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

100th Session **Judgment No. 2517**

The Administrative Tribunal,

Considering the complaints filed by Mr M.B. and Mr C.L. against the European Patent Organisation (EPO) on 14 May 2004 and corrected on 11 August, the Organisation's replies of 25 November 2004, the complainants' rejoinders of 28 February 2005 and the EPO's surrejoinders of 6 and 8 June 2005;

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 none of the parties has applied;

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

A. The complainants, of Italian and Swedish nationalities respectively, are employed as examiners at the European Patent Office, the secretariat of the EPO.

Facts relevant to this case are given in Judgment 2440 delivered by the Tribunal on 6 July 2005. It may be recalled that at the initiative of the Office's Staff Union a collective 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 of 28 March, the President of the Office stated that blocking actions, which were designed deliberately to make it difficult to identify participants, 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, which stated that staff would be asked to indicate whether they were participating and that 1 per cent of basic monthly salary would be deducted for each working day of participation from the following month's salary.

The blocking actions having started at the end of March 2001, a form was sent to examiners in April asking them to state whether or not they were participating in the actions, 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 wrote to some examiners urging them again to give an answer by 29 May at the latest. The complainants did not return the Administration's form but opted instead to state in writing, on 28 May in the case of Mr L. and 29 May in the case of Mr B., that they were "performing [their] 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. On 26 June the complainants received an additional payslip showing the amounts withheld from their June 2001 salaries. On 25 July and 3 September, they wrote to the President of the Office claiming reimbursement, with interest, of the sums withheld, and the payment of damages and costs, failing which their letters were to be considered as initiating an internal appeal.

In communiqué No. 79 of 19 July 2001, the President informed all staff that the amounts withheld would be refunded, as indeed they were. 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.

Mr L., who had filed an appeal on 3 September 2001, and Mr B., who had written to maintain his appeal, were informed that the President had decided that their request could not be granted and that the matter had been referred to the Appeals Committee. The two complainants denied before the Committee that they had taken part in the collective action. Mr B. also reported that at the time of the action he had been busy with documentation and classification work and had suffered health problems. In its opinions dated 1 December 2003 the Committee wondered, in Mr B.'s case, "whether the finding that [he] had participated [had been] correct" and considered, in

Mr L.'s case, that it was necessary to look again at the question of his participation in the light of his productivity. It recommended by a majority that the appeals be allowed with respect to the claims to payment of interest but that they be rejected in all other respects.

By letters of 17 February 2004 the Director in charge of Conditions of Employment and Statutory Bodies informed the complainants that, as a gesture of goodwill in line with the ongoing negotiations, the President of the Office had decided to follow the opinion of the Appeals Committee in part and to grant them interest. Those are the impugned decisions.

B. The complainants contend for their main plea that blocking actions do not constitute a strike and therefore cannot give rise to a pay deduction. According to them, the Office has not demonstrated, as it should, that in the course of the action they had not performed their work correctly, full time and in accordance with their contractual obligations and the rules in force. Given that the productivity of examiners is calculated in terms of annual output, that they are left considerable autonomy in allocating priorities and that the delivery of completed dossiers is not ranked as a higher priority than other functions, they object to the fact that, in order to determine whether or not staff members took part in the industrial action, the Office relied on the productivity assessments provided by the hierarchical superiors.

According to the complainants, the withholding of salary constituted a violation of the Service Regulations, in particular Articles 64 and 65, which make no provision for the non-payment of salary in the circumstances of the case. They argue that if the Office wishes to withhold salary on the basis of an alleged failure to meet contractual obligations it must initiate disciplinary proceedings. Firstly, such proceedings must be formally opened against each individual, which was not the case. Secondly, the Office must prove its allegations. Not only did it not do so, but it reversed the burden of proof by requiring staff members to state whether they were participating in the industrial action and by assuming that they were if they failed to reply, which is unacceptable. Thirdly, the disciplinary measures taken must correspond to those listed in the Service Regulations. The withholding of salary, which is not one of the sanctions listed in Article 93, is only applicable, according to Article 95, to staff members guilty of serious misconduct and who have therefore been suspended, which they were not. They conclude that the measure taken constituted covert disciplinary action.

