112th Session **Judgment No. 3056**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr P. A. against the European Patent Organisation (EPO) on 15 November 2008 and corrected on 5 December 2008, the EPO's reply of 20 May 2009, the complainant's rejoinder of 1 July, corrected on 20 July, the Organisation's surrejoinder dated 30 October 2009, the complainant's additional submissions of 5 October 2011 and the EPO's final comments of 28 October 2011;

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. Facts relevant to this case are to be found in Judgments 2580, 2795 and 2816, concerning the complainant's fourth, fifth and sixth complaints, respectively.

Suffice it to recall that, on the basis of the Medical Committee's opinion in November 2005 that the complainant was permanently

unable to perform his duties but that his invalidity did not result from an occupational disease, the President of the Office decided that with effect from 1 December 2005 he would cease to perform his duties and would receive an invalidity pension under what was then Article 14(1) of the Pension Scheme Regulations. In his fourth complaint the complainant challenged that decision, claiming inter alia an invalidity pension due to occupational disease under what was then Article 14(2) of the Pension Scheme Regulations. That complaint led to Judgment 2580, delivered on 7 February 2007, in which the Tribunal found no error in the Medical Committee's determination of the complainant's invalidity, nor any specific evidence casting doubt on the EPO's contention that his invalidity did not result from an occupational disease. It nevertheless stated that the Office would have to reconsider the complainant's rights to an invalidity pension under Article 14(2), if it appeared from the complainant's appeals pending before the Organisation at the time that his invalidity might have been directly or indirectly due to his working conditions.

Prior to that, in October 2004, the President had rejected the complainant's request for an investigation into his allegations of harassment. That decision was the subject of the complainant's fifth complaint, which led to Judgment 2795. In that judgment, which was delivered on 4 February 2009, the Tribunal held that, as a result of the Organisation's failure to order an investigation, the complainant had missed a valuable opportunity to establish his allegations and thus to work in an acceptable work environment until retirement age. It therefore set aside the impugned decision and awarded the complainant material and moral damages, and costs.

Pursuant to Administrative Council decision CA/D 30/07 the rules governing invalidity pensions were amended with effect from 1 January 2008. As from that date, employees who retired on grounds of invalidity before having reached the statutory retirement age of 65 would not become pensioners immediately but would be considered as employees with non-active status. As such, they would receive an invalidity allowance instead of an invalidity pension and, except where their invalidity was due to an occupational disease, they would continue to contribute to the pension fund. When they reached the age

of 65, their contributions to the pension fund would cease and they would begin to draw a retirement pension. A tax adjustment would be payable in respect of the retirement pension, but not in respect of the invalidity allowance, as this allowance would be exempt from national income tax. Transitional measures would ensure that no loss would be suffered by employees already receiving an invalidity pension. For the complainant, who had not yet reached the statutory retirement age, this meant that his invalidity pension was replaced by an invalidity allowance, that he no longer received a tax adjustment, and that he had to resume contributions to the pension fund until the age of 65.

On 14 January 2008 he was informed in writing of these changes and on 23 January he received a document containing a calculation of his entitlements under the old and the new rules. On 13 February, after having received his January 2008 payslip, the complainant wrote to the President arguing that he had been forced to retire on an invalidity pension through a flawed procedure and that, as the real cause of his condition was workplace mobbing, his invalidity was due to an occupational disease. He requested that he be exempted from the payment of pension contributions or, alternatively, that the old rules governing invalidity be applied. In the event that his request was not granted, he asked that his letter be treated as an internal appeal. By a letter of 8 April he was informed that his case had been referred to the Internal Appeals Committee for an opinion.

On 9 October 2008 the complainant wrote to the President of the Office explaining that he had been advised that, pursuant to Article 107(2) of the Service Regulations for Permanent Employees of the European Patent Office, he did not have to await the EPO's position paper before bringing a complaint to the Tribunal. He asked the President to reconsider his case and stated that, if he did not receive a reply within two weeks, he would seise the Tribunal. By an e-mail of 15 October 2008 he was advised that, based on the Tribunal's conclusions in Judgment 2580, it was not established that the Medical Committee's opinion was wrong or that his invalidity resulted from an occupational disease. Accordingly, the President considered that the decision to deduct pension contributions from his invalidity allowance was correct. That is the impugned decision.

B. The complainant contends that his acquired rights have been breached through the amendments introduced by the EPO to the rules governing invalidity pensions. He explains that he made financial decisions based on the fact that as from 1 December 2005 he would be drawing an invalidity pension, and would thus be exempted from making pension contributions, and he asserts that it is a general principle of law that a rule shall not have retroactive effect. In his opinion, the calculation of his entitlements under the old and the new rules sent to him on 23 January 2008 was incorrect and, in any event, such calculation should have been performed by a third party.

He also contends that he was the victim of a conspiracy by senior managers to remove him from the Organisation and that the decision to separate him from service on invalidity grounds was actually a covert dismissal. In effect, the procedure through which his invalidity was allegedly established was an act of retaliation for his daring to report his harassers and to take action against them.

The complainant contests the Medical Committee's opinion of November 2005 and he asserts that his health problems are the direct result of the workplace mobbing to which he was subjected over several years and which the Administration failed to prevent or even to address, thereby failing in its duty of care. In that respect, he draws attention to earlier medical reports which, in his view, constitute clear evidence of the occupational origin of his condition.

Furthermore, the procedure before the Medical Committee was flawed. In his view, the Committee failed to take into account important facts and circumstances and it contravened the Service Regulations, in particular because it initiated an invalidity procedure before he had even exhausted his sick leave entitlements. There were several irregularities in the appointment of its members and their impartiality was not beyond question. In fact, they were all under the full control of the EPO and, in the case of the Office's Medical Adviser, who also acted as the member appointed by the Organisation, there was a clear conflict of interest. The Committee's opinion which served as the basis for the decision to retire him on invalidity grounds contained no proper diagnosis of his condition and the Committee

members' final conclusion was in sharp contradiction to their earlier individual statements that his symptoms were akin to those caused by workplace mobbing.

The complainant asks the Tribunal to recognise that his invalidity is due to an occupational disease and to award him the arrears resulting from the difference between the invalidity pension which he received as from 1 December 2005 and that which he would have received as from the same date had his invalidity been attributed to an occupational disease. He claims payment as from 1 January 2008 of the tax adjustments to which he was entitled under the old rules, as well as reimbursement of the pension contributions paid by him as from the same date. Alternatively, he asks that the old pension scheme be applied to him. He seeks interest on all of the above amounts and moral damages.

C. In its reply the EPO argues that the complaint is irreceivable for failure to exhaust internal remedies to the extent that the complainant is challenging the introduction of the new rules governing invalidity. Moreover, it is irreceivable under *res judicata*, to the extent that he is challenging the procedure leading to his retirement on invalidity grounds and the finding that his invalidity was not due to an occupational disease, as these matters were examined by the Tribunal in Judgment 2580.

On the merits, the Organisation submits that the complaint is devoid of merit. It points out that the amendment of the rules governing invalidity was carried out by the competent body within the limits set by the Tribunal's case law, and that the complainant had no legitimate expectation that these rules would remain unchanged. In its view, the introduction of an invalidity allowance did not infringe the complainant's acquired rights, since it did not affect any essential or fundamental term of his employment. If anything, it was fully in line with the Office's obligation to provide social security coverage while abiding by the principle of sound financial management. In addition, the complainant's objections to the calculation of his entitlements under the old and the new rules are not tenable, not least because the Office is best placed to provide such a calculation.

The EPO rejects the complainant's allegations of harassment as unsubstantiated and contends that he has advanced no convincing argument or evidence in support of his claim for recognition of the occupational origin of his invalidity. In its opinion, the Tribunal has already ruled on the issue of the complainant's invalidity and its origin in Judgment 2580, by rejecting his claim for the award of an invalidity pension due to an occupational disease. Moreover, no situation has so far arisen which would warrant reconsideration of the complainant's rights under former Article 14(2) of the Pension Scheme Regulations, as directed by the Tribunal in the said judgment.

As regards the procedure before the Medical Committee, the defendant argues that the complainant's contentions are neither sound nor new. It recalls that the Committee's conclusion on the complainant's invalidity and its origin was unanimous and that, since the report was intended for the Administration, it was correct for it not to include a diagnosis of the complainant's condition. It denies the assertion that the complainant had not exhausted his sick leave entitlement when the procedure was initiated and refutes the accusations levelled at the Committee's members. The Organisation considers it unnecessary to reply to the complainant's allegations of a conspiracy by senior managers against him and describes his comments in that respect as clearly inappropriate.

D. In his rejoinder the complainant argues that his complaint is receivable under Article 107(2) of the Service Regulations, which provides that for decisions taken after consultation of the Medical Committee internal remedies are deemed exhausted and he may therefore have direct recourse to the Tribunal. The introduction of new rules governing invalidity not only breached his acquired rights, but also defied the principles of good faith and legal certainty. He reiterates that his invalidity resulted from workplace mobbing and that it is therefore of occupational origin, and he produces a number of documents which, in his view, constitute unequivocal evidence of the bullying he suffered over many years. Relying on the wording of Judgment 2580, he rejects the contention that the Tribunal has given a definitive ruling on the origin of his invalidity. In light of his

improved state of health, he expresses confidence that he can be reintegrated into the Office's workforce.

E. In its surrejoinder the Organisation maintains in full its position on the receivability and the merits of the complaint. It explains that the amendment to the rules governing invalidity pensions was dictated by broad considerations of maintaining the equilibrium and sustainability of the pension scheme. It recalls its view that the complainant's allegations of workplace mobbing have been dealt with by the Tribunal in Judgment 2795 and that they are therefore *res judicata*.

F. In his additional submissions the complainant produces a letter dated 28 September 2011 informing him of the decision, taken by the President of the Office on the basis of the Medical Committee's opinion, to reintegrate him into active status with effect from 1 October 2011. He also produces a number of documents which, according to him, prove that in 2004 he was placed on compulsory sick leave, which eventually led to a procedure before the Medical Committee and the decision to separate him from service on invalidity grounds.

G. In its final comments the EPO argues that the complainant's additional submissions contain no element liable to modify its position. It explains that at the complainant's request a new procedure was launched before the Medical Committee in order for it to determine whether he could resume his functions as an examiner. A majority of the Committee's members found the complainant fit to work again and, accordingly, the President decided that he should be reintegrated. It adds that the discussion on the modalities of

his reintegration is still ongoing but that, should he eventually be reintegrated, his claim to recover an invalidity pension would be limited to the period from 1 January 2008 until the date of reinstatement.

CONSIDERATIONS

1. In November 2005 the Medical Committee determined that the complainant was permanently unable to perform his duties but that his invalidity was not the result of an occupational disease within the meaning of Article 14(2) of the Pension Scheme Regulations. On 23 November 2005 the President of the Office decided that the complainant should cease to perform his duties with effect from 1 December 2005. He has since been informed of the decision taken by the President to reintegrate him with effect from 1 October 2011. The decision that the complainant should cease duty was the subject of the complainant's fourth complaint before the Tribunal. In that complaint, the complainant asked that he be reinstated as a permanent employee with retrospective effect from 1 December 2005, arguing, amongst other things, that the Medical Committee's conclusion that he was permanently unable to carry out his duties was manifestly erroneous. Subsidiarily, he asked that he be awarded a pension on the basis of an occupational disease in accordance with Article 14(2) of the Pension Scheme Regulations, together with arrears and interest. The Tribunal ruled on the complaint in Judgment 2580, delivered on 7 February 2007. The Tribunal held that there was no reviewable error involved in the determination by the Medical Committee that the complainant was permanently unable to perform his duties. So far as concerns the subsidiary claim for payment of a pension for an occupational disease, the Tribunal stated, under consideration 8, as follows:

> "[T]he complainant has produced no specific evidence casting doubt on the EPO's contention that the complainant's invalidity is not attributable to an occupational disease. If, however, in the light of the appeals currently pending before the Organisation it appears that the complainant's health problems might have been directly or indirectly due to his working conditions, the Office will have to reconsider his rights to an invalidity

> pension under Article 14(2) of the [Pension Scheme] Regulations." (Emphasis added.)

In the result, a decision regarding the claim for an invalidity pension due to occupational disease was "suspended pending the final decisions on the questions raised by the complainant in his internal appeals" that were then pending. A subsequent application by the complainant for review of Judgment 2580 was dismissed (see Judgment 2816).

2. One of the internal appeals pending when the EPO filed its surrejoinder in the proceedings that led to Judgment 2580 concerned a decision by the then President of 5 October 2004 refusing to conduct an investigation into the complainant's claims that he had been the victim of bullying. The appeal was unsuccessful and the complainant filed a fifth complaint with the Tribunal. That complaint resulted in Judgment 2795, delivered on 4 February 2009. The Tribunal noted that the issue before it was not whether the complainant had been the victim of harassment, but whether the Organisation had fulfilled its duty to investigate his allegations. The Tribunal referred to specific allegations of events on 25 November and 2 December 2002. Those allegations, if true, constituted *prima facie* evidence of harassment. The Tribunal also recalled, under consideration 7, that in Judgment 1344, delivered on 13 July 1994, it had sanctioned the Organisation for "having disguised punitive measures as routine assessments of the complainant's work". In the result, the Tribunal held that the Organisation had not fulfilled its duty to conduct an investigation, and it set aside the President's decision dismissing the complainant's appeal and awarded the complainant material and moral damages.

3. The matters set out above provide the background to the present complaint which originates in decision CA/D 30/07 by the Administrative Council to replace the invalidity pension by an invalidity allowance with effect from 1 January 2008. In its reply the EPO describes the change effected by that decision as follows:

> "A major feature of th[e] decision was that former pensioners were now considered as inactive employees who therefore had to continue to contribute to the pension scheme, and who would no longer receive a tax adjustment. However, pensioners receiving an invalidity pension on account of a service-incurred invalidity would be exempted from the contributions to the pension scheme".

4. The complainant was informed of the changes effected to the pension scheme in January 2008. Following receipt of his January payslip, he wrote to the President of the Office on 13 February 2008 claiming that "[t]he cause of [his] invalidity was workplace mobbing" and requesting that he be exempted from the payment of pension contributions or, in the event that that was not granted, that the old invalidity pension provisions continue to be applied to him. He asked that, if his request was not granted, his letter be treated as an internal appeal. The complainant was informed on 8 April 2008 that the President considered that the relevant rules had been correctly applied and, hence, his case had been referred to the Internal Appeals Committee. As nothing had apparently occurred in the meanwhile, the complainant sent an e-mail to the President on 9 October 2008 stating that he had been advised that, by reason of Article 107(2) of the Service Regulations, he did not "have to await the EPO's position paper before bringing his complaint to the [...] Tribunal". He concluded by saying that, if he did not receive an answer within two weeks, he would file a complaint. The Director of the Employment Law Directorate replied on 15 October as follows:

> "The President of the Office has taken note that, according to Judgement [...] 2580 [...] which is final and definitive, it is not established that the conclusions of the medical committee are wrong, nor that your invalidity results from an occupational decease, [sic] and therefor[e] considers that the decision to deduct pension contribution[s] from your invalidity allowance is correct."

The complainant filed the present complaint on 15 November 2008, seeking that his invalidity be recognised as occupational or, alternatively, that he be granted the benefit of the old pension scheme on the basis of an acquired right, together, in either case, with consequential relief. He also seeks moral damages.

