112th Session **Judgment No. 3057**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr P. A. against the European Patent Organisation (EPO) on 24 June 2009 and corrected on 11 August, his ninth complaint against the EPO filed on 7 July 2009, the EPO's replies of 8 December, the complainant's rejoinders of 22 December 2009, the Organisation's surrejoinders dated 5 February 2010, the complainant's additional submissions of 5 October 2011 and the EPO's final comments dated 28 October 2011;

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

Having examined the written submissions;

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

A. Facts relevant to these cases are to be found in Judgment 2580, delivered on 7 February 2007, concerning the complainant's fourth complaint. Suffice it to recall that in November 2003, as the complainant was approaching the maximum number of days of paid sick leave to which he was entitled, a Committee had to be convened to address the issue of extended sick leave, in accordance with Article 62(7) of the Service Regulations for Permanent Employees of the European Patent Office. The Medical Committee met on 2 September 2004 and issued a report in which it concluded that

his sick leave should be extended for a period of one year. The complainant was not on sick leave on that date, but on 13 September he was examined by the Office's medical adviser, who decided that his condition was such as to warrant placing him on compulsory sick leave with immediate effect.

On 24 October 2004 the complainant exhausted his entitlement to paid sick leave under Article 62(6) of the Service Regulations. As the Office had decided to extend his sick leave in light of the Medical Committee's report of 2 September, he would thus ordinarily have been on extended sick leave as from 25 October 2004. However, the version of Article 62(7) of the Service Regulations then in force relevantly provided that, during a period of extended sick leave, "the employee shall cease to be entitled to advancement in step, annual leave and home leave". In view of the fact that the complainant was due to advance to step 13 of grade A4 on 1 January 2005, the Office decided to place him on annual leave from 25 October 2004 until 1 January 2005, to enable him to reach the next step before his period of extended sick leave commenced. As a result, 40 days were deducted from his annual leave entitlement, and his extended sick leave began on 2 January 2005.

In November 2005 a Medical Committee determined that the complainant was permanently unable to perform his duties. The President of the Office therefore decided that he would cease to perform his duties with effect from 1 December 2005 and would receive an invalidity pension in accordance with Article 14(1) of the Pension Scheme Regulations. Various amounts were paid to him upon separation, including a lump sum for invalidity and an amount corresponding to the balance of his annual leave.

On 30 January 2006 the complainant wrote to the President, disputing the amounts shown in his payslip for December 2005. He claimed an increased tax adjustment on his pension, a tax adjustment on the above-mentioned lump sum, 181.3 days' salary in respect of accrued annual leave, instead of the two months that had been paid, and an additional 190 days' salary because he had not reached the maximum number of days of sick leave at the time of his retirement on

invalidity grounds. He also claimed moral damages and costs, and he requested that his letter be treated as an internal appeal if his claims were not satisfied. Following an initial rejection of his claims, the matter was referred to the Internal Appeals Committee for an opinion.

In January 2006 and January 2007, following retroactive adjustments of salaries and other elements of remuneration of permanent employees of the Office and pensions paid by the Office, the complainant was paid arrears on his salary and on the balance of annual leave he had received upon separation. On 8 March 2007 he wrote to the President contending that the arrears on the balance of his annual leave had not been paid. He claimed arrears on approximately six months' annual leave instead of two, with interest at the rate of 8 per cent per annum, 10,000 euros in moral damages, 250 euros for postage and photocopying costs and an award for legal costs. In the event that these requests were denied, his letter was to be treated as an internal appeal. This matter was likewise referred by the President to the Internal Appeals Committee.

The two appeals were joined by the Internal Appeals Committee. At a hearing on 11 February 2009 the complainant clarified his claims. In its opinion of 23 April 2009 the Committee unanimously considered that the complainant should be paid an additional 1.6 days' annual leave, with 8 per cent interest, and that the travel expenses he had incurred in order to attend the hearing before the Committee should be reimbursed, but that his appeals should otherwise be dismissed. By a letter of 18 June 2009 the Director of Personnel informed the complainant that the President agreed to reimburse his travel expenses, as recommended by the Committee, but rejected all his other claims. The complainant impugns that decision in his eighth and ninth complaints.

