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

102nd Session **Judgment No. 2613**

The Administrative Tribunal,

Considering the complaint filed by Mrs L. M. against the European Patent Organisation (EPO) on 18 August 2005, the Organisation's reply of 2 December 2005, the complainant's rejoinder sent on 8 January 2006 and the EPO's surrejoinder of 7 April 2006;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Article 83 of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO, deals with sickness insurance. It provides, in pertinent part, that:

"(1) In accordance with the Implementing Rules, a permanent employee, his spouse, his children and other dependants within the meaning of Articles 69 and 70 shall be insured against expenditure incurred in case of sickness, accident […]. One third of the contribution, calculated by reference to the basic salary of the employee, which is required to meet such insurance shall be charged to the employee, but so that the amount charged to him shall not exceed 2.4% of his basic salary.

(2) a) An employee whose service terminates for reasons other than retiring or being put on invalidity pension may, on request, continue to be insured as provided for in paragraph 1. However, the total contribution shall be borne by the employee.

b) The request should be made before termination of service and the insurance may continue for not more than six months unless the President of the Office, following an examination made by a medical practitioner designated by him, decides otherwise; in this case it must be established that the employee is suffering from a serious or protracted illness which was contracted before leaving the service and notified to the Office within six months of leaving.

(3) An employee who has remained in the service of the Office until he retires or is in receipt of an invalidity pension shall be entitled to the cover provided for in paragraph 1 after he has left the service. The amount of contribution shall be calculated by reference to the amount of pension.

Benefits shall also apply to the person entitled to a survivor's pension following the death of an employee who was in active employment or who remained in the service of the Office until he retired or following the death of a person entitled to an invalidity pension. The amount of the contribution shall be calculated by reference to the amount of survivor's pension.

(4) A person entitled to an orphan's or dependant's pension shall not be entitled to the cover provided for in paragraph 1 except at his request. The contribution shall be calculated by reference to the orphan's or dependant's pension."

Article 83a, entitled "Long-term care insurance" states that:

"In accordance with the Implementing Rules, a permanent employee, his spouse, his former spouse, his dependent children within the meaning of Article 69 and other dependants within the meaning of Article 70 shall be insured on either a compulsory or a voluntary basis against expenditure arising from reliance on long-term care. This insurance is intended to provide a fixed amount of financial support to defray some of the expenses incurred if an insured person's autonomy becomes seriously impaired on a long-term basis and he therefore requires help to carry

out everyday activities; it shall not include any expenditure on medical fees associated with the treatment of an illness or resulting from pregnancy or an accident."

According to paragraph 1 of the Implementing Rules to Article 83a: "The following persons shall be insured on a compulsory basis:

(a) permanent employees;

(b) former employees in receipt of an invalidity pension or an outright retirement pension;

(c) dependent children of insured persons under (a) or (b);

(d) dependent children of insured persons under (a) or (b) in receipt of an orphan's pension following the death of the insured person under (a) or (b)."

The complainant, who is a Belgian national, was born on 29 April 1938. She was therefore aged 60 years and 7 months when she was recruited by the Office to fill the post of Principal Director at the Vienna sub-office as from 1 December 1998. In the offer of employment sent to her on 9 July 1998 it was explained that, in order to draw a retirement pension, she would have to have completed ten years' service.

The complainant's daughter, who was born in 1971, is disabled. As from 1 July 2000 she was considered to be a dependent child within the meaning of Article 69, paragraph 5, of the Service Regulations, which provides for the continued payment of the dependants' allowance "in respect of a child prevented by serious illness or invalidity from earning a livelihood […] irrespective of age".

On 1 July 2001 the Office introduced a long-term care insurance scheme to which the complainant immediately subscribed. In January 2002 it was decided that her daughter should be given retroactive cover under this insurance scheme as from 1 July 2001. This decision resulted in the monthly payment of long-term care benefits.

The complainant retired on 1 May 2003, after completing four years and five months' service, whereupon the sums deducted from her salary in respect of her pension contributions were reimbursed to her and she received a severance grant. Previously, in a letter sent to the President of the Office on 25 March, she had requested that she should be allowed to retain social security cover after her retirement even though she did not have enough reckonable years of service to be eligible for a retirement pension. She explained that she wished to be able to go on being covered by sickness and long-term care insurance "on affordable terms". In a letter of 20 May, the Vice-President in charge of Directorate-General 4 replied that it was impossible to accede to her request. The complainant lodged an internal appeal against this decision on 29 May 2003.

The Appeals Committee, to which the case was referred, issued its report on 2 May 2005; it unanimously recommended that the appeal should be dismissed. It considered in respect of continued sickness insurance that Article 83, paragraph 3, of the Service Regulations applied only to former permanent employees in receipt of a retirement pension and that paragraph 2, which offers the possibility of taking out individual insurance, applied to the complainant. The Committee held that continued long-term care insurance cover and further payment of long-term care benefits were both contrary to the applicable provisions. In a letter of 23 May 2005, which constitutes the impugned decision, the Director in charge of Personnel Management and Systems notified the complainant that the President of the Office had decided to follow the Committee's opinion and to dismiss her appeal.

B. The complainant states, with regard to the issue of sickness insurance, that she is asking to continue to be insured at a reasonable cost, with the Office's participation, because the cost of individual insurance is exorbitant. In this connection, she believes that, since she remained in the Office's service until she retired, it is in fact Article 83, paragraph 3, of the Service Regulations which applies to her. Moreover, she asserts that before she accepted the Office's offer of employment, she enquired into the conditions on which she would be insured on retirement. Since the Office did not reply, she says that she could legitimately assume that the provisions of the said paragraph 3 would apply to her when the time came.

Although she accepts that after retirement a pension must form the basis for calculating contributions to sickness insurance, she considers that the fact that she does not draw one should not prevent the calculation of the said contribution, for the reference to the pension is, in her opinion, only an "administrative indication relating to the financing of sickness insurance cover". In addition, she relies on the "principle of the last employer's obligation"

which, she contends, underpins the provisions of Article 83 and requires “continued cover if the permanent employee immediately retires on leaving the service”.

With regard to long-term care insurance, the complainant refers to what she terms a “universally accepted” principle whereby the benefits are due in full if the insured risk has materialised during the insurance period. In her opinion, refusing to continue payment of long-term care benefits after the staff member has left the service, when the latter is no longer able to take out insurance with another insurance company to cover a risk of reliance on long-term care which has already materialised, is contrary to the very purpose of the cover.

The complainant requests the quashing of the decision of 23 May 2005 inasmuch as it refuses further monthly payments of long-term care benefits and maintenance of “sickness insurance cover through the Office” for herself and her daughter as from the date on which she retired. In addition, she seeks the “immediate reinstatement” of herself and her daughter in the list of insured persons which is supplied to the insurance companies, and the establishment of a basis for calculating her contribution to sickness insurance, two-thirds of which should be borne by the Office. Moreover, her contribution should take into account her “real net income […] from her pension rights”. Furthermore, she requests payment of the arrears on the long-term care benefits together with the “Belgian statutory interest”, the immediate resumption of the payment of these benefits and 10,000 euros in compensation for the moral and material injury she has suffered. She also claims costs.

C. In its reply the Organisation submits that the impugned decision is not tainted with any flaw which might justify its quashing.

On the matter of sickness insurance it argues that the payment of a pension and entitlement to cover under the sickness insurance scheme are indissociable: an employee who is automatically retired at the age of 65 without a retirement pension is not entitled to continued sickness insurance cover on the terms provided for in Article 83, paragraph 1, of the Service Regulations. Since the complainant does not draw any pension from the Office, paragraph 2 of that article should apply. Relying on Judgment 1897, the EPO contends that the difficult financial situation in which the complainant finds herself does not afford valid grounds for making an exception to the applicable provisions. It adds that the complainant’s allegations concerning the request for information which she allegedly made before accepting the Office’s offer of employment are totally unsubstantiated.

As far as long-term care insurance is concerned, the Office submits that the provisions of the Implementing Rules to Article 83a indicate that only former permanent employees in receipt of a pension may be insured. This is not the case of the complainant. In addition, only an insured person may receive insurance benefits and, since the complainant and her daughter have not been insured since May 2003, they are not entitled to continued benefits. The EPO asserts that the provisions applicable to the Office do not provide for the continued payment of benefits beyond the period of membership and that the complainant has not proved the existence of any general principle requiring insurance companies to continue to pay benefits while exempting insured persons from the payment of premiums.

D. The complainant reiterates her arguments and claims in her rejoinder. Noting that the EPO calls her statements into question, she produces the letter of 12 July 1998 which she sent to the Office before entering its service and in which she broached the question of sickness insurance cover after her retirement. She considers that the reference to Judgment 1897 is irrelevant as she is merely requesting the application of Article 83, paragraph 3, of the Service Regulations and is not calling for any derogation.

E. In its surrejoinder the EPO maintains its position. It explains that although the letter produced by the complainant is not to be found in her personal file, it does not dispute its authenticity. It adds that the Administration never gave the complainant to understand that she could continue to benefit from preferential terms for sickness insurance cover once she had retired.

CONSIDERATIONS

1. The complainant, who was born on 29 April 1938, entered the service of the European Patent Office on 1 December 1998. She was retired on 1 May 2003 because she had reached the age of 65. As she had not completed the minimum period of actual service required by Article 7 of the EPO’s Pension Scheme Regulations in the employ of the Office or one of the international organisations listed in Article 1 of the Regulations, she is not

entitled to draw a retirement pension. The Office did, however, pay her the severance grant provided for in Article 11 of the said Regulations.

On 25 March 2003 the complainant had asked to remain in the Office's sickness insurance scheme and to continue to receive the monthly long-term care benefits she had been paid since 1 July 2001 for her disabled daughter. This request was rejected on 20 May 2003.

2. The complainant appealed against that decision. The Appeals Committee recommended the dismissal of the appeal in its report of 2 May 2005. In substance the Committee considered that Article 83 of the Service Regulations did not give the complainant the right to remain insured on a compulsory basis under the sickness insurance scheme since she was not drawing a retirement pension, but that she could be insured on a voluntary basis. It further concluded that the complainant could not continue to receive long-term care benefits, because Article 83a of the Service Regulations restricted this possibility to the period of membership.

By a letter of 23 May 2005 the Director in charge of Personnel Management and Systems notified the complainant that the President of the Office had decided to accept the Committee's opinion and to dismiss her appeal. That is the impugned decision.

The issue of sickness insurance

3. The complainant submits that Article 83 of the Service Regulations entitles her to sickness insurance cover for the sole reason that she reached retirement age while she was in the Office's service, even though she does not receive a retirement pension. In her opinion, paragraph 3 of this article, on which she bases her claim, simply omits to stipulate the basis for calculating the contribution which must be paid by retired permanent employees in her situation.

In addition, the complainant refers to the fact that the Office did not reply to a letter she sent to it on 12 July 1998 before she accepted the Office's offer of employment and in which she broached the issue of the sickness insurance scheme which would apply to her after her retirement.

(a) The relevant part of Article 83 of the Service Regulations is quoted under A, above.

Whether or not the complainant must be granted the preferential terms of sickness insurance cover provided for in Article 83, paragraph 1, in respect of a permanent employee, his spouse, his children and other dependants depends on the interpretation of the initial phrase of paragraph 3, "[a]n employee who has remained in the service of the Office until he retires".

Interpreted literally, this phrase appears to concern all retired permanent employees and hence also the complainant, who left her job because she had reached the statutory retirement age, i.e. 65. But this literal interpretation is not consistent with the sickness insurance scheme established under Article 83. Paragraphs 3 and 4 of this article permit certain persons to continue to benefit from sickness insurance on the preferential terms laid down in paragraph 1. Under paragraph 3, this benefit is automatic for retired or disabled employees and also for the surviving spouse of an employee who was in active employment, or of a retired or disabled employee. Under paragraph 4, it is optional for persons entitled to an orphan's or dependant's pension. In all these cases the contribution for securing sickness insurance cover is calculated on the basis of the pension paid to the beneficiary. Employees who, for any reason, leave the Office's service without being eligible for a retirement pension or invalidity pension forfeit their right to the preferential terms of contribution provided for in paragraph 1 and move to the arrangement provided for in paragraph 2, whereby they have the possibility to continue to be insured against sickness through the Office but henceforth have to pay the full contribution.

The complainant does not dispute the fact that when she retired she was not eligible for a retirement pension. In addition to being reimbursed the sums deducted from her salary in respect of her pension contributions, she therefore received a severance grant calculated in accordance with Article 11, subparagraph (ii), of the Pension Scheme Regulations. She fails to show that this system of withdrawal settlement is patently inconsistent with any higher principle of the law of the international civil service or social security law.

(b) On 12 July 1998, after the competent bodies of the Office had examined her job application, the complainant told the Office that, on retirement, she wished to be able to benefit from "sickness insurance identical to that of the Office's pensioners". This letter apparently went unanswered. The complainant concluded from this silence that the

Office had implicitly recognised that she would continue to be entitled to sickness insurance cover after she retired.