5. The EPO contends that the complaint is irreceivable by reason of failure to exhaust internal remedies. Additionally, it contends that the complainant is barred by *res judicata* from founding receivability on Article 107(2)(a) of the Service Regulations which allows for complaints to be lodged directly with the Tribunal with respect to "decisions taken after consultation of the Medical Committee". Quite apart from the doctrine of *res judicata*, Article 107(2)(a) has no application to the present case. The decision put in question by the present complaint was a decision to apply the new rules governing invalidity to the complainant on the basis that his invalidity was not the result of occupational disease. The decision was not taken after consultation of the Medical Committee; it was simply based on an earlier finding by that Committee.

6. It is correct, as the EPO contends, that the complainant's internal appeal relating to the new invalidity allowance has not been finally decided. The material does not disclose what steps have or have not been taken to have that appeal processed. All that appears is that, by October 2008, the Office had not filed its position paper. However, and as stated in Judgment 2039, under consideration 4, "the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainant's rights". Thus, as also pointed out in that case by reference to Judgments 1829 and 1968, "[c]omplainants may therefore go straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable time, depending on the circumstances".

7. The circumstances in the present case are unusual. They include the e-mail from the Director of the Employment Law Directorate of 15 October 2008 in which reference was made to the "final and definitive" nature of Judgment 2580, according to which, it was stated, "it is not established that the conclusions of the Medical Committee are wrong, nor that [the complainant's] invalidity results from occupational [disease]". That involves a misreading of Judgment 2580. The only final and definitive aspect of that judgment

concerns the question whether or not the complainant was permanently unable to carry out his duties. The question whether he was suffering from an occupational disease was left in abeyance, with a direction that that question should be reconsidered if it appeared in the light of the then pending internal appeals that his "health problems might have been directly or indirectly due to his working conditions".

8. It appears from the reply of the EPO that there has not yet been a reconsideration of the question directed by the Tribunal in Judgment 2580. In this respect, it points out that internal appeals lodged on 7 February 2006 and 20 April 2007 are still pending. The first claim raised in the present complaint depends on the answer to the question whether the complainant's invalidity was occupational in nature. As there has been no reconsideration of that question and no indication of whether and, if so, when, reconsideration may occur, it is clear, in the words used in Judgment 2039, that "the competent bodies are not able to decide that issue within a reasonable time". It follows that the complaint is receivable.

9. Although the complaint is receivable, the Tribunal is unable to decide whether the complainant's invalidity was the result of occupational disease. That question must be reconsidered by a Medical Committee. Strictly speaking, the internal appeal concerning the failure to investigate the complainant's claims of harassment was no longer pending when the Tribunal delivered Judgment 2580 on 7 February 2007, as the President had dismissed that appeal on 20 December 2006. However, and as already noted, it was still pending when the EPO filed its surrejoinder in the proceedings that led to that judgment. It was, therefore, one of the pending appeals referred to in the judgment that might necessitate reconsideration of the question whether the complainant's invalidity was due to an occupational disease. As the complainant has at all times claimed that his illness was the result of workplace bullying or mobbing, the specific allegations referred to in Judgment 2580 were sufficient to

raise the possibility that his "health problems might have been directly or indirectly due to his working conditions". That was sufficient to activate the obligation of the EPO to reconsider the nature of his invalidity. And any such reconsideration should have dated back at least to the time when punitive measures were imposed as routine assessments of his work.

10. As the EPO has not reconsidered the nature of the complainant's invalidity, the matter must now be remitted to the President of the Office to refer that question to a differently constituted Medical Committee. The reconsideration should be completed within six months of the date of this judgment and the Tribunal informed of its outcome within 21 days of its completion. The complaint is stood over to the 114th Session of the Tribunal for consideration of the course then to be taken, including with respect to costs.

DECISION

For the above reasons,

1. The matter is remitted to the President of the Office to refer the question whether the complainant's invalidity was due to an occupational disease to a differently constituted Medical Committee. The Medical Committee is to report within six months of the date of this judgment.

2. The EPO is to provide the Tribunal with the report of the Medical Committee within 21 days of its receipt.

3. The matter is stood over until the 114th Session of the Tribunal for consideration of the course then to be taken, including with respect to costs.

In witness of this judgment, adopted on 10 November 2011, 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 8 February 2012.

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