The Administrative Tribunal,

Considering the second complaint filed by Mrs C. R. F. against the European Patent Organisation (EPO) on 9 October 2006 and corrected on 19 October 2006, the Organisation's reply of 31 January 2007, the complainant's rejoinder of 12 April and the EPO's surrejoinder of 7 August 2007;

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 Spanish national born in 1959, joined the European Patent Office, the EPO's secretariat, in 1990 as an examiner. She currently holds grade A3. Facts relevant to this case are to be found in Judgments 2341, which dealt with a similar case, and 2448 concerning the complainant's first complaint. Suffice it to recall that on 15 September 2003 the complainant filed a complaint with the Tribunal contesting the decision of the EPO Administrative Council to dismiss her appeal of 1 October 2001, which was directed against the Council's decision of 28 June 2001 introducing provisions for long-term care insurance, as well as the relevant implementing rules, into the Service Regulations for Permanent Employees of the European Patent Office. She contended in particular that the decision to dismiss her appeal was tainted with a substantial procedural flaw because the Appeals Committee of the Administrative Council (hereinafter the "Appeals Committee"), which issued the opinion on which the Administrative Council's decision was based, was not "properly constituted". In Judgment 2448, delivered on 6 July 2005, the Tribunal set aside the impugned decision and referred the case back to the Council for a new decision after consultation of a "properly constituted" Appeals Committee.

Following the delivery of that judgment, the complainant was invited by letter of 26 January 2006 to attend a hearing before the Appeals Committee on 24 March. On 22 February the complainant's counsel wrote to the Committee, raising objections concerning its composition. These objections were dismissed in a letter from the Chairman of the Committee, which was handed to the complainant on the day of the hearing. At the hearing the complainant again protested against the Committee's composition, and denounced the dual role of the Council Secretariat as the secretariat of both the Administrative Council and the Appeals Committee. She requested that the proceedings be suspended until the members to whom she objected had been replaced, the staff working in the Council Secretariat had been excluded from the Committee's deliberations and decision, and the Representatives of the Administrative Council had been invited to attend. By a letter of 26 April the Chairman of the Committee informed the complainant that the Committee had decided to refuse her requests.

In its opinion dated 9 June 2006 the Appeals Committee recommended that the appeal be dismissed as unfounded. On 5 July 2006 the complainant was notified that, at its 106th meeting held from 26 to 30June, the Administrative Council had decided to dismiss her appeal for the reasons set forth in the Committee's opinion. That is the impugned decision.

B. The complainant contends that several substantial procedural violations occurred in the course of the proceedings before the Appeals Committee, and hence that the Administrative Council's decision, which was based on the Committee's opinion, cannot stand. She asserts that her right to a fair hearing was infringed by the Committee's refusal to replace two of its members who lacked the neutrality necessary to give an impartial opinion by reason of their participation in the deliberations of the Appeals Committee that issued the first opinion recommending the dismissal of the appeal. In the same vein, she considers that the fact that a third Committee member, the staff representative, had also sat on the General Advisory Committee which at its 144th meeting held in April 2001 unanimously recommended in favour of the adoption of the decision concerning long-term care insurance, constituted an "accumulation of functions [which] is at odds with the duty of independence laid down in Article 111 [of the Service Regulations]".

According to the complainant, the bias on the part of the two Committee members who had also participated in the

proceedings leading to the first opinion which was rendered in May 2003, is further aggravated by the fact that the Appeals Committee reached its conclusion long before the complainant had had the opportunity to exercise her right to be heard. In this regard she points out that the text of the first opinion is almost identical to that of a provisional opinion drafted in May 2002. The complainant also argues that the participation of members of the Administrative Council Secretariat in the deliberations of the Appeals Committee and the drafting of its opinion may lead to a conflict of interest, given that they owe loyalty to the Council and may thus allow it to have "privileged access" to the Committee's dealings and internal documents. This would not only compromise the impartiality of the Appeals Committee but would also be incompatible with the principle of equal treatment of the parties.

She further asserts that the intentional omission on the part of the Chairman of the Appeals Committee to invite the representative of the Administrative Council to attend the hearing amounts to a breach of a fundamental procedural rule. This breach operated to her disadvantage, since it placed the Administrative Council in a position where it could have contested the validity of a finding in her favour or withheld relevant arguments and presented them at a later stage.

