing at least part of their obligations. Since the 1 per cent rate of deduction was more favourable to staff than that provided for in Article 65, the complainant cannot criticise the Office in that respect, and the intervention of the legislator was not required. It adds that the deduction was applied to the June salary in order to give staff members enough time to send in their replies.

Secondly, the Organisation contends that it made no error when implementing the measures taken. In its view, even if it were shown that a staff member who was assumed to have participated in the collective actions had in fact not participated, it would still need to be determined whether the EPO could be held responsible for any such error, which seems unlikely given that the error would have been caused by the staff member's ambiguous reply in breach of Article 14 of the Service Regulations.

Since the complainant did not submit his production figures until 12 July, his supervisor was not able to take them into account when conveying the names of participants to the Administration on the basis of the replies received by 29 May. The defendant points out that the Appeals Committee had been unable, using those figures, to establish with certainty whether or not the complainant had taken part in the collective actions. Even though the Office treated each case individually, in the case in point the retirement of the supervisor concerned made it particularly difficult to establish the facts, especially with respect to training days. In any case, verification of the calculation of the deduction made was no longer warranted since the complainant had already been reimbursed.

As for the notice in the *Gazette*, it was justified in view of the very high number of internal appeals, which in principle had become devoid of substance once the sums withheld had been reimbursed. It did not adversely affect the complainant himself in any case, as his appeal was ultimately maintained at his request.

D. In his rejoinder the complainant admits that he did not file a claim for interest with the Appeals Committee, but reiterates that the omission resulted from careless redrafting of the initially filed appeal documents. According to him, the Committee, nevertheless by addressing the question, acknowledged that his right to receive interest was "inalienable". He points out that as he is not a SUEPO member, he did not have access to legal advice during his internal appeal and asks the Tribunal to demonstrate some measure of tolerance for "minor procedural errors".

The question put by the Office in the form it circulated had greatly annoyed him and he did not give a clear reply because he was afraid of having his life made unbearable at work. This was because many of his colleagues were SUEPO members and exerted pressure to persuade the other examiners to participate in the collective actions. His supervisor himself, he suggests, called weekly unofficial meetings in which he repeatedly stated his support for the participants. In the complainant's view, his production figures were accessible electronically and could therefore have been consulted before 29 May 2001 by his supervisor. As the latter did not retire until July 2002, the Office had plenty of time to interview him in order to establish the facts. The complainant maintains that during the two months in dispute his productivity exceeded his set target by 20 per cent. He points out that the Appeals Committee expressed doubts as to whether in the event the Organisation had been right in concluding that he had participated in the blocking actions. The fact that he was informed that a deduction would be made from his salary only on the day on which it was made, placed him in an extremely awkward and stressful situation vis-à-vis his bank. He therefore did suffer injury.

E. In its surrejoinder the Organisation presses its pleas. With regard to the pressure supposedly exerted on the complainant by his colleagues, it points out that he is mentioning it for the first time; it must therefore be considered as an unsubstantiated assumption. At any event, the question is, in its view, whether it can be held responsible for the injury the complainant says he suffered, considering that he neither informed his hierarchy of his fears nor sought their advice or assistance.

CONSIDERATIONS

1. In March 2001 the Staff Union of the European Patent Office launched a series of collective actions entailing strikes and the "blocking" of dossiers and of B84/B85 notifications. After the staff members concerned had been informed that a deduction on salaries of those who took part in the blocking actions would be made, the Administration distributed a form to examiners, asking them whether and since when they were participating in the blocking actions, adding that failure to respond would be interpreted as participation. In a letter of 21 May 2001 the

Vice-President in charge of DG1 confirmed to examiners that he was asking them to inform him, before 29 May 2001, whether or not they were participating in the industrial action and dossier blockage, adding that he would have to conclude that those who did not answer were participating.

2. The complainant, a grade A3 examiner, did not reply to the question asked in the above-mentioned form, but on 26 May 2001 signed a statement, based on a model supplied by the staff representatives, in which he protested against the management's demands and measures, which infringed the right to strike, and asserted: "I hereby confirm that I am performing my duties pursuant to the Service Regulations and the Guidelines." He also informed the management that he had not taken part in the blocking actions and had worked normally, as shown by his production figures.

3. As the Office considered that the complainant had participated in the blocking of dossiers and/or of B84/B85 notifications, the June payslip he was sent showed a deduction of 4,699.23 Dutch guilders. The complainant then filed an appeal, dated 12 July 2001, against the decision to apply such a deduction, stating that he had not participated in the blocking actions.

