117th Session **Judgment No. 3309**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C. L. against the European Patent Organisation (EPO) on 25 September 2010 and corrected on 29 October 2010, the EPO's reply of 8 February 2011, the complainant's rejoinder of 13 May and the EPO's surrejoinder of 22 August 2011;

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

Having examined the written submissions and decided not to order oral proceedings, for which neither party has applied;

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

A. By decision CA/D 23/07 of 29 June 2007, the Administrative Council of the EPO amended, with effect from 2 April 2007, Article 62 of the Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat, by inserting of a new paragraph 5. As a result of this amendment, permanent employees working part time for medical reasons could no longer take fractions of days' annual leave. Annual leave was to be deducted from their leave entitlement in full days, irrespective of the percentage reduction in their working time.

The complainant is a permanent employee of the EPO who at the relevant period was working part time due to medical reasons. On 28 September 2007 he wrote to the President of the EPO contesting the Council's decision to introduce Article 62(5) as well as the Administration's decision to apply it to the annual leave that he had taken between July and September of that year. He argued that the new provision was discriminatory and that it had been applied to him retroactively, as he was not notified of it until he returned from annual leave in September 2007. As a result, he had suffered a loss of annual leave days. He requested that these be restored – the calculation of his annual leave days should be done by reference to the old arrangements – and that the decision to introduce Article 62(5) be quashed. In the event that his request was not granted, he asked that his letter be considered as an internal appeal, in which case he also claimed damages and costs. The matter was referred to the Internal Appeals Committee (IAC), which on 7 April 2010 rendered its opinion on the appeals lodged by the complainant and two other staff members in connection with Article 62(5). On the complainant's appeal, the IAC recommended unanimously that it should be allowed insofar as it concerned his annual leave taken in the period from July to September 2007. The IAC, also unanimously, recommended that the claims for damages and costs be rejected as unfounded. With regard to the request for the quashing of the decision to introduce Article 62(5), the IAC was divided: a majority of its members considered the appeal as devoid of merit. A minority of its members, nevertheless, found that the introduction of Article 62(5) was unlawful and recommended that the appeal should be sustained in this regard. By a letter of 7 June 2010 the complainant was informed of the President's decision to endorse the IAC majority opinion to only partially allow his appeal. That is the impugned decision.

B. The complainant challenges Article 62(5) of the Service Regulations on several grounds. He argues that it is discriminatory and contrary to the principle of equal treatment, because only staff working part time for medical reasons are denied the right to take fractions of days' annual leave. He also argues that it is inconsistent and illogical, since

it is based on the assumption that a staff member working part time due to a medical condition is in perfectly good health during periods of annual leave. He asserts that Article 62(5) contravenes the case law of the European Court of Justice (ECJ) and general principles of law, and that by introducing Article 62(5) the EPO failed in its duty of care. Indeed, under the new arrangements the annual leave entitlement of sick staff members is substantially reduced, which goes against the Organisation's duty to protect sick staff and allow them sufficient time to recover. The complainant requests that the impugned decision be quashed and that the EPO be ordered to withdraw Article 62(5) of the Service Regulations. He seeks compensation for "filing and processing" his appeal and his complaint in the form of a reduction by seven of the number of productive days required by him in the years from 2007 to 2010. He also seeks 5,000 euros in moral damages and 150 euros in costs.

C. In its reply the EPO contends by reference to Judgment 2822 that the complainant cannot impugn a general decision, such as the decision to introduce Article 62(5). Relying on Judgment 2313, it explains that the said provision is neither discriminatory nor contrary to the principle of equal treatment: staff on part-time sick leave who have not accumulated the number of days required to be placed on extended sick leave, i.e. more than 250 days over a three-year period, such as the complainant, are not in the same legal or factual situation as staff working full time or staff on extended sick leave. It denies that the introduction of Article 62(5) involved a breach of its duty of care. In this regard it emphasises not only that the EPO is entitled to regulate the right to annual leave, but also that under Article 62(5) staff working part time for medical reasons retain full entitlement to their basic salary, step advancement, home leave and annual leave. It adds that the Tribunal is not bound by the case law of the ECJ and rejects the assertion that Article 62(5) contravenes general principles of law. The EPO invites the Tribunal to dismiss the complaint, including the complainant's claims for compensation for "filing and processing" his appeal and for damages and costs. It notes in this regard that working time should not be devoted to private matters, such as the preparation

of an appeal, and that the complainant has not shown any grounds warranting the award of damages or costs.

D. In his rejoinder the complainant contends that the introduction of Article 62(5) also breached his acquired right to annual leave. He modifies his claim for compensation for "filing and processing" his appeal, asking that the number of productive days required by him in the years from 2007 to 2010 be reduced by four.

E. In its surrejoinder the EPO denies any breach of the complainant's acquired rights. Referring to the case law, it expresses the view that the complainant cannot convincingly claim that the right to take fractions of days' annual leave constituted a fundamental term of his employment.

CONSIDERATIONS

1. The complainant is employed by the EPO. In these proceedings he seeks to impugn a decision of the President of 7 June 2010. The events leading to the impugned decision may be described briefly in the following way. The conditions of the complainant's employment are generally regulated by the EPO Service Regulations. Articles 59 and 62 of the Service Regulations deal with annual (and special) leave and sick leave respectively. By a decision dated 29 June 2007, the Administrative Council of the EPO amended Article 62, inserting a new paragraph 5 in the following terms:

> "During periods of part-time sick leave, the permanent employee shall retain his entitlement to annual leave as defined in Article 59. Annual leave taken during such period shall be deducted in full days from the permanent employee's leave entitlement, irrespective of the percentage reduction in his working time. During such period, the permanent employee may not take fractions of days' leave."

The amendment operated from 2 April 2007. It appears that prior to this amendment of Article 62, leave arrangements for employees on part-time sick leave enabled them to take, notionally, leave for a period on each day when they otherwise would have been working (but only

for part of a day). Their annual leave entitlement of 30 working days would be exhausted only when all the periods of leave taken for part of the day together with leave taken for full days were, in aggregate, the equivalent of 30 full-time working days.

On 28 September 2007, the complainant wrote to the President. He noted that he worked part time for medical reasons. It appears he worked half a day only on Wednesdays because of a medical condition. He had earlier applied for (in June 2007) and taken annual leave (in July and August 2007). The arrangements introduced by the amendment of Article 62(5) were applied during the period he took this leave. Accordingly, each of the nine Wednesdays in July and August were treated as exhausting nine days of his 30 days leave entitlement rather than exhausting, for each of those days, only half a day of his 30 days leave entitlement. In his letter of 28 September 2007, the complainant asked for his annual leave days to be restored (presumably on the basis that he should be treated as having exhausted only 4.5 days of his 30 days leave entitlement for each of the nine Wednesdays). He also asked that the decision to introduce Article 62(5) be quashed. The complainant went on to say that if the "Office find[s] itself unable to accede to this request", the letter be treated as the commencement of an internal appeal. This occurred.

2. The IAC published its opinion in relation to the complainant's appeal (and the appeals of two other employees) on 7 April 2010. The members of the IAC were divided in their opinions. The reasons of the majority noted that the relief sought by the complainant (and another appellant) was, firstly, to restore annual leave days lost due to the application of Article 62(5), secondly, to quash Article 62(5) and its implementing decision and, thirdly, to award damages and reimburse expenses/costs (including compensation for time spent on "filing and processing" the appeal). The majority rejected the complainant's claims to quash Article 62(5), for damages, and to be reimbursed expenses/costs. However it did recommend that the complainant's annual leave entitlements be adjusted so that the amount of leave exhausted when the complainant took annual leave in July and August 2007 (the period

of leave apparently actually concluding on 3 September 2007) be calculated by reference to the old arrangements and not Article 62(5).

3. In the impugned decision of 7 June 2010, the President adopted the same approach as the IAC and accepted the recommendation to adjust the complainant's annual leave for July and August 2007 in line with the "old practice". This is important. The complainant, in his complaint to this Tribunal insofar as it challenges the lawfulness of Article 62(5), has not been adversely affected by the application of the provision. That is because, as a result of the President's impugned decision, Article 62(5) had not been applied to the leave taken by the complainant in July and August 2007. It is well settled by judgments of the Tribunal, that a complainant cannot attack a rule of general application unless and until it is applied to the complainant in a manner prejudicial to her or him (see Judgments 1786, consideration 5, 1852, consideration 3, and 2822, consideration 6). A complaint purporting to do so is irreceivable. In its reply the EPO alluded, somewhat cryptically, to this issue in referring to Judgment 2822.

4. This is no barren technical point. By the President's impugned decision, any earlier prejudicial application of Article 62(5) to the complainant had been nullified. The complainant was not adversely affected, in this respect, by the impugned decision. Moreover, as very recently discussed by the Tribunal in Judgment 3048 (a judgment admittedly not available to the parties at the time they prepared their pleadings in these proceedings) which involved another challenge to the lawfulness of Article 62(5), there are separate and distinct provisions in the Service Regulations for appeals with respect to decisions of the President, on the one hand, and those of the Administrative Council on the other. In the present case, the President refused to "quash" the contentious Article. But no one, including the complainant, has pointed to the source of the power of the President to do so. It may be doubted that she or he had power to do so.

The complaint, insofar as it challenges the lawfulness of Article 62(5), is irreceivable. The residue of the complaint is a claim for compensation for filing and processing the appeals, damages and

costs. The complainant identifies no legal foundation for his claim for compensation for filing and processing the appeal (later refined in his rejoinder to time compensation of four days) and it should be rejected. No damage was suffered by the complainant by the impugned decision as his annual leave entitlements (affected by leave actually taken) were restored on the basis of the arrangements existing prior to the amendment to Article 62. As the complainant has not otherwise succeeded in these proceedings, no order in his favour as to costs should be made. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