118th Session **Judgment No. 3331**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J.D.M.L. B. against the European Patent Organisation (EPO) on 9 June 2010 and supplemented on 25 November 2010, the EPO's reply of 10 March 2011, which was limited to the issue of receivability of the complaint, the complainant's rejoinder of 11 May on the same issue and the EPO's surrejoinder of 17 August 2011;

Considering Articles II, paragraph 5, and VII 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. The complainant joined the European Patent Office, the secretariat of the EPO, in 2000 at its branch in The Hague (Netherlands).

While on sick leave in May and June 2008, the complainant asked the Office's Medical Adviser if he could go abroad during his sick leave. The Medical Adviser refused on the ground that the medical certificate he provided contained no information about diagnosis and

treatment. The complainant was therefore asked to take annual leave for the period he had planned to stay abroad. The complainant did not do so, but he nevertheless travelled to Finland. In December 2008 the complainant was informed that a formal investigation would be undertaken in that respect. The Principal Director of Human Resources issued a written warning on 9 April 2009, in accordance with Articles 94(1) and 93(2) of the Service Regulations for Permanent Employees of the European Patent Office, explaining that the complainant had never been granted authorisation to spend his sick leave abroad, as required under applicable rules, and that he had consequently committed misconduct. On 14 May the complainant requested the President of the Office to review that decision, contending that the warning was unfounded; his request was denied and he was informed on 14 July 2009 that the matter had been referred to the Internal Appeals Committee (IAC) for an opinion.

On 26 May 2010 the complainant wrote to the Administration stating that he had not yet received the Office's position paper concerning the appeal he had initiated more than a year previously. He added that should he not receive it before 9 June, he would consider that the internal means of redress had been exhausted. The Administration informed him on 1 June that his appeal was being dealt with. On 9 June, at 9.35 a.m., the complainant filed a complaint with the Tribunal impugning the decision of 9 April 2009 and the implied rejection of his internal appeal. A few minutes later, at 9.41 a.m., the IAC forwarded to the complainant the EPO's position paper that it had received the previous day. It indicated that he had until 13 August to respond to the EPO's position paper and that he had the right to be heard. Also on 9 June, at 10.27 a.m., the complainant notified the Administration that he would not withdraw his complaint with the Tribunal.

B. The complainant contends that he had exhausted all internal means of redress because he did not receive the EPO's position paper before 9 June 2010, as he requested. He asserts that until the date of filing his complaint with the Tribunal he had received no news concerning his pending appeal. According to Article 96(1) of the

Service Regulations, he could request the removal of the warning from his personal file three years after it was issued. Given that the EPO took almost 13 months to submit its position paper to the IAC, it was highly improbable that the internal appeal proceedings would be completed before he could request the removal of the written warning from his file on the basis of Article 96; thus the main reason for filing his appeal would no longer exist. He therefore had to file a complaint with the Tribunal.

On the merits, he contends that the written warning is unfounded and was in breach of the Service Regulations. He also alleges abuse of authority and criticises the EPO for having failed to honour the duty of care it owes him. He points out that it issued a written warning despite the fact that his health situation was deteriorating.

The complainant asks the Tribunal to quash "the decision", to cancel the written warning, and to order the EPO to withdraw the warning from his personal file. He also claims moral damages and damages for the mental and physical distress he suffered from having to file a complaint with the Tribunal. He further seeks costs.

C. In its reply, which was limited to the issue of receivability of the complaint, the EPO submits that the complaint is irreceivable for failure to exhaust internal means of redress, as it was not unlikely that the internal appeal proceedings would be processed within a reasonable time when the complainant filed his complaint with the Tribunal. The EPO's position paper was communicated to the complainant on 9 June, as requested by him, only a few minutes after he had filed his complaint with the Tribunal; consequently, the EPO did not paralyse the internal appeal proceedings. It also contends that the complainant did not fulfil his duty to do all that could be reasonably expected of him to speed up the appeal procedure, as required by the Tribunal's case law. He was invited to reply to the EPO's position paper and to indicate if he wished to be heard or not, but he did not respond.

The EPO indicates that the IAC put the complainant's appeal on the agenda of the hearings to be held in April 2011 but, on 2 March, he informed the Administration that he wished to proceed with his

complaint before the Tribunal and requested that the IAC should not examine his appeal for the time being. By return e-mail he was informed that the internal appeal proceedings were suspended pending the Tribunal's decision on the receivability of his complaint. The EPO draws attention to the importance of internal appeal proceedings, in particular given that it is not the role of the Tribunal to engage in fact-finding. In its view, the principles of good administration of justice and of procedural economy require that the IAC provides a first opinion on the case.

The EPO limits its reply to the issue of receivability, as allowed by the President of the Tribunal on 7 December 2010.

D. In his rejoinder the complainant emphasises that the written warning, which was placed in his personal file, had a serious impact on his career.

E. In its surrejoinder the EPO maintains its position.

CONSIDERATIONS

1. Receivability is the only issue which arises for determination in this judgment inasmuch as the President of the Tribunal requested the EPO to reply only to that issue.

2. In the brief to his complaint, the complainant states that the impugned decision is the written warning sent to him. The Principal Director of Human Resources issued it, on 9 April 2009. It was expressly issued pursuant to Articles 93(2)(a) and 94(1) of the EPO's Service Regulations as a form of disciplinary action because the complainant travelled to Finland for a period of sick leave. The EPO contends that he did so without the requisite permission.

The complainant's brief reveals that he intends to impugn an alleged implied decision of the President of the Office rejecting his appeal.

3. In that regard, the background to the relevant proceedings thus far shows that the complainant appealed the written warning on 14 May 2009. He thereby sought a decision to quash it and to have it withdrawn from his personal file. Considering the appeal to be unfounded, by correspondence dated 14 July 2009, the President referred it to the IAC, which acknowledged receipt of it on 16 July 2009. The complainant received the correspondence on 3 August 2009. On 26 May 2010, he requested the position of the Office on his appeal. He stated that failing receipt of that position paper, before 9 June 2010, he would consider his internal means of redress exhausted under Article 109(3) of the Service Regulations.

4. Article 109(3), which is similar to Article VII, paragraph 1, of the Statute of the Tribunal, permits a permanent employee of the EPO to file a complaint with the Tribunal when all internal means of appeal have been exhausted. The complaint is then to be filed under the conditions provided in the Statute of the Tribunal.

5. While the EPO submits that the complaint is irreceivable as there was no final decision and the complainant did not exhaust the internal means of redress as Article 109(3) of the Service Regulations and Article VII, paragraph 1, of the Statute of the Tribunal require, the complainant contends that he is entitled to bring his case directly to the Tribunal in accordance with the Tribunal's case law. This, he states, is because the President did not make a decision on his internal appeal within a reasonable time. The complainant's case is that there was an unreasonable delay because he received no response from the Office for about one year after his appeal was referred to the IAC. Neither did he receive a response to his correspondence of 26 May 2010 requesting the position of the Office before he filed his complaint with the Tribunal on 9 June 2010.

6. The applicable case law is clearly stated, for example, in Judgment 2039, under 4, as follows:

> "Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainants' rights. Complainants 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 (see Judgments 1829, […], 1968, […], and the numerous judgments cited therein).
>
> However, a complainant can make use of this possibility only where he has done his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a decision within a reasonable time (see, for example, Judgments 1674, […] under 6(b), and 1970 […]). In general, a request for information on the status of the proceedings or the date on which a decision may be expected is enough to demonstrate that the appellant wants the procedure to follow its normal course, and gives grounds for alleging unjustified delay if the authority has not acted with the necessary diligence. However, there are circumstances in which it is unclear whether the procedure has been abandoned or whether the staff member has implicitly consented to the suspension of his appeal in law or in fact. In such cases, the case law says that the staff member must indicate clearly if he wants the procedure to continue. [...]"

7. In short, before the complainant brought his case directly to the Tribunal, he had to inform the EPO of his continued interest in his internal appeal, thus putting it on notice that he wanted the process to proceed. The Tribunal will accept a complaint to be brought directly to it where the internal redress process is not exhausted if it appears that a complainant's rights in the internal appeal process have been paralysed.

8. The EPO argues that the complaint is irreceivable because the circumstances show that the complainant's rights were not paralysed in the internal appeal process.

9. There was no activity on the case for about a year after the appeal was referred to the IAC. The complainant's correspondence of 26 May 2010 sought the reactivation and continuation of his case in the internal process. The deadline which he set for receiving the Office's position paper reflected the seriousness that he attached to that. The records seem to show that the Office and the IAC took it as such.

10. The Tribunal notes that by return e-mail of 1 June 2010 to the complainant's correspondence of 26 May 2010, the Director of Employment Law informed him that "the appeal was being dealt with". The IAC received the position paper of the Office on 8 June 2010 and sent a copy of it by post to the complainant. A scanned copy of the position paper was sent by e-mail to him at 9.41 in the morning of 9 June 2010. The complainant responded at 10.27 that same morning, informing the IAC that he had earlier that morning filed his complaint with the Tribunal and would not withdraw it because he considered his internal means of redress exhausted. He did not reply to the position paper of the Office. Moreover, on 2 March 2011 the IAC informed the complainant that it intended to consider his internal appeal by written procedure sometime during the period from 4 to 8 April 2011. The complainant asked the IAC to suspend its proceedings pending the Tribunal's decision on receivability. The complainant contends that the IAC should have set the matter down for hearing in its October 2010 session. However, he had not replied to the Office's position paper to facilitate the case being heard then.

11. The foregoing circumstances do not suggest that the complainant's rights were paralysed in the internal appeal process. It appears that steps were being taken to facilitate a decision on the internal appeal in April 2011. Accordingly, the complaint is dismissed as it is irreceivable in the Tribunal. The Tribunal expects that the internal appeal will now be expedited.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 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 9 July 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