In accordance with the rules of good faith, employees have the right to demand that the Administration abide by the actual assurances it has given them, where in reliance on such assurances they have made arrangements they cannot cancel without suffering injury. In some exceptional cases implicit assurances may be sufficient if the employee has good reason to deduce objectively from the Administration's silence that a right which plainly does not flow from a written rule does exist. In the instant case, these conditions are not met. The letter to which the complainant refers is in fact no more than a request for information, and not a request for recognition of a right which, in view of the Administration's silence, could be deemed to be confirmed. Consequently, the complainant's claim for continued sickness insurance cover cannot be based on the rules of good faith. It is merely regrettable that the Office did not find the letter in question or any reply to it in the complainant's personal file.

The issue of long-term care insurance

4. The complainant challenges the Office's refusal, after she had left the service, to continue the payment of the long-term care benefits she was receiving for her disabled daughter.

(a) Article 83a of the Service Regulations – which deals with long-term care insurance – and paragraph 1 of the Implementing Rules to that article are quoted under A, above.

In Circular No. 266 of 14 November 2001, the Office explained the procedure to be followed and criteria to be applied for assessing the degree of reliance on long-term care pursuant to Article 83a of the Service Regulations. This circular does not provide any solution to the issues raised in this case.

(b) As indicated above in connection with sickness insurance, the only former employees of the Office who can be insured against the risk of themselves or their dependants needing long-term care are those drawing an outright retirement pension or an invalidity pension. Moreover, the complainant does not dispute this similarity between the two insurance schemes and acknowledges that, as she did not retire with an outright retirement pension, she cannot demand continued cover in respect of the risk that she herself may become reliant on long-term care at some later stage.

The point in issue is whether an employee receiving long-term care benefits in respect of an insured risk which materialised while he or she was in the Office's service loses this entitlement when he or she leaves the service without a retirement or an invalidity pension, as is the case of the complainant. She was insured against the risk of reliance on long-term care as soon as Article 83a of the Service Regulations entered into force. The risk insured under that article materialised in the person of the complainant's daughter while the complainant was still in the Office's service. Consequently she was paid monthly long-term care benefits.

(c) It should be noted that neither Article 83a of the Service Regulations nor paragraph 1 of the Implementing Rules to that article provides that long-term care benefits paid to a serving employee cease as soon as he or she leaves the Office's service. Furthermore, it would be plainly outrageous if the payment of benefits under long-term care insurance were to cease on termination of service where the insured risk had materialised in the person of the employee while he or she was in the Office's service. It must be added that, as far as the length of the payment of benefits is concerned, the above-mentioned provisions do not draw a distinction between benefits paid for the employee and those paid for a dependant.

(d) The analogy between the sickness insurance scheme and the long-term care insurance scheme, and the fact that, in both cases, the circle of insured persons is similar does not mean that the insured risks are of the same nature. Sickness insurance covers risks which are not necessarily long lasting, and when a serious or protracted illness does occur, the solution chosen – as in Article 83, paragraph 2(b) of the Service Regulations, for example – is that generally applying in the event of invalidity.

The complainant rightly draws attention to the fact that the risk of reliance on long-term care is closely linked to the risk of serious or protracted illness, within the meaning of Article 83, paragraph 2(b) of the Service Regulations, or to the risk of invalidity within the meaning of Article 84. These provisions establish the principle of continued payment of benefits after termination of service provided that the insured risk has materialised before the termination of service. These solutions are justified particularly because the employee is no longer able to obtain cover on a compulsory basis from a third party in respect of his or her ailment or that of a dependant.

It must therefore be found that the Office's refusal to continue to pay the long-term care benefits due to the complainant for her disabled daughter is not supported in any way by the applicable provisions and is contrary to the purpose of the long-term care insurance established under Article 83a of the Service Regulations.

5. It may be concluded from the above that the complaint is without merit insofar as the complainant claims continued sickness insurance cover after termination of her service. It is, however, well founded insofar as she claims continued payment of long-term care benefits for her disabled daughter.

The decision of 23 May 2005 to refuse the continued payment of long-term care benefits after termination of the complainant's service must therefore be quashed. The Office must accordingly pay the arrears on the long-term care benefits due for the whole period after termination of the complainant's service together with interest for late payment at a rate of 8 per cent per annum.

6. The complainant claims 10,000 euros in compensation for the material and moral injury she has suffered. The Tribunal will not accede to this request because the execution of this judgment will fully redress the injury she has suffered.

7. Since she partially succeeds, the complainant is entitled to an award of costs, set at 2,500 euros.

DECISION

For the above reasons,

1. The decision of 23 May 2005 to refuse the continued payment of the long-term care benefits due to the complainant for her disabled daughter is quashed.

2. The EPO shall pay the complainant the arrears on these benefits as from termination of her service together with interest for late payment at a rate of 8 per cent per annum.

3. It shall also pay her the sum of 2,500 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.