They allege violations of the rights of the defence and of the general principles of law contained in the European Convention on Human Rights, and complain that they were not given the information on which the decision to withhold pay was based. According to them, electronic data was used to calculate the salary deductions, which is contrary to the data protection rules. They also consider that there was unequal treatment between staff members of the Office since, unlike in their case, no salary deductions were made when the previous B84/B85 blocking action occurred.

The complainants request the withdrawal of communiqué No. 74, moral damages for wrongful withholding of salary and costs. Mr L. also requests an apology from the Administration and compensation "in time", for the purpose of productivity calculation, in respect of the time spent on his appeal.

C. In its replies the Organisation contends that, insofar as the complainants seek the withdrawal of communiqué No. 74, their complaints are irreceivable, since according to the Statute of the Tribunal they may only seek the rescinding of the decisions impugned, namely those of 17 February 2004. Mr L.'s claim for compensation in time, moreover, was not put forward until March 2003 although the impugned withholding occurred in June 2001, so that the claim is time-barred. The EPO recalls that the Appeals Committee found that the official duties of an examiner, for which he receives a salary, do not include the exercise of his own rights in an appeal procedure.

It further contends that the complaints are devoid of merit since the measures taken were legitimate and well founded in the circumstances. It considers that 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 during the collective dispute. The directors, who oversee some 20 or more examiners, each of whom has between 30 and 100 files in stock, had no means of knowing with any certainty which of them were taking part in the blocking actions. This is why in order to identify participants 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 the staff members themselves, 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 interests of the [...] Organisation [...] in mind".

The defendant 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. It adds that the communiqué would have been pointless if the burden of proof of participation had still rested with the EPO.

The Organisation also argues that there was no breach of the Guidelines for the protection of personal data. Since directors normally have access to the production data of their examiners, they retained that right during the collective action and were thus able to draw conclusions as to whether or not staff members had participated. The processing required for the implementation of the salary deductions was considered to comply with the above-mentioned guidelines by the Data Protection Officer, who examined it at the request of the Appeals Committee. There can therefore be no financial compensation pursuant to Article 11(e) of the Guidelines.

According to the defendant, the application of a salary deduction pursuant to Article 65(1)(b) of the Service Regulations complied with the Tribunal's case law whereby salary is payable only for services rendered. It was fully justified, as confirmed by the Appeals Committee, since the participants in the dossier blockages were not performing at least part of their obligations. The Organisation recalls that the Committee found a significant drop in the complainants' production figures during the blocking actions. It maintains that they were paid interest as a gesture of goodwill and because the financial amount in question was negligible. The President did not initiate disciplinary measures because he had decided to consider the collective action as lawful.

The defendant also contends that the measures taken were lawful. It submits that even if it were shown that a staff member who was assumed to have participated in the collective action 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. Moreover, considering that the complainants were reimbursed within one month after the deduction, and considering their ambiguous conduct, the Organisation argues that they suffered no moral prejudice as defined in Tribunal case law.

D. In their rejoinders the complainants contend that the Office is misinterpreting Article 14 of the Service Regulations, which in their view is designed to establish the independence of staff and does not require them to abandon their rights. They consider moreover that Article 65 is not relevant.

E. In its surrejoinders the Organisation presses it pleas. It contends that when a collective action is announced the President of the Office, in accordance with Article 10 of the European Patent Convention, has a discretion to decide which measures are appropriate, and that discretion is subject to only limited review by the Tribunal. It notes that other public services have been confronted in the past with similar situations and that the Commission of the European Communities, for instance, applied the same solution in 1991 when it distributed a form stipulating that the absence of a reply would be considered as "signifying participation in all work stoppages concerning the duty station". It submits that the Tribunal will have to clarify the legal issues raised by dossier blockage, which enables participants to benefit from the advantages of a strike without suffering the drawbacks.

CONSIDERATIONS

1. The complainants are employed as examiners at the European Patent Office. Following a collective dossier and B84/B85 notification blockage launched in March 2001 by the Office's Staff Union in circumstances which the Tribunal outlined in Judgment 2440, delivered on 6 July 2005, and in Judgment 2516, also adopted this day, they were considered by the Administration as having participated in the blocking actions. Part of their salaries for June 2001 was therefore withheld according to calculations set out in a communiqué of 28 March 2001 by the Vice-Presidents in charge of Directorates-General 1, 2 and 4, to which communiqué No. 74 of the President of the Office referred, amounting to "1 per cent of basic monthly salary for each working day of participation in the 'dossier blockage' or 'B84/B85 action'". Following negotiations with staff representatives, the President of the Office informed staff that the salary withholdings would be refunded, and the complainants were in fact reimbursed at the end of July 2001. The complainants, who had lodged an appeal against the decisions to withhold part of their salaries, claimed interest on the sums wrongly withheld and compensation for the damages they had allegedly suffered on account of those decisions, which in their view were unlawful.

2. In two opinions issued on 1 December 2003, one in English on Mr L.'s appeal and the other in French on

Mr B.'s appeal, the Appeals Committee, to which the cases were referred, considered by a majority that there could be no objection, under the particular circumstances of the industrial action which had given rise to the appeals, to the action of the Office management in responding to the blockage actions with a proportional reduction of the salaries of staff members taking part. In determining who had taken part in the actions in question, however, the Administration could not rely merely on the fact that staff members had refused to complete the questionnaire they had been given for the purpose of indicating whether or not they had taken part. According to the Committee, failure to respond to the questionnaire should have been construed solely as an argument in support of evidence produced by the Office, and the staff members concerned should have been at liberty to prove otherwise at all times.

In the cases under consideration, however, the Committee found, with regard to Mr L., that while several of his arguments concerning the justification for the measures taken by the Office should be rejected, he had nevertheless stated in his reply, and at the hearing, that he had not taken part in the blocking actions. It was therefore necessary to look again at the question in the light of the staff member's productivity during the relevant period and the information to be requested from his line manager. If a deduction had been made – the Committee added – even though he had not taken part in the blocking actions, his request for the payment of interest should be allowed.

In Mr B.'s case, the Committee considered that the matter should be referred back to the Office for a review of his entitlement to the payment of interest, since the complainant had stated that he had not taken part in the collective action and that the drop in his production had been largely attributable to his health problems, supporting his arguments with documents on his productivity and referring to the time he had spent on documentation and classification work. In conclusion, without waiting for the Office to give an opinion, the Committee recommended "allowing the appeal in respect of the claim to payment of interest".

3. In two decisions, both dated 17 February 2004, the Director of Conditions of Employment and Statutory Bodies informed the complainants that the President had agreed partly to follow the majority opinion of the Committee and, as a gesture of goodwill, but without adopting the Committee's reasoning, nor accepting any legal obligation to do so nor admitting any fault on behalf of the Office, to grant them the payment of interest.

4. These decisions were considered inadequate by the complainants, who filed two complaints with the Tribunal, primarily seeking the withdrawal of communiqué No. 74, moral damages in compensation for their alleged injury and costs. Since these complaints are similarly drafted and seek the same redress, they are joined to form the subject of a single judgment.

5. Insofar as they challenge the legality of the procedure followed by the defendant and request the withdrawal of communiqué No. 74, the complainants must obtain the same answers as those given in Judgment 2516, also adopted this day. The only difference between the present cases and those leading to that judgment resides in the fact that the requests of Messrs Baldan and Lentz were partially granted, and although the Organisation states that it acceded to their request for the payment of interest only "for economic reasons" and "as a gesture of goodwill", it did not seek further information as suggested by the Committee, thus apparently admitting implicitly that the participation of the complainants in the collective action had not been proved. Consequently, it is legitimate to consider whether or not the complainants are entitled to compensation, over and above the interest they have already been granted. The complainants have not shown the Tribunal any evidence of emotional disturbance or stress "beyond that caused by the ordinary setbacks of life" (see Judgment 437, to which Judgment 2440 refers). In the circumstances, taking into account the fact that the sums withheld by the Office were reimbursed very rapidly and that the Administration agreed to pay the complainants interest on those amounts, the claims for moral damages must be dismissed, as must the claims for costs. Since the main claims are dismissed, so too are all related subsidiary claims.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.