B. The complainant contends that the Medical Committee's "decision" of 2 September 2004 to extend his sick leave was unlawful because, according to the version of Article 62(7) of the Service Regulations then in force, that decision could only be taken "at the expiry of the maximum period of sick leave", which, according to the Office, did not occur until 24 October 2004. He considers that the

decision to place him on annual leave for the period from 25 October 2004 to 1 January 2005 was also unlawful, and that it was a punitive measure taken, not by the Office's medical adviser, but by the Director of Personnel. Referring to Circular No. 22, he submits that it was not necessary for him to use 40 days' annual leave in order to advance to the next step, as his accrued annual leave would in any case have counted towards reaching that step. Furthermore, this period of annual leave, which he had not requested, could not be granted while he was on sick leave. In his view, the period from 21 September 2004 until 31 November 2005 was a period of authorised absence from work during which his entitlement to annual leave, home leave and step advancement continued to accrue.

According to the complainant, the calculation of the annual leave balance due to him in December 2005 was incorrect for several reasons: 40 days' leave were wrongly deducted for the period from 25 October 2004 to 1 January 2005; the payment did not include the education allowance and long-term care insurance payment to which he was entitled; nor did it include home leave (11 days), the so-called "Kober days" payable in respect of shortened lunch breaks in 2004 and 2005, and the two days' leave granted for 25 years of service, to which he would have been entitled had he been allowed to remain in service. As a result of the omission of these items, the arrears on his annual leave balance that were paid to him in 2006 and 2007 were likewise miscalculated.

The complainant reiterates that his medical condition resulted solely from the harassment to which he was subjected in the workplace, particularly by his Director, which he describes in detail. He also raises more general criticisms of the legal remedies available to serving and former employees of the Office.

In his eighth complaint he asks the Tribunal to grant him 181.5 days as the balance of his annual leave; 11 days for home leave and the reimbursement of home leave expenses for him and his family; "correct payment" of his salary, including his education allowance and long-term care benefit and taking into account the salary adjustments up to 1 July 2005; costs; interest at the rate of 8 per cent per annum on

all sums due to him; and moral damages in the amount of 20 euros per day from 2 September 2004 to the date of the judgment, for the delay in the internal appeal proceedings and for the bad faith, malice and "criminal intent" of the Organisation. He also requests an oral hearing.

In his ninth complaint he claims arrears on the above-mentioned 181.5 days' leave, taking into account the adjusted salary scales, his education allowance and his long-term care benefit; 8 per cent interest on these arrears; 10,000 euros in moral damages for the injury caused by the EPO and for delay in the internal appeal proceedings; and costs.

C. In its replies the EPO contends that the complaints are partially irreceivable. It takes the view that the complainant's allegations regarding the lawfulness of the procedure leading to his retirement on invalidity grounds and his allegations of harassment are *res judicata* following the Tribunal's rulings in Judgments 2580 and 2795, and that all claims relating to these matters are therefore irreceivable. It also points out that the complainant no longer has a cause of action with regard to the payment of his salary in accordance with the adjusted salary scales and the payment of his education allowance, as these claims have been satisfied.

According to the Organisation, the amount received by the complainant in respect of the balance of his annual leave, and the subsequent arrears on that amount resulting from the salary adjustments in 2006 and 2007, were correctly calculated. In particular, the deduction of 40 days' annual leave for the period 25 October 2004 to 1 January 2005 was an exceptional decision which was to the complainant's advantage and which, as such, was lawful. Indeed, had those days not been deducted, he would not have advanced to step 13 on 1 January 2005. Thus, although in that case an additional 40 days might have been included in the balance of leave paid to him in December 2005, all the payments that he received thereafter would have been reduced, as they would have been calculated on the basis of a lower salary step.

The EPO states that the complainant is mistaken in thinking that the payment he received in respect of his untaken annual leave should have included "Kober days", home leave and days for 25 years of

service, as there is no provision in the relevant texts for payment in lieu of these forms of leave. As for the travel expenses that he claims in connection with his home leave, these are not payable unless home leave travel is actually undertaken, which is not the case here.

The Organisation disagrees with the Internal Appeals Committee's finding that the complainant was owed an additional 1.6 days to account for weekends. In this regard, it asserts that its interpretation of Rule 4(f)(iii) of Circular No. 22, which ensures a uniform treatment of all staff members, was upheld by the Tribunal in Judgment 2489[*].

