The Administrative Tribunal,

Considering the complaint filed by Mrs B.H.A. G. against the European Patent Organisation (EPO) on 9 January 2007 and corrected on 27 February, the EPO's reply of 11 June, the complainant's rejoinder of 24 July and the Organisation's surrejoinder of 31 October 2007;

Considering Article II, paragraph 5, 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 German national born in 1945, joined the European Patent Office, the secretariat of the EPO, in 1988 as a formalities officer at grade B4. She currently holds grade B5.

On 6 June 2003 the Head of the Personnel Administration Department informed her that she had taken 313.5 days of sick leave over a three-year period. Twelve months being the maximum period of paid sick leave to which a permanent employee was entitled under Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office applicable at the time, invalidity proceedings had therefore been initiated pursuant to Article 62(7) of the Service Regulations and she was asked to appoint a medical practitioner to the Invalidity Committee convened to address the issue of her extended sick leave. On 24 June 2003 the complainant provided the Office with the name of the medical practitioner she was appointing. She indicated that her absence was the result of a medical error, for which she was considering initiating legal proceedings for malpractice against the doctors who had treated her, and requested that the Invalidity Committee clarify whether such error was to be regarded as an accident. In its report of October 2003 the Invalidity Committee concluded inter alia that the complainant was not suffering from a severe illness or total invalidity and that her medical condition was not the result of an accident.

By a letter dated 20 November 2003 the Head of the Personnel Administration Department informed the complainant of the outcome of the invalidity proceedings, stating that, in light of an additional medical opinion of 4 November, her sick leave was deemed to have ended on 12 November 2003. He proposed a reintegration schedule, according to which she could have resumed her duties on 13 November on a 50 per cent basis until 4 December, then at 75 per cent until 25 December, and full-time thereafter. By another letter of the same day she was notified that, in light of the Invalidity Committee's conclusions and the fact that on 27 July 2003 she had reached the maximum period of paid sick leave to which she was entitled, her basic salary was reduced to 50 per cent from 28 July 2003 and during the whole period of her extended sick leave in accordance with Article 62(7) of the Service Regulations. She was also notified that her annual leave entitlement for 2003 amounted to 29 days, provided that she observed the proposed reintegration schedule.

The complainant resumed work on 1 December 2003. By a letter of 8 December 2003 she contested the decision to reduce her salary, claiming that her absence was the result of a medical error, which should have been considered as an accident within the meaning of Article 62(7) of the Service Regulations. She asked that her letter be treated as an internal appeal in the event that the decision was maintained.

Pursuant to a decision of the EPO Administrative Council, the provisions of the Service Regulations concerning sick leave and invalidity were amended with effect from 1 January 2004. Article 62(6) and (7), as amended, provided that staff members were entitled to paid sick leave up to a maximum of 250 working days within three consecutive years and that, during the extended sick-leave period, they would receive 90 per cent of basic salary for the first 250 days, 80 per cent for the next 250 days and 70 per cent thereafter, irrespective of the nature and cause of the illness.

On 13 January 2004 the Director of Employment Law informed the complainant that the President of the Office had decided to reject her appeal and accordingly the matter had been referred to the Internal Appeals Committee.

Before the Internal Appeals Committee the complainant claimed, in particular, that she had collected further evidence that her absence was due to a medical error, and thus an accident, and she requested that her case be referred back to the Medical Committee (as the Invalidity Committee was renamed from 1 January 2004) in order for it to reconsider the cause of her prolonged incapacity for work. She also argued that the Office had miscalculated her sick-leave entitlement, which had led to an unwarranted reduction in her salary and annual leave entitlement. The Office replied that the appeal was inadmissible because the challenged decision was based on the Invalidity Committee's opinion; and devoid of merit because the complainant had failed to substantiate her contention that her condition was the result of an accident.

In its opinion of 11 August 2006 the Internal Appeals Committee unanimously held that the complainant had failed to demonstrate either that the invalidity proceedings had been conducted incorrectly or that there were new facts warranting a review of the Invalidity Committee's conclusions. Thus, there were no grounds for the case to be referred back to the Medical Committee. It also held that, irrespective of the amendment of the Service Regulations, the Office's method of determining when the maximum period of paid sick leave was exhausted conflicted with the meaning and purpose of Article 62(6) of the Service Regulations insofar as days of sick leave on reduced pay (i.e. extended sick leave) were treated as days of sick leave with full pay for the purpose of calculating the days of sick leave with full pay allowed over a three-year period. It thus recommended that the Office should recalculate the complainant's sick-leave entitlement from 28 July 2003 onwards based on the options it suggested. It also recommended that the withheld salary be reimbursed with interest and that her leave entitlement be recalculated accordingly. By a letter of 13 October 2006, which is the impugned decision, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to endorse the Internal Appeals Committee's recommendation regarding her claim for referral back to the Medical Committee. Concerning the claim for recalculation of sick-leave entitlement, the President had decided not to follow the Internal Appeals Committee's recommendation. The Office's practice in this respect was, in his view, in accordance with a literal interpretation of Article 62(6) of the Service Regulations. He therefore rejected the appeal in its entirety.

B. The complainant challenges the decision to reject her claim for referral of her case back to the Medical Committee. She emphasises that there were two distinct causes for her prolonged absence, one of which was a medical error which should have been regarded as an accident within the meaning of Article 4 of the Collective Insurance Contract. The report form which the Invalidity Committee had to fill out did not provide the necessary information nor did it allow the medical practitioners to select several linked causes for her medical condition, as would be appropriate. Furthermore, the Invalidity Committee was not duly informed as to the Office's interpretation of the term "accident" according to Article 4 of the Collective Insurance Contract. In the complainant's opinion, since the Invalidity Committee failed to consider whether her sick leave was caused by an accident, its report is not sound and all decisions based thereon are invalid.

She also argues that, in interpreting Article 4 of the Collective Insurance Contract, the Office identified additional criteria for a situation to qualify as an accident, thus restricting the scope of application of that article. Furthermore, the Internal Appeals Committee erroneously concluded that there were no new facts warranting referral of the case back to the Medical Committee, although it admitted that a new medical report was available, to which it could not have access, as it contained confidential medical information.

The complainant contests the rejection of her claim for recalculation of her sick-leave entitlement. She submits that Article 62(6) of the Service Regulations, in both its old and its new wording, provides that only the number of sick-leave days on full pay can be taken into account for the purpose of determining when the maximum period of paid sick leave was exhausted.

The complainant asks the Tribunal to quash the impugned decision and to order the referral of her case to the Medical Committee for reconsideration of the causes of her sick leave. She also requests that her sick-leave entitlement be recalculated according to Article 62(6) of the Service Regulations and that the Tribunal order the retroactive withdrawal of all decisions based on the Invalidity Committee's report and on the alleged miscalculation. Stressing that the withholding of annual leave cannot be fully rectified, and that the Office's miscalculation placed her under pressure not to take sick leave in order to avoid financial loss, she claims 2,000 euros in moral damages. She also claims 2,000 euros in costs.

C. In its reply the EPO points out that the complainant has failed to prove that her sick leave was the result of malpractice. The opinion of the medical practitioner she appointed does not support her submission, and

complications, which are a risk inherent in any medical intervention, do not qualify as an accident. Therefore, in the absence of a conclusion ascertaining gross medical malpractice, the Invalidity Committee did not have to consider even the possibility of an accident. Nor did its members need to be briefed on the notion of accident since they are qualified medical practitioners. The Invalidity Committee properly reviewed all the relevant aspects of the complainant's case, and its referral back to the Medical Committee is thus not warranted.

