114th Session **Judgment No. 3158**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O.S. Beyer against the European Patent Organisation (EPO) on 26 January 2010 and corrected on 7 April, the EPO's reply dated 14 July, the complainant's rejoinder of 12 October 2010, the Organisation's surrejoinder of 25 January 2011, the complainant's additional submissions of 7 March and the EPO's final comments of 12 August 2011;

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, a German national born in 1964, joined the European Patent Office – the EPO's secretariat – in 2004. He holds a grade A3 post.

Between June 2006 and January 2007 he submitted several claims to the insurance broker responsible for the day-to-day administration of the EPO's Collective Insurance Contract (CIC), seeking reimbursement of the cost of various products prescribed for him by his physician. The insurance broker refused to reimburse him

for three of the products in question, on the grounds that they were not covered by the CIC. It explained that there was a lack of consensus in the medical world regarding the therapeutic effects of one of the products and that the other two products did not contain active pharmaceutical components.

In a letter of 19 March 2007 the complainant contended that the insurance broker's refusal to reimburse him for products prescribed by his physician was contrary to Article 20 of the CIC, given that the diagnosis was not contested. He asked the President of the Office either to compel the insurance broker to reimburse the cost of the products or, alternatively, to arrange for him to be reimbursed by the Office. In the event that his request was not met, the complainant indicated that his letter was to be regarded as the lodging of an internal appeal, in which case he would also be claiming moral damages, as well as costs.

On 21 March the EPO's Medical Adviser was asked by the Personnel Administration Department to examine the complainant's case and to give his advice on the matter. In this connection, his attention was drawn to the fact that the insurance broker reimbursed the cost of medicines under four conditions: the medicines must be prescribed by a medically qualified person; they must be part of a generally accepted medical treatment (the expenses claimed must result from sickness, accident, pregnancy or delivery, excluding experimental and/or preventive treatments); the prescribed medicines must contain active pharmaceutical components; and they must have scientifically proven therapeutic effects.

That same day, the Personnel Administration Department enquired with Directorate 4.3.3, which is in charge of relations with the insurance broker, about the above-mentioned conditions as they did not appear under Article 20 of the CIC: they wanted to know whether they were part of an "*avenant*" or additional clause to the CIC. The Directorate replied that the conditions for reimbursement were indeed accepted by the Office, but that they were not formally part of a contract endorsement. Rather, they constituted a practice or interpretation of the CIC, which was accepted by the Office. An

explanatory note from the insurance broker dated 20 October 2000, setting out the four conditions, was attached to this communication.

On 26 March the Medical Adviser informed the Personnel Administration Department that the products at issue were generally considered as "food supplements", not as medicines. He added that it was unclear whether they contained any active pharmaceutical component, that there was no scientific agreement on their therapeutic effects and that, in the complainant's case, the diagnosis for which these products had been prescribed was unclear. In his view, as three of the four conditions for reimbursement were not fulfilled, the insurance broker was correct in refusing to reimburse the costs.

In an undated letter which, according to the Office, was sent at the beginning of April, the Director of Personnel informed the complainant that, having consulted the Medical Adviser, he was not in a position to comply with his request. He explained that the products for which reimbursement had been denied did not meet the conditions for being considered reimbursable medicines within the meaning of Article 20(b)(2) of the CIC. The Director also emphasised that, as the dispute concerned a medical issue, it should be submitted to the Medical Committee pursuant to Article 90(1), paragraph 2, of the Service Regulations for Permanent Employees of the European Patent Office. He therefore asked the complainant to reconsider his decision to file an internal appeal and suggested that he proceed before the Medical Committee instead.

By a letter of 18 May 2007 the Director of the Employment Law Directorate informed the complainant that, after an initial examination of the case, the President considered the insurance broker's position to be justified and his internal appeal had therefore been referred to the Internal Appeals Committee. The Director nevertheless observed that the review of medical questions did not come within the jurisdiction of that body but rather within that of the Medical Committee.

In its opinion of 21 September 2009, the majority of the Internal Appeals Committee recommended that the appeal be rejected as unfounded, the insurance broker having applied correctly the relevant provisions of the Service Regulations and of the CIC. In the majority's

view, the agreement between the insurance broker and the Office establishing interpretative guidelines defining "medicines" for the purposes of Article 20(b)(2) of the CIC did not have to be published or submitted to the General Advisory Committee for consultation under the Service Regulations. It was held sufficient that the insurance broker explained the essential criteria for reimbursement on its website. The majority also found that the insurance broker had exercised due care in examining the complainant's case. On the contrary, the minority found that the criteria laid down in the CIC were fulfilled and that the insurance broker should have reimbursed the complainant. In its view, the Office and the insurance broker had acted *ultra vires* by applying additional guidelines which had never been published or made clearly available to staff members, and it recommended reimbursing the complainant and awarding him moral damages as well as costs.

The complainant was informed by a letter of 11 November 2009, which constitutes the impugned decision, that the President of the Office had decided to follow the majority opinion and to dismiss his appeal as unfounded.

B. The complainant contends that, as the dispute concerns legal matters, in particular the application of Articles 16 and 20 of the CIC, the Internal Appeals Committee and the Tribunal are the competent bodies to review the subject matter of his appeal. He submits that he is contesting the legality of the "practice" invoked by the Office, rather than whether that "practice" is medically sound, and that Article 90 of the Service Regulations concerning disputes relating to medical opinions is therefore not applicable to his case.

On the merits, the complainant argues that he suffered unequal treatment, because in two other internal appeals the Committee recommended reimbursing the cost of one of the products prescribed by his physician, whereas reimbursement was denied in his case. He considers that he was denied due process, not only because the decision impugned is not properly reasoned, but also because the internal appeal procedure was tainted with bias. In this regard he

argues that the way in which the members of the Internal Appeals Committee are appointed does not guarantee either their independence or their impartiality.

The complainant points out that the four conditions used by the insurance broker do not appear in the CIC, nor in any other applicable regulation. In his view, the insurance broker therefore had no authority to limit the scope of Article 20(b)(2) of the CIC, which provides that medicines are reimbursed at the rate of 80 per cent insofar as they are prescribed by a doctor, by applying additional criteria which had never been published and which had not been the subject of a proper consultation process.

Moreover, the "practice" on which the Office relies cannot override the plain meaning of Article 20(b)(2). Indeed the complainant argues that, if there was an ambiguity in the text, which he denies, it should be resolved in favour of the staff member in accordance with the *contra proferentem* principle. Since the CIC, the relevant implementing regulations and the Service Regulations do not define the term "medicine", it should be understood in its broadest sense, in conformity with the *patere legem* principle.

Lastly, the complainant submits that the Office breached its duty of care and violated Article 28 of the Service Regulations by failing to fulfil its duty to assist him in his claim to compel the insurance broker to respect the CIC.

The complainant asks the Tribunal to set aside the impugned decision and to order the reimbursement of all the medical expenses at issue, including those incurred after the lodging of his internal appeal. He also seeks damages for "additional health damage due to neglect and unnecessary stress created by the EPO", moral damages, and costs.

C. The EPO submits that the complaint is only receivable with respect to the issue of whether the insurance broker correctly applied the provisions of the CIC. It considers that the question of whether a particular pharmaceutical product forms part of an appropriate course of treatment for a specific illness must be answered by the Medical

Committee under Article 90 of the Service Regulations, as it constitutes "a dispute relating to medical opinions".

On the merits, the Organisation denies that the complainant's due process rights were violated during the internal appeal proceedings. It points out that the relevant provisions governing the composition of the Internal Appeals Committee, found in the Service Regulations and the Committee's Rules of Procedure, entitle the President to nominate three of its members. Furthermore, the Service Regulations entitle the President to take whatever final decisions she considers to be just upon completion of the internal appeal proceedings.

In the defendant's view, when the insurance broker receives a claim for reimbursement, pursuant to Article 16 of the CIC it must examine whether the product has been prescribed by a medically qualified person as a medical treatment in connection with an illness, an accident, pregnancy or confinement. Further, Circular No. 236, entitled "Reimbursement of medical expenses", states that "the fact that expenses have been incurred on prescription by medically qualified persons **does not in itself mean they are reimbursable**", and it is up to the insurance broker "to make sure that they really are covered by the insurance contract". For this reason, even though the complainant was indeed given a prescription by a medically qualified person, he is not thereby entitled to automatic reimbursement. It is the insurance broker which decides, based on the relevant special circumstances of each individual case, whether or not to grant reimbursement. In this respect the Organisation explains that, since the medical advisers of the Office and of the insurance broker have arrived at a "consensus" regarding the definition of medicines within the meaning of Article 20(b)(2) of the CIC, the reimbursement of some pharmaceutical products, including the products prescribed for the complainant, is possible only if they fulfil the conditions for reimbursement contained in the consensus.

Further, the reason why the consensus, which is expressed in the insurance broker's letter dated 20 October 2000, is not contained in the Service Regulations or the CIC is precisely because its aim is not to amend the Service Regulations with additional criteria, but rather to

define the term “medicines” in order to avoid arbitrary decisions by the insurance broker and to ensure just and equal treatment of Office staff. For that same reason, a formal consultation of the General Advisory Committee (GAC) was not necessary. The EPO emphasises that the guidelines followed by the insurance broker are merely indicative and can be adapted to individual cases. Their inclusion in the Service Regulations or CIC would tend to set these guidelines in stone, whereas in fact they evolve in line with medical progress.

The defendant submits that the insurance broker’s decision not to reimburse the cost of certain products prescribed by the complainant’s doctor was taken with due care, after careful examination of the diagnosis and consultation with the EPO Medical Adviser. Consequently, it did not violate Articles 16 and 20(b)(2) of the CIC.

Lastly, the Organisation denies that the complainant has suffered unequal treatment, as the case referred to in his complaint was factually different. Moreover, it maintains that Article 28 of the Service Regulations does not apply in the present case, because the insurance broker is not a party to these proceedings.

D. In his rejoinder the complainant presses his pleas. He contends that there has been a breach of medical secrecy, because the defendant’s reply shows that the EPO’s Medical Adviser has had access to his medical file without his consent. He also claims that his right to be heard was violated, as one of the members of the Internal Appeals Committee did not sign the opinion. Instead, it was signed by an alternate member who was not present during the hearings. The complainant submits that, had the EPO’s Medical Adviser or the insurance broker exercised due care in dealing with his case, it would have been submitted to the Medical Committee and not “summarily” dismissed. In his view, the fact that the EPO is now calling for a Medical Committee is evidence of its bad faith.

E. In its surrejoinder the EPO maintains its position in full. It denies any breach of medical secrecy and points out that the defendant’s Medical Adviser must by definition be consulted. However, as

Article 7 of the CIC makes clear, both the insurance broker and the Medical Adviser have an obligation to maintain the strictest secrecy regarding any information which they may obtain. As regards the complainant's right to be heard, the EPO submits that replacing a member of the Committee who had been in a serious accident and was not able to fulfil his duty in the internal appeal proceedings was necessary and was carried out in accordance with the Committee's Rules of Procedure and the Service Regulations. It points out that the alternate member submitted an opinion in the complainant's favour and that the latter did not request another hearing.

F. In his additional submissions the complainant denies that he was given an opportunity to request a new hearing, as he only learned of the new composition of the Committee when he received the defendant's surrejoinder in the course of the present proceedings. He therefore introduces a new claim for damages on account of "wilful deception".

G. In its final comments the EPO asserts that the complainant and his representative knew of the change in the composition of the Committee at the latest once they received the latter's opinion. Thus, his allegations of procedural manipulation and bad faith are clearly unfounded.

CONSIDERATIONS

1. The complainant impugns the EPO President's decision, which was communicated to him by a letter of 11 November 2009, stating that the President had endorsed the majority opinion of the Internal Appeals Committee which recommended dismissing his appeal as unfounded. The appeal was considered to be receivable with regard to the issue of whether or not the insurance broker had correctly applied the provisions of the Collective Insurance Contract (CIC). However, when the Internal Appeals Committee considered whether the insurance broker had taken due care in examining the possibility of the reimbursement requested by the complainant, it was

of the opinion that it was not competent on the question of whether or not the pharmaceutical products prescribed for the complainant by his doctor could be considered "medical treatment" prescribed as the result of illness or accident, as this question was within the competence of the Medical Committee in accordance with Article 90 of the Service Regulations.

The majority found that the insurance broker had correctly applied the provisions of the CIC in accordance with the explanatory note of 20 October 2000 setting out the four conditions under which a medical product will qualify for reimbursement.

Consequently, it recommended that the President dismiss the appeal. The President did not agree with the Internal Appeals Committee's minority opinion which, in her view, "interprets Articles 16 and 20 of the [Collective Insurance Contract] as creating an obligation for reimbursement of any substance or treatment, as long as it is prescribed by a doctor, and denies [the insurance broker] the competence of examining the compliance of such claims with the contract". She considered that the insurance broker had determined correctly that the product did not fit all the conditions for reimbursement.

2. The complainant requests the Tribunal to quash the impugned decision and to award him material and moral damages, as well as costs. He contends that the Internal Appeals Committee was competent as the dispute is related to legal aspects, namely the reading of Articles 16 and 20 of the CIC, and therefore Article 90 of the Service Regulations is not applicable to the present case. He also contends that there was a breach of the principles of equal treatment and due process. He argues that the practice consisting in the application of the four conditions laid out in the explanatory note by the insurance broker and agreed to by the EPO is not part of the CIC, was not published, and therefore does not have any legal force and cannot override the plain meaning of the staff members' written rights. In conclusion, in his view, "[t]he plain wording of the [CIC] obliged [the insurance broker] to reimburse the medical costs of the case. Because it was unwilling to do so, [the insurance broker] and the

EPO's Medical Adviser just added some criteria on top of the ones appearing in the applicable regulations."

3. The Tribunal is of the opinion that the CIC was not correctly implemented; the proceedings regarding that implementation were flawed as there were violations of due process.

4. Firstly, the complainant only became aware of the substitution of one of the members of the Internal Appeals Committee (which occurred after the hearings) when he received a copy of the Internal Appeals Committee's opinion. For the sake of transparency and due process, the complainant should have been informed at the time of the substitution so that he could exercise his right to contest the composition. The fact that the alternate member voted in the complainant's favour does not redeem that flaw. Moreover, the alternate member did not attend and participate in the hearing, whereas his participation could have changed or influenced the Internal Appeals Committee's final opinion.

5. Secondly, the consensus between the Office and the insurance broker contained in the explanatory note of 20 October 2000 (as detailed in Part A of this judgment) should not be considered as binding, since it merely establishes guidelines interpreting the term "medicines" as contained in Article 20(b)(2) of the CIC ("Medicines – 80% reimbursement for medicines insofar as they are prescribed by a doctor"). Similarly, in Judgment 3031, under 14, the Tribunal found that:

> "It is clear that the insurance broker's decision to reject the complainant's claims were based on the unpublished agreement entered into between the medical advisers of the EPO and of the insurance broker whereby the cost of the medicine at issue would only be reimbursed for two medical indications. However, the CIC provides that reimbursement will be made if the medical treatment is prescribed by a medically qualified person and is the result of one of the four circumstances enumerated in the CIC. In refusing the claims on the basis of the agreement, the insurance broker acted outside the scope of its authority."

6. Thirdly, the conditions listed in the explanatory note of 20 October 2000 involve an interpretation of both "generally accepted medical treatment" and "proven therapeutic effects", in order to determine what constitutes "medicines" for the purpose of Article 20(b)(2) of the CIC. The Tribunal considers that such an interpretation implies a medical opinion. Accordingly, the questions of whether the products prescribed for the use of the complainant are "medicines" for the purpose of the insurance policy and whether the complainant is entitled to be reimbursed under the policy consistent with his rights under Article 83 of the Service Regulations, require a medical opinion. As a result, these questions have to be referred to the Medical Committee in accordance with Article 90(1), paragraph 2 ("[the Medical Committee] shall also be competent to decide upon all disputes relating to medical opinions expressed for the purposes of these Service Regulations"). Likewise, as the Tribunal noted in Judgment 3030, under 7:

> "The second condition is that the medicine in question must have been prescribed in respect of treatment as a result of illness, accident, pregnancy or confinement. In the instant case, the only relevant issue is therefore whether the medicine was prescribed to treat an illness. In an e-mail which the insurance broker received on 17 October 2005, the complainant's doctor explains why he prescribed this medicine. The e-mail mentions an underlying pathology related to severe stress at work and an excellent prognosis in the short term as a result of the prescribed treatment.
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> This is therefore a 'dispute about the nature of […] medical treatment' within the meaning of Circular No. 236, which must be decided by the Medical Committee. Moreover, this is what the Organisation has always maintained. However, rather than merely suggesting to the complainant that he should turn to that Committee, it ought itself to have referred the matter to it and to have invited the complainant to cooperate."

7. The complainant's remaining claims regarding breach of due process are unfounded. Specifically, his contention that the composition of the Internal Appeals Committee is prone to bias as three of the five members are appointed by the President, who takes the final decision, is mistaken. It has to be considered that the composition of the Committee as well as the process for selection of the members is

provided for in the Service Regulations and in the Internal Appeals Committee's Rules of Procedure. These provisions and procedures are consistent with the administrative nature of the Committee. The argument that there was a violation of Article 28 of the Service Regulations, as the complainant was not assisted by the Organisation in his claim to compel the insurance broker to respect the CIC, is also unfounded. In the relevant part, Article 28 of the Service Regulations provides:

> "(1) If, by reason of his office or duties, any permanent employee […] is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act."

In the present case, the insurance broker is not a party to these proceedings, the only parties being the complainant and the Organisation.

8. The claim of unequal treatment is likewise unfounded. The complainant has not proven the similarity between his case and the appeals cited by the minority opinion other than the fact that the same medicine was involved. This is not sufficient to prove similarity in fact and in law.

9. In light of the above considerations, the impugned decision must be set aside. The case must be remitted to the Organisation with orders to convene a Medical Committee without further delay, in accordance with Article 90 of the Service Regulations and Circular No. 236. The Medical Committee will give its opinion considering, but not bound by, the interpretation detailed in the explanatory note of 20 October 2000. The complainant is entitled to an award of moral damages stemming from the unlawful decision, in the amount of 700 euros. He is also entitled to costs in the amount of 600 euros. All other claims will be dismissed.

DECISION

For the above reasons,

1. The decision of the President of the Office of 11 November 2009 is set aside and the case is remitted to the EPO for a redetermination as detailed under 9, above.

2. The EPO shall pay the complainant moral damages in the amount of 700 euros.

3. It shall also pay him 600 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Michael F. Moore
Catherine Comtet