With regard to the complainant's claim for moral damages, the EPO accepts that compensation is due for any unreasonable delay in the internal appeal proceedings. However, in this case, it considers that no further moral damages are justified, given that his complaints are unfounded and that he has not demonstrated any serious injury resulting from the impugned decision.

The EPO rejects the complainant's allegations regarding the inadequacy of the legal remedies open to him. In its view, the combination of the internal appeals procedure and subsequent recourse to the Tribunal are entirely adequate for the proper examination of complaints by serving or former employees. It submits that the complainant's decision to maintain two complaints against the same administrative decision and his submission of information which is unrelated to the impugned decision and which has already been examined by the Tribunal in the context of his previous complaints constitute an abuse of process. It invites the Tribunal to take appropriate action in this respect.

D. In his rejoinders the complainant reiterates his arguments. He acknowledges that he received a payment for his education allowance in December 2008, including the corresponding arrears, but asserts that he still has a cause of action with respect to this claim as the allowance was paid for only two months instead of six. He also

[*] Rule 2(f)(iii) of Circular No. 22, considered by the Tribunal in Judgment 2489, was subsequently renumbered Rule 4(f)(iii) as the result of an amendment.

submits that his allegations of harassment have never been examined by the Tribunal and therefore cannot be considered as *res judicata*.

E. In its surrejoinders the EPO maintains its position in full.

F. In his additional submissions the complainant produces a letter dated 28 September 2011 informing him of the President's decision, based on an opinion of the Medical Committee, to reintegrate him as an active employee with effect from 1 October 2011.

G. In its final comments the EPO states that the complainant's additional submissions contain no element liable to modify its position.

CONSIDERATIONS

1. These two complaints arise out of a single decision of the President of the Office, dated 18 June 2009, with respect to two internal appeals lodged by the complainant. The internal appeals concerned payment on the complainant's cessation of service in December 2005 for untaken leave. The complainant's eighth complaint relates to the payment made on cessation of service in December 2005, the ninth to the calculation of arrears following the review of salary scales and allowances with retrospective effect. Both complaints raise the same issues of fact and of law and it is appropriate that they be joined.

2. In his eighth complaint the complainant seeks an oral hearing. However, the essential facts are not in dispute and the outcome turns on the meaning and effect of the applicable provisions of the Service Regulations. Accordingly, the application for an oral hearing is refused.

3. At the centre of the present complaints is the question whether the complainant is entitled to payment for 40 days apportioned to annual leave in 2005. At the relevant time, he was on paid sick leave and was soon to reach the maximum period allowed and would then be placed on extended sick leave. If he reached the maximum period of paid sick leave without returning to duty, he would not be eligible for a

step increase for which he would otherwise shortly become eligible. To allow the complainant to obtain the step increase, he was placed on annual leave between 25 October 2004 and 1 January 2005. The complainant contends that he was forced to take annual leave against his will and that he would have been eligible for the step increase even if he did not take annual leave. He therefore claims that he should have been paid for these 40 days of leave on his cessation of service. This argument is rejected. The version of Article 62(7) of the Service Regulations in force at the material time clearly states that during extended sick leave "the employee shall cease to be entitled to advancement in step, annual leave and home leave". Moreover, the evidence is that the complainant agreed to being placed on annual leave for the period in question so that he could obtain the step increase.

4. At the material time, Rule 4(f)(ii) of Circular No. 22 provided for payment of the following with respect to unused leave on cessation of employment:

> "- salary, calculated [...] in accordance with Article 65(1)(b) of the Service Regulations, including any intervening step increases,
> - family allowances,
> - expatriation allowance,
> - rent allowance,
> - language allowance, if any,
> - acting allowance."

It is accepted that, on cessation of service, the complainant was not paid an education allowance for his children. However, this has since been rectified. He claims that he should also have been paid for 10.5 "Kober days" (4 in 2004 and 6.5 in 2005), 2 days of special leave for 25 years of service and, also, 11 home leave days and travel expenses for home leave. "Kober days" represent time to be credited for shortened lunch breaks. It is specifically provided in Communiqué No. 5 that such time is to be credited only if work is actually performed, and not if a staff member is ill or on leave. The complainant has not established that he was entitled to "Kober days" in 2004 or in 2005. Moreover, no provision is made for payment in lieu

of "Kober days". As to the claim for two days' leave for 25 years of service, it is correct that the complainant was unable to take these leave days because they fell during the period he was on extended sick leave. However, no provision is made for payment in lieu of these days. Similarly, no provision is made for payment in lieu of unused home leave. Further, travel expenses are only payable when an employee actually takes home leave. It follows that all these claims must be rejected.

5. The complainant contends that a long-term care insurance payment with respect to his mother should have been included in the calculation of the payment to which he was entitled in lieu of unused annual leave. In the absence of a provision to this effect in Circular No. 22, this claim must also be rejected.

6. It is clear that, leaving aside the 40 days of annual leave taken in late 2004, the complainant had an entitlement to 84 days of leave at the end of 2004, 51 days having been carried forward from 2003 and 33 accumulated in 2004. As the 40 days were correctly deducted, this left a balance of 44 days. And as the complainant was on extended sick leave in 2005, Article 62(7) of the Service Regulations precluded the accumulation of further annual leave. He was, in fact, paid for 60 days, being the 44 days accumulated in 2003 and 2004 and 16 days for weekends. The Internal Appeals Committee took the view that the complainant should have been paid for 17.6 days for weekends, rather than the 16 days calculated by the Administration. The President rejected its recommendation to this effect on the basis that the calculation of 16 days was consistent with its established practice relating to the application of Rule 2(f)(iii) of Circular No. 22.

7. Rule 2(f)(iii) of Circular No. 22 was considered by the Tribunal in Judgment 2489. The Tribunal held that it indicated "that a theoretical calculation is to be made, as if the employee were still at work" and pointed out that "there is no way of knowing when exactly the leave should have been taken". The Tribunal stated that the practice

was to calculate two weekend days for every five days of leave and that the practice was "equally applied to all staff members and it [did] not seem to be an unreasonable interpretation of the provision". There is no reason to depart from that approach. On the basis of that practice, the complainant was entitled to 17.6 days for weekends, not 16. It follows that, to the extent that the President rejected the recommendation of the Internal Appeals Committee that the complainant be paid for an extra 1.6 days, her decision of 18 June 2009 must be set aside. There will be an order for payment for 1.6 days by reference to the adjusted salary scales and allowances, including education allowance, together with interest at the rate of 5 per cent per annum from the date of the complainant's cessation of service until the date of payment.

8. Leaving aside the 1.6 days referred to above, there is no evidence to support a conclusion that the complainant has not been properly paid all amounts to which he was entitled on cessation of service even though payment of the education allowance was not initially included in the calculation. And again leaving aside the 1.6 days, there is no evidence that the complainant has not been paid the sums to which he was entitled by reason of the retrospective adjustment of salary scales and allowances.

9. In his internal appeal the complainant claimed that errors were made with respect to the tax adjustment for his invalidity pension and that he should have received a tax adjustment for the lump sum payment received. During the hearing on 11 February 2009 he informed the Internal Appeals Committee that he was not maintaining those claims and he does not maintain them in the complaints.

10. The complainant raises other issues in his pleadings with respect to the nature of his invalidity and the circumstances in which his employment ceased. These are separate matters and are not connected to the internal appeals giving rise to the present complaints. In particular, and contrary to the complainant's arguments, they do not justify an award of moral damages with respect to the matters now in

issue. However, the complainant is entitled to moral damages in the sum of 500 euros for the wrongful rejection of the Internal Appeals Committee's recommendation for payment of 1.6 days and for the delay in processing his internal appeals – more than three years in the case of his appeal relating to the payment made on the cessation of service and more than two years in the case of the appeal concerning adjustments based on the revised salary scales and allowances. And having had a measure of success, he is entitled to costs in the sum of 250 euros.

DECISION

For the above reasons,

1. The decision of the President of the Office dated 18 June 2009 is set aside to the extent that it rejected the recommendation of the Internal Appeals Committee for payment in lieu of an extra 1.6 days' annual leave.

2. The EPO shall pay the complainant for 1.6 extra days calculated by reference to the adjusted salary scales and allowances, including education allowance, together with interest at the rate of 5 per cent per annum from the date of the complainant's cessation of service until the date of payment.

3. It shall pay the complainant moral damages in the sum of 500 euros.

4. It shall also pay him costs in the sum of 250 euros.

5. The complaints are otherwise dismissed.

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