4. Following negotiations with the staff representatives, the President of the Office decided to reimburse the proportion of pay which had been withheld, as a result of which the complainant received the corresponding refund at the end of July 2001. Subsequently, the Administration published a notice in the *Gazette* stating that since those who had appealed had, on the whole, achieved a satisfactory outcome, unless they expressed objections, their appeals would thenceforth be deemed to be devoid of substance and the files would be closed. The complainant, who announced that he was maintaining his appeal, was informed on 17 October 2001 that the President had rejected it and had referred the matter to the Appeals Committee. In the proceedings before that Committee, the complainant withdrew the claims he had originally submitted for the refund with interest of the amounts withheld, for compensation for the damage caused to his professional reputation and for costs, but maintained his claims for damages for the Administration's unlawful and negligent pursuit of its salary deduction policy.

5. In an opinion issued on 1 December 2003 the Appeals Committee recommended by a majority that the appeal be dismissed. While rejecting many of the complainant's legal arguments, it did find it "inadmissible [in the event of no reply being given to the form] to consider that participation [had been] established, without offering the possibility of proving otherwise, or to assume such participation irrefutably". It added that, even though the complainant's reply stating "that he was performing his duties" did not answer the question of whether or not he had participated in the industrial action, he had nevertheless put forward evidence of his non-participation in the course of his appeal. In this regard, the Committee stated that "[i]n the light of the figures provided [it] doubt[ed] whether in the event the Office [had been] right in concluding that he had participated in the blocking actions". According to the Committee, however, there was no need to clarify that point any further, since the complainant had withdrawn his claim for the payment of interest and was in any case not entitled to damages since he had suffered no injury. By letter of 13 February 2004, the complainant was informed that the President had decided to reject his appeal for the reasons put forward by the Office during the appeal proceedings and in accordance with the majority opinion of the Committee.

6. The complainant challenges that decision of 13 February 2004 before the Tribunal. He reiterates his claim for compensation in respect of alleged moral injury and requests that the Office be ordered to pay him interest for the period during which part of his salary was withheld prior to being refunded.

7. With regard to the claim for the payment of interest, the defendant rightly contends that it was withdrawn by the complainant during the internal appeal procedure. Even though the latter maintains that dropping that claim was an oversight, it is a fact that it was not brought before the Appeals Committee and therefore cannot be raised before the Tribunal.

8. With regard to moral damages, doubts have been expressed again before the Tribunal regarding the legitimacy of the measures taken by the Office to ensure continuity of the service which the international organisation in question is responsible for providing, to identify participants in the blocking actions and to withhold the proportion of staff members' salaries corresponding to the period they spent participating in the actions. In fact, the only question that arises is whether the Office, which was naturally entitled to withhold pay for days not worked, could legitimately infer from the complainant's refusal to fill in the form distributed by the Administration that he had taken part in the industrial action. The Tribunal does not consider that this question can be answered in the affirmative, considering that the complainant formally informed his director that he was continuing to perform

his duties and gave details which led the Appeals Committee to recognise that there was doubt on this issue. As the Committee rightly pointed out, the failure to reply to the form could be construed "as an argument in support of evidence" of participation but could not justify irrefutably assuming participation. The Tribunal cannot accept the defendant's position in its reply when it states that "[i]f the complainant is telling the truth, and really did not participate in the collective action, it is regrettable that the deduction was applied to him. However, he mostly has himself to blame, because it was his deliberately ambiguous reply that was the direct cause of the deduction". Similarly, the Tribunal notes that the defendant is a little overhasty in dismissing the calculations put forward by the complainant to show that the deduction mistakenly included two days of training on the grounds that the argument is secondary, that verification of the complainant's calculations would have required consulting his supervisor who has since retired, and that it would have been unnecessary because the complainant had already obtained a refund of what may be considered negligible sums.

9. The fact that the Office reimbursed the complainant – and his colleagues – without delay considerably diminishes its liability, but does not remove it altogether given that it did not have proof that the complainant had participated in the collective actions. However, such liability presupposes that the complainant can show that he suffered injury. Clearly no material injury arises since the disputed sums were repaid and since a claim for the payment of interest is irreceivable. As for the claim for compensation in respect of moral injury, it cannot be based on the need to set an example in order to deter the EPO "from acting in a similar manner in future", or on the allegedly disciplinary nature of the Office's measure, as the complainant suggests. This claim could however succeed on the basis of evidence of emotional disturbance or stress "beyond that caused by the ordinary setbacks of life" (see Judgment 437, under 4, on this point). In the present case, while it is true that the inconvenience caused to the complainant by the Office's attitude was rapidly cleared up, the fact that he was unable to gain recognition of his rights until he had been through a lengthy procedure, during which doubts were cast on his good faith, did cause him injury, which would be fairly compensated with a sum of 1,000 euros.

10. Since he partially succeeds, the complainant is entitled to costs, which are set at 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 1,000 euros in compensation.

2. It shall also pay him 1,000 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 28 April 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.