The complainant asks the Tribunal to set aside the impugned decision and to refer the case back to the Administrative Council for decision after a procedurally correct hearing has been conducted before a properly constituted Appeals Committee. She also claims 5,000 euros in moral damages and 2,000 euros in costs.

C. In its reply the EPO submits that the opinion on the basis of which the Administrative Council made its decision was delivered by a properly constituted Appeals Committee following the completion of a flawless procedure. It dismisses the allegation of bias, emphasising that the two Committee members who participated in both opinions no longer had any official functions in the Organisation at the time when they acted as members of the Appeals Committee and had neither a personal interest in the particular case nor any involvement in preparing the decision under appeal. It asserts that the second Committee was a properly constituted Appeals Committee within the meaning of Judgment 2448, not least because it included members appointed by the Staff Committee. Regarding the participation of one of the members in the General Advisory Committee which had recommended the adoption of the decision concerning long-term care insurance, the Organisation notes that the exclusion of all staff members who at one point were involved in the preparation of administrative decisions would substantially reduce the number of potential appointees.

The EPO further rejects the assertion that the Appeals Committee that issued the first opinion had decided the case even before the complainant had the opportunity to be heard. It explains that the Rules of Procedure of the Appeals Committee require the Chairman of the Committee, who normally acts as *rapporteur*, to arrange for the appeal file to be communicated to the Committee members together with the provisional opinion he/she has drafted. The Committee prepares the hearing on the basis of that provisional opinion and subsequently decides whether it must be amended. Thus, contrary to the complainant's contention, the fact that the conclusions of both the provisional and final opinions were the same does not constitute proof of bias on the part of the Committee.

With regard to the dual role of the Administrative Council Secretariat, the EPO indicates that the Rules of Procedure of the Appeals Committee provide that the Committee shall be assisted by the Secretary of the Administrative Council and the Council Secretariat. In supporting the work of the Committee, the Council Secretariat exercises a purely administrative role without any involvement in the Committee's deliberations or the preparation of the Council's defence.

Furthermore, the Organisation notes that Article 6(2) of the Rules of Procedure of the Appeals Committee, which requires that the Chairman invite the parties to a hearing, has been interpreted as amounting to a standing invitation of the Council. As the Chairman of the Appeals Committee indicated in a letter to the complainant, the Council has, in practice, decided not to make use of its right to attend hearings and is therefore not formally invited. Thus, the argument that the Chairman of the Committee intentionally breached the said Rules by not inviting the Council cannot stand.

On the merits the EPO maintains its position that the contribution payable for spouses under the long- term care insurance scheme is in conformity with the principle of equality. It considers both the distinction made between married and divorced couples and the "ceiling" imposed on the contribution payable by Office staff, once remuneration reaches the level of grade A7, as being fully justified. It recalls that participation in the scheme is not compulsory for spouses, and that the solution adopted was a compromise between the protection of the institution

of marriage and the principle of solidarity.

D. In her rejoinder the complainant presses her pleas. She argues that the existence of a draft opinion prior to the hearing of the parties and the final deliberation is likely to have influenced the members of the Appeals Committee, thus rendering the proceedings flawed. Acknowledging that the Administrative Council is not obliged to attend a hearing, she maintains that the omission by the Chairman of the Appeals Committee to invite the Council constitutes a breach of a procedural rule. She also points out that the EPO has not provided any document confirming the Council's decision not to make use of its right to attend the hearings before the Committee.

E. In its surrejoinder the EPO maintains its position. It asserts that the drafting of a provisional opinion containing a recommendation on the outcome of the appeal was in conformity with the provisions of the Rules of Procedure of the Appeals Committee. It observes that, apart from noting that the conclusions of the provisional and final opinions did not differ, the complainant has not provided any evidence to substantiate her contention of bias. On the alleged omission on the part of the Committee's Chairman to invite the Council to attend the hearing, it refers the complainant to Article 18 of the Administrative Council's decision CA/D 8/06, which stipulates that "[t]he Council shall decide whether and by whom to be represented before its Appeals Committee". It also denies any bias on the part of the Committee member who was on the General Advisory Committee which had approved the decision under appeal, noting that he had merely participated in the formulation of an opinion on a document submitted by the President of the Office and not in the elaboration of that document.

CONSIDERATIONS

1. The complainant is an employee of the European Patent Office. In June 2001 the Administrative Council of the Organisation approved the introduction into the Service Regulations of provisions for long-term care insurance and implementing rules for the scheme. The relevant rules entered into force on 1 July 2001. Thereafter, on 1 October 2001, the complainant lodged an appeal with the Appeals Committee of the Administrative Council with respect to the Council's decision claiming, amongst other things, that the implementing rules breached the principle of equality. The Appeals Committee recommended that her appeal be rejected as unfounded and the Administrative Council so decided. The complainant then lodged a complaint with the Tribunal.

2. In Judgment 2448 the Tribunal ruled that the Appeals Committee that considered the complainant's appeal was not properly constituted in that its members did not include a staff representative. By reason of the resulting invalidity of the decision in question, it was not necessary for the Tribunal to rule on other issues then raised by the complainant. In the result, the Tribunal remitted the matter to the Administrative Council for a new decision after consulting a properly constituted Appeals Committee.

3. After Judgment 2448 was delivered, the complainant's appeal came before an Appeals Committee that included a staff representative. The complainant objected to the composition of the new Committee on the basis that it included two members who had been members of the earlier Committee that had recommended against her claim in circumstances that will be detailed later. Her objection was dismissed on the basis that the members of the Committee had been validly appointed and there was no breach of Article 111 of the Service Regulations to which reference will also later be made. Another member of the Appeals Committee, the staff representative, had been a member of the General Advisory Committee that had unanimously recommended in favour of the adoption of the long-term care insurance policy that was the subject of the complainant's appeal. However, the complainant did not know this when her appeal was heard.

4. The second Appeals Committee also recommended that the complainant's appeal be rejected as unfounded. Again, the Administrative Council accepted that recommendation and the complainant lodged a second complaint with the Tribunal. The complainant does not advance any argument with respect to the substance of her claim, only with respect to the composition of the Appeals Committee and its practices and procedures.

5. The first issue raised by the complainant repeats the substance of an issue raised in her first complaint. The first Appeals Committee issued a report that, except for minor details of no present importance, repeated the text of an opinion that had been prepared before the hearing of her appeal. The complainant argued in her first complaint that this indicated that the opinion of the Appeals Committee was neither impartial nor objective. As earlier indicated, it was not necessary for the Tribunal to consider this issue. The complainant now raises the matter to establish that the two members of the second Appeals Committee who were members of the earlier Committee

were neither impartial nor objective.

6. The EPO points out in its surrejoinder that the Rules of Procedure of the Appeals Committee of the Administrative Council provide that an appeal file "shall be accompanied by the provisional opinion of the rapporteur, containing at the very least a statement of the facts and of the relevant law". It is the practice of many tribunals and advisory bodies for a *rapporteur* to prepare a draft or provisional opinion in advance of a hearing and for that draft to become the subject of consideration by other members of that body. The draft or provisional opinion may or may not be adopted in its entirety. Its adoption, even without alteration, does not indicate that the members of the body in question did not consider the issues to be determined impartially and objectively. Accordingly, the complainant's argument, based on the first Appeals Committee having adopted the text of a draft opinion that was prepared before hearing the complainant, must be rejected.

7. The complainant also argues that the decision based on the opinion of the second Appeals Committee should be set aside because the Appeals Committee of the Administrative Council shares its Secretariat with the Council. According to the complainant, "[s]taff of the Secretariat, including its head […], was present at (and involved in?) the hearings, the deliberations and the preparation of the Committee's Opinion". There is no evidence that the staff of the Secretariat were so involved. Accordingly, the Tribunal must proceed on the basis that the Committee acted regularly and uninfluenced by the staff of its Secretariat. Whether or not members of the Secretariat have divided loyalties, as argued by the complainant, is beside the point. The issue is solely one of the impartiality and objectivity of the members of the Appeals Committee, not of its Secretariat. Nor is there any evidence for the complainant's contention that the sharing of a secretariat results in the Administrative Council having "privileged access to the [Appeals] Committee's dealings and internal documents". Accordingly, her argument, based on the premise that the sharing of a secretariat is "incompatible with the equal treatment of all parties", must also be rejected.

8. The complainant objected at the hearing of her appeal before the second Appeals Committee that representatives of the Administrative Council had not been invited to the hearing in accordance with Article 113(3) of the Service Regulations and repeats her argument in these proceedings. The EPO resists her argument in this regard on the basis that the Administrative Council has, in practice, decided not to avail itself of its right to be heard and the Appeals Committee treats Article 6(2) of its Rules of Procedure as a standing invitation to the Council. Whatever the practice, the failure to invite representatives of the Administrative Council to attend the hearing was a procedural irregularity. However, it is an irregularity upon which only the Council, itself, can rely. It is not one that occasioned any detriment to the complainant and, thus, she cannot rely upon it in support of her present claims.

9. It is necessary now to turn to the composition of the second Appeals Committee and the terms of Article 111 of the Service Regulations. Relevantly, that Article provides that if a member of the Appeals Committee:

"is required to take part in a case in which he might have a personal interest or in respect of which he participated in preparing the decision under appeal, with the result that this might prejudice the impartiality of his judgement, the Committee shall find, on being informed by the member concerned, or at the request of the appellant, or of its own motion, that the member concerned is unable to take part in that case."

10. The first issue is whether, as apparently the second Appeals Committee thought, Article 111 is a complete and exhaustive statement of the circumstances in which a member is disqualified from hearing an appeal. Two matters militate against that view. First, Article 111 does not, in terms, state that it is only in those circumstances that a member is disqualified. Second, it does not cover every case of bias. For example, it does not cover the case where a member is known to be openly hostile to or prejudiced against the appellant. Accordingly, Article 111 should not be construed as specifying the only circumstances in which a member of the Appeals Committee is disqualified. For practical purposes, the situation is the same as that considered in Judgment 179. In that case the Tribunal held that a specific provision dealing with disqualification did not exclude the application of the general rule requiring a person to withdraw from a decision-making body or a body making a recommendation in the decision-making process when "his impartiality may be open to question on reasonable grounds".

11. In Judgment 1317, under 31, the Tribunal stated:

"An internal appeal procedure that works properly is an important safeguard of staff rights and social harmony in an international organisation and, as a prerequisite of judicial review, an indispensable means of preventing dispute

from going outside the organisation."

The notion of "working well" necessarily encompasses the requirement that the members of an internal appeal body should not only be impartial and objective in fact, but that they should so conduct themselves and be so circumstanced that a reasonable person in possession of the facts would not think otherwise. In this last regard, it is necessary only to observe that staff confidence in internal appeal procedures is essential to the workings of all international organisations and to preventing disputes from going outside those organisations.

12. A reasonable person, knowing that a member of the Appeals Committee had already expressed a concluded view as to the merits of the appeal being considered, would not think that that member would bring an impartial and objective mind to the issues involved. So much was decided in Judgment 179 in which it was said that "failing any explicit provision in the regulations and rules, the [members] concerned are bound to withdraw if they have already expressed their views on the issue in such a way as to cast doubt on their impartiality". To the extent that the EPO argues otherwise by reference to Judgment 101, that argument must be rejected. That case was concerned with judges of the Tribunal who had earlier heard a complaint brought by the same complainant, not with the situation where they were deciding the exact same complaint. It follows that those persons who had been members of the first Appeals Committee were disqualified from membership of the second Committee.

13. The situation of the staff representative on the second Appeals Committee was, for all practical purposes, the same as if he had participated in the decision under appeal. He, too, was disqualified from membership of that Committee.

14. It follows that the decision of the Administrative Council based on the recommendation of the second Appeals Committee must be set aside. Because it is the obligation of the EPO to ensure that Appeals Committees are constituted by persons who are both qualified and impartial, there should be an award of moral damages, which the Tribunal sets at 2,000 euros. The complainant is also entitled to 2,000 euros as costs.

DECISION

For the above reasons,

1. The decision of the Administrative Council of 5 July 2006 is set aside.

2. The case is remitted to the Administrative Council for a new decision to be taken after consulting a differently constituted Appeals Committee.

3. The EPO shall pay the complainant 2,000 euros by way of moral damages, and a further 2,000 euros by way of costs.

4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 5 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet