106th Session **Judgment No. 2787**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs E.A. H. against the European Patent Organisation (EPO) on 10 January 2007 and corrected on 15 February 2007, the EPO's reply of 25 January 2008, the complainant's rejoinder of 5 May and the Organisation's surrejoinder of 18 September 2008;

Considering Articles II, paragraph 5, and VII 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. The complainant, a British national born in 1947, joined the European Patent Office – the EPO's secretariat – on 1 December 1992 as Section Head (Personnel) at the Berlin sub-office. By a letter of 5 April 2004 she requested that a Medical Committee be convened to determine whether the conditions of invalidity, as laid down in the then current Article 13 of the Pension Scheme Regulations of the European Patent Office (hereinafter "the Pension Regulations"), were met in her case. The Medical Committee, which comprised Dr K., appointed by the President of the Office as Chairman, Dr G., appointed by the

complainant, and Dr B., agreed upon by the other two members, concluded in its opinion of 9 July 2004 that the complainant was suffering from invalidity but that her invalidity did not arise from an occupational disease within the meaning of Article 14(2) of the Pension Regulations as it then stood. By a letter dated 19 August 2004 the complainant was informed that the President of the Office had decided to endorse that opinion. Consequently, the complainant retired on an invalidity pension with effect from 1 August 2004.

She lodged an internal appeal on 26 November 2004 against the decision of 19 August 2004, arguing that in the absence of rules applicable in the Office for the definition of "occupational disease", the term should be defined as "[a]n illness caused by or significantly contributed to by work or working environment". She requested that her case be referred back to the Medical Committee in order for it to reconsider the occupational origin of her disease in the light of that definition. On 21 January 2005 the complainant was informed that her appeal had been referred to the Internal Appeals Committee.

On 29 April 2005 Dr G. and Dr B. wrote to Dr K. explaining that, at the Medical Committee's meeting of 9 July 2004, they had not been able to confirm the occupational origin of the complainant's illness because they had assumed that the definition of "occupational disease" used in German law was applicable in the Office. They expressed the opinion that, according to the definition used in the EPO, of which they had been informed only after the Medical Committee's meeting, the complainant's illness was clearly attributable to the conditions in the workplace. They thus requested that the opinion of 9 July 2004 be corrected accordingly.

The Internal Appeals Committee issued its opinion on 8 August 2006. It considered the appeal admissible and held that, since there were substantiated doubts as to whether the three practitioners on the Medical Committee had based their findings on a uniform definition of the term "occupational disease", and the Office had failed to show any settled uniform practice with regard to the criteria to be used in defining that term, the contested decision was vitiated by a procedural

flaw. It recommended that the question of whether or not the complainant's invalidity had arisen from an occupational disease be remitted to the Medical Committee for a new assessment on the basis of a clarified legal position, which would be determined by the Office in the light of the *contra proferentem* rule. It also recommended that the complainant be reimbursed the costs of the proceedings "to an appropriate extent against documentary evidence".

By letter of 9 October 2006 the Director of Personnel Management and Systems informed the complainant that, although the Office had not adopted the Internal Appeals Committee's reasoning, the President had decided to follow its recommendation and to refer the case back to the Medical Committee in order for it to be examined on the basis of a more precise definition of the term "occupational disease". However, all her other claims were rejected. On 7 November the complainant nevertheless requested payment of 7,406.14 euros in costs and submitted a detailed invoice in support of her claim. The Director replied, in a letter of 20 December 2006, that the Office was prepared to pay her 4,673.41 euros, an amount equivalent to the costs she incurred in the course of the internal appeal proceedings. On 10 January 2007 the complainant filed the present complaint with the Tribunal impugning the decisions of 9 October and 20 December 2006.

On 14 February 2007, having re-examined the complainant's case, the Medical Committee concluded by a majority that her invalidity was of occupational origin. By a letter dated 9 March 2007 the complainant was informed that the President had decided to endorse that opinion, thereby recognising her illness as an occupational disease.

B. In her brief dated 10 January 2007 the complainant submits that she is lodging a complaint as a precautionary measure in order to preserve her right of recourse to the Tribunal, because it is not clear whether the Office intends to implement the Internal Appeals Committee's recommendation by providing a clarified legal definition of the term "occupational disease" on the basis of which the Medical Committee could properly reassess the case. She requests that the Tribunal suspend its proceedings until the Office's response to those

recommendations is known and explains that consequently she has restricted her submissions.

