112th Session **Judgment No. 3075**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr J. A.S. against the European Patent Organisation (EPO) on 16 June 2009, the EPO's reply of 14 October, the complainant's rejoinder dated 6 November 2009 and the Organisation's surrejoinder of 17 February 2010;

Considering the applications to intervene filed by Mr M. A., Mr M. L., Mr L. P. and Mr L. R. on 16 June 2009;

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 is a permanent employee of the European Patent Office, the EPO's secretariat. At the material time he was Vice-Chairman of the Local Staff Committee in The Hague.

In a Note to All Staff in The Hague sent by e-mail on 18 July 2006, Infrastructure Services drew attention to Article 1 of the EPO House Rules which, in the version then in force, dealt inter alia with access to the Office's buildings in The Hague. The Note indicated that incidents involving the children of staff members necessitated

a reminder that family members and private visitors were permitted to have access only to public areas of the buildings. However, in exceptional circumstances they could have access to non-public areas, provided that they were accompanied by a staff member, that approval had been given by the line manager concerned and that there was no resulting disturbance in the working areas.

In an e-mail of 20 July 2006 to the Principal Director of Administration the complainant, in his capacity as a staff representative, asserted that Infrastructure Services were acting *ultra vires* by imposing a restrictive interpretation of Article 1 of the House Rules which had no basis in law. He suggested inter alia that the Principal Director order the retraction of the "offending mail". On 21 July the Principal Director replied that the Note was perfectly acceptable and its tone appropriate but that, in light of the complainant's comments, it might be necessary to clarify the Rules. To that end, he would ask Infrastructure Services to propose such a clarification at a review of the House Rules that was scheduled to take place in early 2007.

By a letter of 21 July 2006 the complainant asked the President of the Office to order the retraction of the Note. In the event that his request could not be granted he asked that his letter be treated as an internal appeal, in which case he also claimed moral damages in the amount of one euro per staff member in The Hague and costs. By a letter of 20 September he was informed that the President considered that the Note had been necessary, and that the matter had been referred to the Internal Appeals Committee for an opinion. Nine other staff members, eight of whom were staff representatives, challenged the Note on the same grounds and they were joined as appellants in the internal appeal proceedings.

In April 2007 revised House Rules were issued for the Office's premises in The Hague. The new Rules stipulated inter alia that private visitors and/or family members could be granted access to the office areas if accompanied by the staff member concerned, and provided that no disturbance was created in the working areas and that the line managers concerned did not object.

The Internal Appeals Committee issued its opinion on 24 March 2009. So far as concerns the complainant and the four interveners in the present case, it considered unanimously that their appeals were receivable. It further considered that the Director of Infrastructure Services was competent to issue the Note, but that it should be quashed because the Local Advisory Committee had not been consulted prior to its publication as provided for by Article 38(4) of the Service Regulations for Permanent Employees of the European Patent Office. It recommended the payment of 200 euros in moral damages to the complainant and each of the four interveners and reimbursement of their reasonable costs.

In a letter of 15 May 2009 the complainant was informed that the President had decided to allow the appeal in part and to award him 200 euros in compensation, together with costs. However, she considered that the Note of 18 July 2006 did not need to be quashed as it had been repealed by the adoption in 2007 of revised House Rules in The Hague. Consequently, this claim showed no cause of action. That is the impugned decision.

B. The complainant submits that when a decision has been taken unlawfully it must be declared void and it is immaterial that later decisions have superseded it. Moreover, in his view, the relevant articles of the revised House Rules are simply a "reworded" version of the Rules that were in effect at the time when he filed his internal appeal, and therefore they do not supersede the Note. He argues that, if the Note merely served to clarify the Rules – as asserted by the defendant – then it can also be used to interpret the revised Rules. He characterises the EPO's contention that the Note was repealed as "incorrect and disingenuous".