As to the alleged miscalculation, the EPO contends that days of sick leave have to be taken into account in full, irrespective of whether they are taken before or after the maximum entitlement provided for in Article 62(6) of the Service Regulations has been exhausted. It emphasises in this respect that even a reduced salary constitutes payment and that nothing in the above provision supports the complainant's interpretation. The EPO underlines that it has not acted illegally or with an intent to harm the complainant. It therefore rejects her claim for moral damages.

D. In her rejoinder the complainant presses her pleas. She points out that the Office had been clearly informed of the malpractice suit pending before the German courts. Those proceedings, she argues, will result in new facts which justify referral of the case back to the Medical Committee.

E. In its surrejoinder the EPO maintains its position.

CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 January 1988. Owing to several operations for a foot disorder and the subsequent periods of rehabilitation, by 27 July 2003 she had taken 365 days of sick leave on full pay within a three-year period, the maximum period allowed under Article 62(6) of the Service Regulations in the version applicable at the time. An Invalidity Committee (subsequently renamed the "Medical Committee") was convened and concluded that the complainant was not suffering from a severe illness or total invalidity, and that her medical condition was not the result of an accident. After having exceeded the maximum period of paid sick leave, the complainant's basic salary was reduced by 50 per cent for each day of sick leave in excess of the maximum period and she ceased to have entitlements to advancement and annual leave. The complainant requested a review of the decision to reduce her salary but her request was rejected and the matter was referred to the Internal Appeals Committee.

2. In its opinion of 11 August 2006 the Internal Appeals Committee recommended unanimously that the appeal should be allowed to the extent that her sick-leave entitlement in the period from 28 July 2003 should be recalculated, but that it should otherwise be dismissed. With regard to the recalculation of sick leave, it held that "only two courses of action seem[ed] to be legally acceptable". These two courses of action would be either to disregard sick leave that was paid at a reduced salary in determining when the maximum period of paid sick leave was exhausted (as the complainant requested) or, to count the sick leave proportionately (i.e. a sick-leave day paid at 50 per cent of the basic salary would be counted as half a sick-leave day). The Internal Appeals Committee considered that the Office's practice of counting as sick leave with full salary, sick leave with reduced salary, was illegal.

3. By letter of 13 October 2006 the Director of Personnel Management and Systems notified the complainant that the President of the Office had decided to endorse the recommendation insofar as it rejected her request to set aside the decision to reduce her salary and to refer the matter back to the Medical Committee. However he had decided not to adopt the recommendation to allow the complainant's request for recalculation of sick-leave entitlement in accordance with Article 62(6) of the Service Regulations. The complainant impugns this decision before the Tribunal.

4. She submits that her absence on sick leave was mainly caused by a grave medical error made by the surgeon in the course of her treatment, which should be considered an "accident" within the meaning of Article 62(7) of the Service Regulations, and that the Office's calculation of sick-leave days was incorrect as it should not have counted days that were paid at a reduced basic salary, as full sick-leave days.

5. The complainant asks the Tribunal to quash the impugned decision, and to order that her case be reconsidered by a new Medical Committee with a view to establishing to what extent her absence was caused by an accident within the meaning of Article 4 of the Collective Insurance Contract. She asks that her sick-leave entitlement be recalculated pursuant to Article 62(6) of the Service Regulations, and that all decisions based on the

Invalidity Committee's report as well as the Office's miscalculation be retroactively withdrawn. She claims 2,000 euros in moral damages and 2,000 euros in costs.

6. The Tribunal notes that the Invalidity Committee was the competent body for deciding whether or not the complainant's sick leave was based on an accident. It comprised a member appointed by the complainant herself, and its report form clearly listed "accident", "severe illness" and "not […] severe illness" as the categorising options. It is therefore illogical to assume that the Invalidity Committee did not consider the question of whether a grave error in treatment had occurred, which could qualify as an accident. In the opinion of the Tribunal, the question was indeed examined by the Invalidity Committee. The Tribunal recalls that:

"[Its] power of review with regard to an act of technical evaluation (such as the Committee's medical evaluation of the complainant) is not limited only to procedural defects. [It] does have full competence to say whether the medical findings show any material mistake or inconsistency or overlook some essential fact, or plainly misread the evidence […]. The limit of this review is that, being scientifically based and scientifically relevant (absolute truth not existing in science), the Committee's evaluations should be accepted by the Tribunal unless they are considered clearly unreliable according to current scientific knowledge." (See Judgment 2580, under 6.)

The Tribunal agrees with the Internal Appeals Committee, which stated, that "any medical operation is carried out with the patient's consent, which also extends to common potential after effects, […] there is no room in this context for an accident scenario". The Tribunal further points out that, even if the after-effects of the medical operation were not "common", the Invalidity Committee deemed that nothing had taken place which could be considered exceptional or abnormal to the point of substituting the assessment according to which the complainant was not suffering from a severe illness for that of an "accident". It is also of the opinion that there is no element which points to the conclusion that the Invalidity Committee's evaluation should be considered unreliable.

7. The complainant's claim concerning the calculation of sick-leave entitlements pursuant to Article 62(6) of the Service Regulations is founded. Article 62(6) and (7), in the version which applies to this case, provide:

"(6) A permanent employee shall be entitled to paid sick leave up to a maximum amount of twelve months, either in one unbroken period or in several periods within three consecutive years. During such a period of paid sick leave a permanent employee shall retain full rights to his basic salary and to advancement to a higher step.

(7) If, at the expiry of the maximum period of sick leave as defined in paragraph 6, the permanent employee, without being permanently disabled, is still unable to perform his duties, the sick leave shall be extended by a period to be fixed by the Invalidity Committee. During this period, the permanent employee shall cease to be entitled to advancement, annual leave and home leave, and shall be entitled to half the basic salary received at the expiry of the maximum period of sick leave as defined in paragraph 6, or to 120% of the basic salary appropriate to Grade C1, step 3, whichever is the greater. However, where the incapacity for work is the result of an accident or a serious illness such as cancer, tuberculosis, poliomyelitis, mental illness or heart disease, the permanent employee shall be entitled to the whole of this basic salary."

The question that arises in relation to Article 62(6) and (7) is whether sick leave which has been paid at a reduced basic salary is to be counted as full sick-leave days in determining whether, in any three-year period, a person has taken his or her maximum period of paid sick leave. The calculation made by the Organisation, according to which "[d]ays of sick leave have to be taken into account in full, irrespective of whether they occur before or after having reached that maximum duration provided for under Article 62 [of the Service Regulations]" is incorrect. The Organisation violated Article 62(6), which clearly stated in the applicable version that during that 12-month period of sick leave the "employee shall retain full rights to his basic salary", in that it counted sick leave paid at 50 per cent of the basic salary towards the 12- month maximum period. In addition not to respect the terms of Article 62 of the Service Regulations, counting sick-leave days paid at a reduced basic salary towards the 12-month maximum period within three consecutive years, would in effect penalise the employees twice as they would lose not only 50 per cent of their basic salary during those days, but also their right to 12 months of sick leave paid at a full basic salary. Moreover, there is nothing in Article 62(6) and (7) which could possibly justify the proportional approach suggested by the Internal Appeals Committee. It follows, as argued by the complainant, that sick leave that was paid at a reduced basic salary must be disregarded in determining when the maximum period of sick leave with full pay has been exhausted.

8. The impugned decision must be set aside insofar as it did not allow the recalculation of the complainant's

sick-leave entitlement. The complainant is awarded compensation for the prejudice she has suffered and to costs. She is also awarded 400 euros in moral damages and 2,000 euros in costs. All other claims are dismissed.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it did not allow the recalculation of the complainant's sick-leave entitlement.

2. The EPO shall recalculate the complainant's sick-leave entitlement in accordance with consideration 7 of this judgment, correct the salary reduction applied, and pay the withheld salary with interest at 8 per cent per annum.

3. The EPO shall pay the complainant 400 euros in moral damages.

4. It shall also pay her 2,000 euros in costs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.