107th Session **Judgment No. 2825**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. F. against the European Patent Organisation (EPO) on 13 September 2007, the EPO's reply of 21 December 2007, the complainant's rejoinder of 3 February 2008 and the Organisation's surrejoinder of 21 May 2008;

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, who is an Italian national born in 1966, joined the European Patent Office – the EPO's secretariat – in October 1999. He was assigned to the sub-office in Berlin as an examiner. By a letter of 4 May 2007 he submitted a request for partial reimbursement of crèche costs to the Personnel Section in Berlin stating that, should his request be rejected, his letter was to be treated as an internal appeal. He stated that, although he did not fulfil all the criteria to receive such reimbursement, he was entitled to it on the grounds that the criteria he did not meet were discriminatory and hence should not be applicable.

The Director of the Employment Law Directorate replied by a letter dated 27 July 2007 that the President of the Office considered that the relevant rules had been correctly applied and that his request could not be granted. She had therefore decided to "reject [his] appeal" and to refer the case to the Internal Appeals Committee for an opinion.

The Chairman of the Internal Appeals Committee wrote to the complainant on 31 July 2007 acknowledging receipt of his appeal dated 4 May 2007. He informed him that his appeal would be dealt with as soon as possible, but that the preparation of a complete dossier, including the Office's comments on the case, might take some time. That same day, the Head of the Administration Department in Berlin indicated the reasons for refusing to reimburse the crèche costs and confirmed that, his claim having been rejected, his letter of 4 May was being treated as an internal appeal.

On 1 August 2007 the complainant wrote to the Director of the Employment Law Directorate asking him to confirm that he was now entitled to file an appeal with the Tribunal. He contended that since his appeal had been rejected by the President on 27 July 2007, his case should not have been subsequently referred to the Internal Appeals Committee. A legal officer informed the complainant by an e-mail of 3 August that internal remedies had to be exhausted before he could file a complaint with the Tribunal. Noting that the complainant seemed to have misunderstood the provisions concerning internal appeals, the legal officer provided him with explanations on the relevant provisions. Thus, he explained that the letter of 27 July was a standard letter informing him that the President had decided to reject his request and that consequently the matter had been referred to the Internal Appeals Committee for an opinion. Since his request for reimbursement was still pending before the Committee and no final decision had yet been taken on his appeal, internal remedies had not been exhausted. The complainant replied on the same day that, in his view, he had exhausted internal remedies as he had been informed on 27 July that the President had decided to reject his appeal and such a decision constitutes a final decision within the meaning of Article 109(2) of the Service Regulations for Permanent Employees of

the European Patent Office. He nevertheless added that he assumed that the President had decided to reject his request and not his appeal, as she had not yet received the opinion of the Internal Appeals Committee. The above-mentioned legal officer replied on 24 August 2007 that the complainant's comments would be attached to the Office's submissions to the Internal Appeals Committee.

On 3 August 2007 the complainant wrote to the President asking her to take a decision regarding the admissibility of documents he had previously submitted to the Internal Appeals Committee. She replied on 14 August that appellants have the right to submit to the Committee any document they wish and that the Committee makes decisions regarding those documents.

On 13 September 2007 the complainant filed his complaint with the Tribunal challenging the decision of 27 July 2007.

B. The complainant indicates that he filed his complaint with the Tribunal in order to protect his interests in the event that the Internal Appeals Committee considers that his appeal was rejected by the letter of 27 July. He is afraid that in that case a complaint subsequently brought before the Tribunal would be irreceivable as time-barred.

He asserts that his complaint is admissible on the grounds that he has received a final decision within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal. Indeed, he was informed by a letter of 27 July 2007 that the President had decided to "reject [his] appeal". He explains that, in accordance with Article 109 of the Service Regulations, there are three ways in which the President may deal with an appeal. On the basis of Article 109(1) of the Service Regulations, she can refer the matter directly to the Internal Appeals Committee and postpone her decision pending receipt of the Committee's opinion. In the alternative, she can rely on Article 109(2) of the Service Regulations and either take a decision on the appeal within two months from the date on which the internal appeal was lodged, or merely refrain from taking a decision. He takes the view that, in his case, the provisions of paragraphs 1 and 2 of Article 109

were "incorrectly mixed" insofar as the President decided to reject the appeal and then referred his case to the Internal Appeals Committee.

In addition, the complainant objects to the delay in processing his claim for reimbursement of crèche costs. According to Article 106 of the Service Regulations, he should have been notified of the President's decision on his request for reimbursement within two months from the date on which the request was made. He submitted his claim on 4 May 2007 and was informed of the President's decision thereon by a letter dated 27 July, that is to say after the prescribed time limit.

The complainant asks the Tribunal to order the withdrawal of the letter of 27 July 2007 and the issuing of a "corrected decision". In the alternative, he asks to be authorised to submit additional documents in support of his complaint in the event that the Tribunal considers that the decision of 27 July is valid. He seeks moral damages in an amount equivalent to at least 14 working hours and asks that that amount, if granted, be paid directly to UNICEF.

C. In its reply the EPO submits that the complaint is irreceivable for failure to exhaust internal remedies. The complainant should have lodged an internal appeal against the decision of 27 July instead of impugning it directly before the Tribunal. In its view, the wording used in the impugned decision should have been interpreted in line with Article 109(1) of the Service Regulations, as no favourable reply could be given to the complainant's appeal. In accordance with the aforementioned provision, the President has to wait for the opinion of the Internal Appeals Committee before making a final decision on the complainant's appeal. The defendant contends that the complainant knew that no final decision had been taken. In support of its contention, it points to the e-mails of 3 and 24 August 2007, in which the Administration referred to the complainant's pending internal appeal, and to his letter of 3 August by which he asked the President about the admissibility of specific documents.

The Organisation acknowledges the delay in taking the impugned decision, but stresses that it exceeded the prescribed time limit by only

23 days. It objects to the claim for moral damages on the grounds that the impugned decision was legally correct.

D. In his rejoinder the complainant reiterates his pleas. He argues that there is no point in filing a new internal appeal against the decision of 27 July 2007 because the Administration would send him another standard letter indicating that his appeal had been rejected; consequently, he would have to file another internal appeal. He maintains that the wording of the letter of 27 July 2007 was rather confusing as the terms "request", "decision", "appeal" and "rejection" were incorrectly used.

In addition, the complainant considers that the request he put forward in his letter of 3 August 2007 should be considered separately. He also submits that the Internal Appeals Committee is an independent body and that the Organisation should not exert pressure on it. Consequently, the defendant was not entitled to assert that the Committee shared its view that his appeal was still pending.

E. In its surrejoinder the Organisation maintains its position. It adds that the reference to the complainant's request of 3 August was only aimed at showing that he knew that no final decision had yet been taken on his appeal. It denies having tried to influence the Internal Appeals Committee and states that it merely tried to clarify the appeal procedure.

CONSIDERATIONS

1. The complainant, who is a staff member of the EPO, requested partial reimbursement of crèche costs on 4 May 2007 and asked that, if not granted, his request be treated as an internal appeal. A letter dated 27 July 2007 informed him that:

> "After an initial examination of the case, the President of the Office considers that the relevant rules have been correctly applied and that your request cannot be granted. Consequently, the President has decided to reject your appeal and to refer the case to the Appeals Committee for an opinion […].

> You will be receiving details of the President's decision as soon as possible."

2. On 1 August 2007 the complainant asserted in an e-mail that, as his appeal had been rejected, he was entitled to file a complaint with the Tribunal and he asked the Director of the Employment Law Directorate to confirm this. He was then informed, amongst other things, that he could not follow that course as internal remedies had not been exhausted. On 3 August the complainant sent an e-mail to the legal officer stating in particular:

> "I presume that the President did not decide to reject my appeal at this stage, without hearing the Opinion of the Appeal[s] Committee, but simply decided to reject my request. Further, being not in a position to give a favourable reply to my appeal, she intended to refer immediately the case to the Appeal[s] Committee as stated in Art. 109(1).
>
> If this is the case, please notify me [of] the withdrawal of the previous communication and re-issue a novel one.
>
> If the appeal is really rejected or the communication I received is still standing, please provide me with a confirmation."

On 24 August the complainant was informed that, when the dossier was prepared for the Internal Appeals Committee, his comments would be placed in the file.

3. The complainant filed his complaint on 13 September 2007 seeking, amongst other things, an order for the withdrawal of the letter of 27 July 2007 and the issue of a corrected notification or, in the alternative, leave for the late filing of documents relating to the merits of his claim. The clear purpose of the complainant is to protect his position in the event that either the Internal Appeals Committee or the Tribunal takes the view that his appeal was rejected on 27 July 2007.

4. The EPO contends that the complaint is irreceivable for failure to exhaust internal remedies. Moreover, it argues that it was clear from the text of the letter of 27 July 2007 that the complainant's appeal had not been rejected, but simply that, at that stage and in accordance with Article 109(1) of the Service Regulations, "a favourable reply [could not be given] to the internal appeal". It is

unfortunate that the letter of 27 July, which, it seems, is a standard letter sent to all those to whom a favourable reply cannot be given, did not follow the precise terms of Article 109(1). Nevertheless, it is clear from the statements in that letter that a final decision had not then been taken to reject the complainant's internal appeal. In this regard, it is sufficient to note the statements that it had been decided to refer the case to the Internal Appeals Committee and that the complainant would receive details of the President's decision as soon as possible.

5. On the basis on which the EPO argues that the complaint is irreceivable, the matter is somewhat complicated by the fact that Article 109(2) of the Service Regulations relevantly provides that:

> "If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected."

To similar effect is Article VII, paragraph 3, of the Tribunal's Statute which relevantly provides:

> "Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision."

6. Whether on the basis of the EPO's Service Regulations or the Tribunal's Statute, the complainant was entitled to file a complaint with the Tribunal on or after 3 July 2007, provided that it was lodged within ninety days of that date. However, the complaint would be in respect of an implied final decision rejecting his internal appeal. The present complaint is not directed to an implied final decision. Rather, it is clear from the complaint form that it is directed to what is said to be the "express decision" of 27 July 2007. In this regard, it is sufficient to note that the complainant completed the section of the complaint form relating to "an *express* final decision" and identified the decision as bearing the date 27 July 2007 and as having been received by him on 28 July. Moreover, he left blank that section of the form that requires, in a case where no decision has been taken within the time limit of Article VII, paragraph 3, of the Tribunal's Statute, the

insertion of the date on which the claim was notified to the organisation.

7. Given the terms of the complaint and the arguments advanced by him, the complainant is estopped from arguing that the complaint is directed to an implied decision rejecting his internal appeal. And because the EPO has consistently argued that the complainant's internal appeal was not rejected by the letter of 27 July 2007 but was properly and promptly referred to the Internal Appeals Committee, it, too, is estopped from arguing to the contrary when the matter is before the Committee or, if the matter proceeds further, before this Tribunal.

8. Because the letter of 27 July 2007 must be construed as meaning that a final decision would only be taken on the complainant's internal appeal after receipt of the opinion of the Internal Appeals Committee, it did not convey a final decision. As Article VII, paragraph 1, of the Tribunal's Statute allows only for complaints with respect to final decisions, the complaint is irreceivable. The matter must proceed before the Internal Appeals Committee.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron
Agustín Gordillo

Dolores M. Hansen
Catherine Comtet