He challenges the award of moral damages and asserts that, by failing to provide a reason for granting an amount lower than that originally claimed, both the Internal Appeals Committee and the EPO committed a procedural error which warrants relief. Furthermore, the amount of 200 euros was inappropriately low in view of the "enormous" delays caused by the Organisation during the internal appeal procedure. He says that it took two years for the Office to issue

a defence statement. Also, as a matter of public policy, the defendant should not be permitted to reduce arbitrarily an award of moral damages.

The complainant asks the Tribunal to quash the impugned decision insofar as it does not grant the relief he claimed in his internal appeal. He seeks a formal retraction of the Note of 18 July 2006, moral damages in the amount of one euro per staff member in The Hague, less any damages already paid, and costs.

C. In its reply the EPO contends that the complaint is irreceivable *ratione materiae* because the complainant lacks a cause of action. The applications to intervene are likewise irreceivable. It points out that the introduction to the revised House Rules of April 2007 explicitly states that they replace the version of January 2005. Therefore, according to the principle of *lex posterior derogat priori*, the revised House Rules supersede both the prior version of the Rules and the Note of 18 July 2006. As a consequence, the Note is no longer applicable and its retraction is unnecessary. Also, the Organisation relies on the principle of *lex posterior ad priores trahi nequit*, i.e. a new law cannot be interpreted in the same way as a previous law, to assert that the Note cannot be used to interpret the revised House Rules and the complainant's concerns in this respect are unfounded. It states that it was previously explained to the complainant that the Note was provisional and that a general review of the House Rules would take place in 2007.

On the merits, the EPO asserts that the complaint is unfounded on the same grounds that it is irreceivable. With respect to the award of moral damages, it argues that the complainant did not make a claim regarding a delay during the internal appeals process and, consequently, the compensation already awarded by the President is appropriate. Referring to the Tribunal's case law, it argues that a complainant can only claim that a delay is unreasonable if he or she has diligently pursued an appeal. In addition, although there was no consultation with the Local Advisory Committee prior to the publication of the Note, according to the case law, the mere fact that a decision is initially flawed is not enough to warrant awarding damages

for moral injury. The EPO states that the Tribunal considers each case individually when determining compensation for moral injury and it denies having acted in bad faith. Furthermore, there is no justification to award one euro to each staff member in The Hague because it is likely that many staff members did not take issue with the content of the Note.

D. In his rejoinder the complainant contends that legitimate questions of fact and law exist with respect to whether the new House Rules superseded the Note. If the Tribunal considers his view incorrect, his complaint may be unfounded, but it is not irreceivable. The EPO has likewise not explained why his claim for higher moral damages is irreceivable. He disputes the Organisation's reliance on the principle of *lex posterior ad priores trahi nequit* and submits that, if the Note was in fact replaced by the new House Rules, no objective reason has been disclosed for the EPO's refusal to retract it. He strongly disputes the defendant's contention that he is partly responsible for the delay in the internal appeal process and he challenges its reliance on the case law in this respect. Lastly, he states that although it may be possible for the Organisation to evaluate general moral damages *ex aequo et bono*, it has a duty to explain why a specific claim for moral damages has not been granted.

E. In its surrejoinder the EPO maintains its position. It accepts that the complainant's claim for moral damages is receivable but submits that it is unfounded.

CONSIDERATIONS

1. On 18 July 2006 the Infrastructure Services of the EPO sent a Note to All Staff at The Hague regarding Article 1 of the House Rules, which, in the version applicable at the time, dealt with access to non-public areas in the Office's buildings. The complainant, who was Vice-Chairman of the Local Staff Committee, filed an internal appeal together with other staff members. He sought inter alia the retraction of the Note on the grounds that it imposed a restrictive interpretation of

Article 1 of the House Rules, that the Director of Infrastructure Services was not competent to issue the Note and that the Local Advisory Committee had not been consulted. The Internal Appeals Committee held that the Note was procedurally flawed given that the Local Advisory Committee had not been consulted prior to its publication but considered that the Director of Infrastructure Services had not acted *ultra vires*. Consequently, it recommended that each appellant with a receivable appeal be paid 200 euros in moral damages and that their reasonable costs be reimbursed. The complainant impugns the decision of 15 May 2009 by which he was informed that the President of the Office had decided to allow the appeal in part and to award him moral damages in the amount of 200 euros. The President, however, decided that the contested Note did not need to be quashed as it had been repealed by the adoption of the revised House Rules in 2007. Four staff members who were joined as appellants in the internal appeal have filed applications to intervene in the present case.