The complainant puts forward several claims which are aimed at obtaining recognition of the fact that her invalidity arose from an occupational disease and, as a consequence thereof, payment of an invalidity pension in accordance with the then current Article 14(2) of the Pension Regulations with effect from 1 August 2004. In addition, she seeks payment of outstanding costs and translation fees, and compensation in respect of the increased income tax which she will be required to pay in the United Kingdom because the arrears due to her as a result of the increase in her pension will be paid retroactively as a lump sum. She also seeks compound monthly interest at the rate of 8 per cent per annum on the difference between the pension she received from 1 August 2004 onwards and that which she ought to have received in accordance with the then current Article 14(2) of the Pension Regulations and on the outstanding costs and translation fees. She claims moral damages in the amount of 10,000 euros for the injury caused to her health by the Organisation's actions and undue delays, and the costs incurred in the course of the proceedings before the Tribunal.

C. In its reply the EPO asserts that the complaint is irreceivable. It argues that the internal appeal lodged against the decision of 19 August 2004 was inadmissible because that decision was taken after consultation of the Medical Committee. Such decisions are not subject to review by the Internal Appeals Committee and can only be challenged before the Tribunal in accordance with Articles 107(1) and (2) and 109(3) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations"). Accordingly, the complainant ought to have filed her complaint within ninety days of the notification of the decision of 19 August 2004, but she failed to do so. Furthermore, in the light of the President's decision of 9 March 2007, the complainant's claims seeking recognition of the occupational origin of her invalidity have become moot and are therefore irreceivable.

Subsidiarily, the Organisation contends that the complaint is devoid of merit. Regarding the claim for payment of outstanding costs, it notes that the invoice submitted by the complainant on 7 November 2006 listed not only the costs of the internal appeal proceedings but also those resulting from the complainant's second complaint filed with the Tribunal, as well as translation fees. In line with the Internal Appeals Committee's recommendation, it agreed to pay the complainant an amount corresponding to the cost of the internal appeal proceedings leading to the present complaint. However, the complainant is not entitled to reimbursement of the costs resulting from her second complaint filed with the Tribunal, which she has withdrawn, or to reimbursement of translation fees. It points out in this respect that she could have obtained translations from the Office free of charge.

Emphasising the far-reaching financial consequences of a decision to retire an employee on grounds of invalidity and the complexity of the legal issues involved in the appeal, the EPO denies that there were any undue delays in the proceedings before the Medical Committee or the Internal Appeals Committee. It strongly rejects the contention that it intervened in the proceedings before the Medical Committee and argues that, as confirmed by the Internal Appeals Committee, the Administration did its utmost to safeguard the complainant's financial interests in the course of the invalidity proceedings.

D. In her rejoinder the complainant withdraws the claims made in her complaint related to her request for a finding that her invalidity was caused by an occupational disease. She nevertheless maintains her claim for full reimbursement of the costs of the internal appeal proceedings, of the proceedings resulting from her second complaint before the Tribunal and of translation fees; her claim for compensation in respect of the increased income tax which she is required to pay; her claim for moral damages; and her claim for the costs incurred for the present complaint.

The complainant argues that the translations mentioned in the invoice she submitted on 7 November 2006 were necessary in order for members of the Medical Committee to be provided with the

information they had requested without delay. Regarding her claim for payment of the costs resulting from her second complaint before the Tribunal, she points out that she had to seek legal representation after the Medical Committee's wrongful decision of 9 July 2004, because her state of health at the time did not allow her properly to defend her case. In her opinion, the Administration's actions resulted in undue delays and caused her unnecessary injury.

E. In its surrejoinder the Organisation maintains its position in full and denies any wrongdoing. It also indicates that all sums due have been paid to the complainant, including compensation for the additional tax payable in the United Kingdom.

CONSIDERATIONS

1. The complainant has been retired and receives an invalidity pension with effect from 1 August 2004. She contests the fact that the President of the EPO decided to retire her on grounds of invalidity without recognising the existence of an occupational disease as the cause of her invalidity. She also contests the rejection of her request for payment of costs.

In her complaint filed on 10 January 2007 she argues that the Organization failed to provide a clarified legal definition of the term "occupational disease" and to pay her costs. She requests that the Organisation be ordered to set aside the decision that her invalidity was not the result of an occupational disease and to make a finding to that effect. Alternatively, she asks the Tribunal to define the legal meaning of the term "occupational disease" and to order that the matter be referred back to the Medical Committee. She seeks moral and material damages and costs as detailed below.