2. The complainant requests the Tribunal to quash the impugned decision insofar as it does not grant the relief he claimed in his internal appeal. He also seeks a formal retraction of the contested Note and moral damages in the amount of one euro per staff member in The Hague, less any damages already paid, and costs.

3. The complainant contends that when a decision has been taken unlawfully it must be declared void and that new decisions replacing old ones must explicitly state that old interpretations are not applicable to them. He also contends that the amount of moral damages awarded was inappropriately low considering the delay in the internal appeals proceedings and he contests the fact that no reason was provided in the Internal Appeals Committee's recommendation, nor in the President's decision for not granting him the amount he had requested.

4. The Organisation submits that the moral damages awarded were appropriate according to the principle of *ex aequo et bono*. It also

states that, according to the principle of *lex posterior derogat priori*, the 2007 version of the House Rules superseded both the prior version of those rules and the contested Note of 18 July, and therefore the complainant has no cause of action. The Organisation rejects the complainant's claim that he should be awarded moral damages for the delay in the internal appeal proceedings as it believes that he failed to pursue his appeal diligently.

5. The Tribunal is of the opinion that there is no need to quash the contested Note as it referred to House Rules which were replaced by new ones adopted in April 2007. As the new House Rules replace the previous ones, it follows that the contested Note was *de facto* annulled, as it was based on the old House Rules and, therefore, it no longer has legal effect. And, as the complainant and interveners have all received an award of moral damages, this aspect of the complaint has become moot.

6. The complainant contests the Organisation's decision to award him moral damages only in the amount of 200 euros. However, the Tribunal finds it reasonable according to the criteria of *ex aequo et bono* given that it has not been established that the contested Note negatively affected all of the staff, that it was in force for less than one year, that it was considered unlawful solely on the basis of a procedural flaw, and that the gist of the Note was subsequently accepted in the revised House Rules. The Tribunal notes that the present case differs from that which gave rise to Judgment 2857, which awarded moral damages in the amount of one euro for each staff member represented by the complainant at the relevant time. In that case the impugned decision, which concerned insurance premium calculation methods, affected all staff and was considered unlawful

because, for the second time, the General Advisory Committee did not receive the requested information necessary for giving a reasoned and informed opinion. The exceptional award of moral damages was justified in that case as the flaw which gave rise to the annulment of the impugned decision concerned the lack of transparency in a proceeding of great importance to the benefits of all staff. In light of the above consideration, the complainant's claim for moral damages must also be dismissed.

7. The Tribunal is of the opinion that the two years which elapsed between the filing of the internal appeal and the filing of the Organisation's reply is an egregious delay. An organisation has the duty to follow its own Rules, and to do its best to ensure the proper functioning of its internal appeal system. The application of time limits in the internal appeal procedure is a safeguard for a proper functioning of the system. The internal appeal procedure is indeed an important step in the remedying of disputes given that an appeal body's competence is broader than that of the Tribunal. Therefore, just as staff members have the duty to pursue their appeals with due diligence, an organisation has the duty to respect the time limits and cannot rely on staff members to monitor the procedures. The possibility of filing a complaint directly with the Tribunal is to be considered a further safeguard for a proper functioning of an internal appeal system and not a fast track for settling a dispute between the parties through a judgment from the Tribunal. Indeed, an internal appeal system which is not fully functional affects the right of defence. Considering the above, the Tribunal awards moral damages in the amount of 250 euros to the complainant and to each of the four interveners.

8. As the complaint succeeds in part, the Tribunal awards costs in the total amount of 500 euros.

DECISION

For the above reasons,

1. The EPO shall pay moral damages in the amount of 250 euros to the complainant and to each of the four interveners.
2. It shall also pay costs in the total amount of 500 euros.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 2 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Giuseppe Barbagallo
Catherine Comtet