2. On 14 February 2007, after re-examining the complainant's case, the Medical Committee concluded by a majority that the complainant's invalidity was of occupational origin. By letter of 9 March 2007 the complainant was informed that the President had decided to endorse that opinion. The Organisation has since paid the

complainant costs and compensation. Following receipt of the decision of 9 March 2007, the complainant has withdrawn some of her claims, which the Tribunal therefore will not entertain. She has maintained only the following claims: firstly, the setting aside of the decisions dated 9 October and 20 December 2006 to the extent that they refuse full compensation for the outstanding costs and translation fees relating to her internal appeal proceedings and her second complaint before the Tribunal; secondly, an order for payment of damages equal to the amount of additional income tax (40 per cent instead of 22 per cent) which she will be required to pay in the United Kingdom due to the retroactive payment of her pension entitlements as a lump sum; thirdly, an order for payment of 10,000 euros for the "stress, anxiety, loss of amenity, pain and further damage to [her] health" caused by the undue delays in the Medical Committee proceedings; the attempt to pervert these proceedings by deliberately misleading two of the practitioners on the Medical Committee as to the meaning of "occupational disease"; the stress caused by the possibility that the Organisation might succeed in its wish to overrule the Medical Committee's final decision; the undue delay in notifying her of the Medical Committee's decision and in informing her about her retirement; and the undue delay in implementing the President's final decision following the recommendation of the Internal Appeals Committee; and fourthly, an order for payment of the costs and expenses incurred in the course of the present complaint before the Tribunal.

3. The Organisation has raised the question of receivability, arguing that according to Articles 107(1) and (2) and 109(3) of the Service Regulations, decisions taken after consultation of the Medical Committee can only be appealed directly before the Tribunal. It contends that the complaint rests on the decision of 19 August 2004, which the Internal Appeals Committee was not competent to review. The internal appeal thus being inadmissible, the complaint itself is irreceivable. In its opinion of 8 August 2006 the Internal Appeals Committee stated that "[t]he question whether the Medical Committee used a lawful basis for definition when examining whether the conditions for an occupational disease were met is a purely procedural

one. It can be clearly distinguished from the assessment of the medical aspects of the case on the basis of that definition and can therefore be subject to review by the Appeals Committee." The Tribunal agrees with the finding of the Internal Appeals Committee and is of the opinion that the complaint is receivable. Since the complainant challenged a procedural aspect of the Medical Committee's opinion, which the latter was not competent to decide – namely whether a lawful basis for definition was used when examining whether the conditions for an occupational disease were met – an internal appeal had to be lodged with the Internal Appeals Committee before the complaint could be brought before the Tribunal (see Judgment 2358, under 17). As the appeal was based on a procedural question and not the assessment of medical aspects of the case, it must be considered outside the scope of Article 107(2) (see Judgment 2079, under 8).

4. The Tribunal finds that the claims against the decisions of 9 October and 20 December 2006, as outlined above, are unfounded. The Organisation is not responsible for costs incurred from the filing of the complainant's second complaint with the Tribunal, which was later withdrawn, as costs are awarded only in the judgment delivered in respect of each specific complaint. Regarding the translation fees incurred by the complainant during the internal appeal proceedings, the Tribunal considers that, as the Organisation offers free translation services, it has the right to deny payment of translation fees that are incurred in non-exceptional cases.

5. Regarding the complainant's claim for damages equal to the amount of additional United Kingdom income tax to be paid, the Tribunal finds that the claim is irreceivable. The complainant alleges that the difference in the taxes to be paid is due to the payment, during one tax year, of a larger lump sum (taxable at a higher rate) and that it would not have been necessary had the Organisation recognised from the beginning that her invalidity was due to an occupational disease and had it paid the proper amount in monthly sums. In its surrejoinder the Organisation raises doubts about the receivability of this claim as, inter alia, the complainant did not submit this request either to the

President of the Office or to the Internal Appeals Committee. The Tribunal observes that the complainant made no such specific claim during the internal appeals proceedings, either in her oral submissions or in her original written submissions in which she claimed correction of "the amount of pension paid to be consistent with the new interpretation of the Medical Committee" which took effect as of her retirement on 1 August 2004. The Internal Appeals Committee did not deal expressly with this specific question and the corresponding claim, but only with the question of the standard adjustment applying to the Member State in which the pension is subject to income tax. Therefore, the Tribunal holds that the claim is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute because the complainant has not exhausted the internal means of redress.

6. The Tribunal agrees with the Internal Appeals Committee's opinion, which states that there were no sanctionable delays in the Medical Committee proceedings. Following the complainant's request for the establishment of a Medical Committee on 5 April 2004, the Organisation appointed its medical practitioner on 22 April, and on 1 July a third medical practitioner was appointed to the Committee by agreement of the practitioners appointed by the complainant and the Office respectively. The Committee rendered its opinion on 9 July 2004. The period of time that elapsed between that opinion and the Organisation's decision, of which the complainant was notified in the letter of 19 August 2004 informing her of the Medical Committee's findings and the President's decision to award her an invalidity pension, cannot be considered an undue delay. The Tribunal notes that there is not a shred of evidence showing that there was a deliberate intention on the part of the Organisation to mislead the members of the Medical Committee as to the meaning of the term "occupational disease". Therefore, no award of moral damages is warranted.

7. Considering that the complainant filed her complaint before the Medical Committee had reassessed her case, and considering that

she did not succeed in her maintained claims, she is not entitled to costs.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's withdrawn claims.
2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet