111th Session **Judgment No. 3019**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs J. W.-M. against the European Patent Organisation (EPO) on 17 June 2009 and corrected on 21 July, the Organisation's reply of 3 November and the complainant's letter of 30 November 2009 informing the Registrar of the Tribunal that she would enter no rejoinder;

Considering the *amicus curiae* brief submitted by the Munich Staff Committee on 15 November 2010, corrected on 1 December 2010, and the EPO's comments thereon of 1 March 2011;

Considering Articles II, paragraph 5, and VII 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. By a decision of 28 June 2001 the Administrative Council introduced, with effect from 1 July 2001 and in addition to its ordinary medical insurance, a long-term care insurance scheme for the permanent employees of the European Patent Office – the secretariat

of the EPO – their spouses and certain of their dependants. Article 83a of the Service Regulations for Permanent Employees provides that individuals eligible for coverage under the scheme "shall be insured on either a compulsory or a voluntary basis".

Circular No. 266 of 14 November 2001 concerning long-term care insurance contains information regarding the actions to be taken by employees according to their marital situation and the income of their spouse, as well as the methodology used by the EPO for calculating the monthly contributions. It also stipulates that employees who decide to decline coverage for persons eligible for insurance on a voluntary basis must file a waiver declaration, and that such declarations can have retroactive effect if they are filed by 31 January 2002. In March 2003 the EPO published a brochure which provided general information to staff members regarding the long-term care insurance scheme.

The complainant, a French national born in 1960, joined the European Patent Office in 1998 as an administrator at grade A3. At all material times her spouse was employed in Germany and was not a staff member of the EPO. In January 2004 the Administration asked her to provide information regarding her spouse's income so that it could calculate the contributions owed for his long-term care insurance. As the complainant was on the point of taking maternity leave, it was agreed that she could have more time to take a decision regarding her spouse's coverage under the scheme. Her leave was extended and upon her return to work in December 2004 she submitted a waiver declaration, signed by herself and her spouse, which stated that her spouse did not wish to be insured.

In January 2005 the complainant was again asked to supply information regarding her spouse's income so that the monthly contributions which had been deducted from her salary since July 2001 for his coverage under the scheme could be adjusted according to his actual earnings. She did not supply the information and on 25 August 2005 the Office reiterated its request. In a letter of 2 September to the Personnel Administration Department the complainant stated that her spouse was not covered under the scheme.

On 13 October she was informed that her waiver declaration revoking his insurance coverage – which was dated 20 December 2004 – had not been submitted in time for it to have retroactive effect from the date of the scheme's introduction and that her spouse's membership had therefore been terminated with effect from 1 January 2005. She was asked to provide a declaration of his gross income for the years 2000 to 2003 so that the Office could finalise its calculation of the contributions due for the period from July 2001 to December 2004. A series of exchanges ensued between the complainant and the Administration, in which she expressed, inter alia, her dissatisfaction with the Administration's implementation of the insurance scheme. On 25 October 2005 she was informed that contributions for her spouse's coverage would be due only from 1 January 2003 and she was asked to supply details of his gross income for the years 2002 and 2003. As she failed to do so, the Office estimated her spouse's gross annual salary at 120,000 euros and determined on that basis that she owed outstanding contributions for his coverage. The sum of 1,610.53 euros was subsequently deducted from her December 2005 salary.

By a letter of 2 February 2006 to the Principal Director of Personnel the complainant challenged the legality of the "involuntary" insurance of her spouse and requested reimbursement of the monthly contributions deducted from her salary from July 2001 to December 2004 as well as the outstanding contributions deducted from her December 2005 salary, plus interest. She requested moral damages. In the event that her requests were not granted she asked that her letter be treated as an internal appeal and she claimed costs. On 23 March 2006 she was informed that the President of the Office had referred the matter to the Internal Appeals Committee for an opinion.

In its opinion of 20 January 2009 the Committee unanimously decided to consider the complainant's appeal receivable only insofar as it challenged the deduction of outstanding contributions from her December 2005 salary. The majority recommended rejecting it as partly irreceivable and unfounded as to the remainder. It held that the insurance scheme was sufficiently transparent, that the EPO's automatic insurance of the complainant's spouse *ab initio* was lawful

and that the consequential deductions from her salary were justified. It considered her claim for moral damages to be disproportionate and unfounded. The minority held that the EPO's automatic insurance of her spouse was tantamount to a "forced sale" and therefore unlawful. Further, the relevant provisions were unclear and had to be interpreted *contra proferentem* and in favour of the complainant. In the minority's view, the Office had not fulfilled its duty of care and should have requested information regarding the income of the complainant's spouse in a timelier manner. It recommended reimbursing the amount deducted in respect of the outstanding contributions, plus interest, and an award of costs. It concurred with the majority that she could not claim moral damages.

By a letter of 20 March 2009 the Director of Regulations and Change Management informed the complainant that the President of the Office had decided to reject her appeal in accordance with the majority opinion of the Internal Appeals Committee. That is the impugned decision.

B. The complainant submits that the relevant provisions are ambiguous. She states that when she was first asked to provide information regarding her spouse's income, she informed the Administration that she had already done so when she joined the Organisation. She assumed that, based on his salary, her spouse was not yet covered by the insurance scheme. In her view, a straightforward interpretation of the Implementing Rules to Article 83a – which were adopted by the Administrative Council – leads to the conclusion that action on the part of an employee is required for his or her spouse to be insured on a voluntary basis. The EPO attempted to remedy the ambiguity by publishing an information brochure in March 2003, but the brochure does not have force of law. In addition, Circular No. 266 does not stipulate any legal or financial consequences for filing applications or waiver declarations after 31 January 2002; it merely provides that, thereafter, they should

be submitted promptly. Relying on the Tribunal's case law, the complainant argues that any ambiguity in the provisions must be interpreted *contra proferentem* and in her favour. Furthermore, she contends that there is no legal basis for the EPO to insure an employee's spouse involuntarily and she likens this practice to a "forced sale", which is unlawful.

She asserts that the defendant breached its duty of care and failed to act in good faith. The EPO has its headquarters in Germany and is aware that, under national law, persons gainfully employed in Germany are compulsorily covered under a similar insurance scheme. As a consequence, with effect from July 2001, all employees' spouses who fell under the national scheme were automatically doubly insured. It then took the Administration more than two years to begin requesting information regarding spouses' incomes. In her view, the insurance scheme was implemented in a manner that was convenient for the Administration, but which did not take into account the interests of staff. In addition, the complainant contends that the Organisation breached the principle of equal treatment because it accepted a waiver declaration filed by a similarly situated staff member and retroactively reimbursed the basic contributions that had been deducted from that person's salary.

The complainant asks the Tribunal to set aside the impugned decision, to order the EPO to treat her in the same way as it treated a similarly situated staff member and to revise its practice of applying long-term care insurance by default to individuals who are gainfully employed and insured under German national law. She claims 1,610.53 euros, that is, the contribution adjustment deducted from her December 2005 salary, and reimbursement of the monthly contributions deducted from her salary for the period from July 2001 to December 2004, plus interest. She also seeks moral and punitive damages and costs.

C. In its reply the EPO argues that the complainant's claim for reimbursement of the monthly premiums deducted from her salary for

the period from July 2001 to December 2004 is time-barred and hence irreceivable. Each payslip is an appealable decision and she failed to challenge those decisions within the three-month time limit prescribed by the Service Regulations. Moreover, her request that the Tribunal order the EPO to review its practice of automatically insuring persons who are gainfully employed and insured under German national law is irreceivable *ratione materiae*.

On the merits, the Organisation disputes the complainant's interpretation of the Implementing Rules to Article 83a and her contention that the relevant provisions are ambiguous. It states that it is clear that a spouse is insured unless an employee has taken a decision to the contrary. Furthermore, in light of subparagraphs 4(b) and 4(d) of the Implementing Rules, which deal with contributions made by the insured person, the complainant should have been aware of the financial implications of her spouse's insurance under the scheme. Circular No. 266 provides all the necessary practical information for an employee to know what action to take according to his or her situation, in particular, how contributions are calculated for a spouse whose income exceeds the set limit, as was the case for the complainant. In the EPO's view, it is also clear from the circular that only waiver declarations filed on or before 31 January 2002 would have retroactive effect from 1 July 2001. It asserts that the monthly premiums and the contribution adjustment were lawfully deducted from her salary and that her claims in this regard are unfounded.

The EPO states that the concept of "inertia selling" is not applicable to the field of social rights. It submits that its long-term care insurance scheme is part of a set of social security rights which it grants to its employees. It fulfils its duty of care towards its employees and their families by insuring all of them *ab initio* and then providing them with a period of time within which to decide whether those persons who may be insured on a voluntary basis wish to benefit from the insurance. In this respect, it recalls that it also bears the largest portion of the costs of the scheme.

As regards the allegation of a breach of the principle of equal treatment, the defendant argues that the complainant and the other

employee referred to were not similarly situated. Citing the case law, it points out that the principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently.

D. In its *amicus curiae* brief the Munich Staff Committee concurs with the complainant's submissions regarding the ambiguity of the relevant provisions and asserts that references to coverage on a "voluntary basis" are incompatible with the requirement that an employee must actively renounce that coverage. It contends that the EPO was negligent in not actively seeking information regarding the income of employees' spouses for the purpose of their inclusion in the long-term care insurance scheme. Furthermore, after that information was solicited, several dozen employees discovered that, unbeknown to them, their respective spouses had been insured on a voluntary basis under the scheme since 1 July 2001. As a consequence, those employees may now be liable for contributions with retroactive effect from that date. It points out that the EPO has prescribed a three-month limitation period within which employees may bring claims against it and finds it unfair that the Organisation is not subject to a limitation period for its claims against staff.

E. In its final comments the Organisation asserts that it is clear from the relevant provisions that the Administrative Council intended that an employee should be required to file a waiver declaration to revoke insurance coverage for his or her spouse. With respect to the Staff Committee's allegation of negligence, the EPO points to the opinion of the majority of the Internal Appeals Committee, which held that the Office was entitled to base the calculation of the contributions for the complainant's spouse on the information she provided when she commenced her employment. In addition, it asserts that the situation of other employees does not justify the complainant's own negligence and it points out that the three-month period referred to by the Staff Committee is the time limit prescribed by the Service Regulations for filing an internal appeal and is thus irrelevant in this matter.

CONSIDERATIONS

1. The complainant impugns the decision taken by the President of the Office, notified to her by a letter dated 20 March 2009, to endorse the majority opinion of the Internal Appeals Committee rejecting her appeal as partly irreceivable and unfounded as to the remainder. The Committee unanimously considered that the complainant's appeal was irreceivable, *ratione temporis*, to the extent that it concerned the monthly contributions deducted from the complainant's salary during the period from July 2001 to December 2004 for her spouse's long-term care insurance coverage. With regard to the complainant's claim concerning the deduction of outstanding contributions in the amount of 1,610.53 euros from her December 2005 salary and her consequent request for moral damages, the majority recommended that they be rejected as unfounded. The minority found in the complainant's favour. It considered that the action required under the EPO scheme in order for an employee to refuse the automatic coverage of his or her spouse amounts to a "forced sale", which is unlawful. Furthermore, it was of the view that, as the Office responded positively to the complainant's request for more time to consider the matter, it was not unreasonable for the complainant to conclude that she could respond later, upon her return from maternity leave. The minority also considered that the Organisation had failed in its duty of care because it only sought information concerning the income of the complainant's spouse at the end of 2003.

2. The complainant submits that she never expressly consented to her spouse being covered by the Office's long-term care insurance scheme, which was described as "voluntary" in Article 83a of the Service Regulations and the Implementing Rules thereto. She argues that the deduction of monthly contributions from her salary from July 2001 to December 2004, as well as the deduction of the adjusted outstanding contributions in December 2005, were unlawful. She points out that in December 2004 she submitted an irrevocable waiver declaration against her spouse's coverage by the long-term care insurance scheme. In addition, she contends that the provisions

regarding the coverage of spouses are ambiguous and must therefore be interpreted *contra proferentem*, so as to disallow automatic coverage. She also contends that the EPO failed in its duty of care towards her and that it treated her differently from another employee in a similar situation.

3. Article 83a of the Service Regulations provides:

> "In accordance with the Implementing Rules, a permanent employee, his spouse, his former spouse, his dependent children within the meaning of Article 69 and other dependants within the meaning of Article 70 shall be insured on either a compulsory or a voluntary basis against expenditure arising from reliance on long-term care. This insurance is intended to provide a fixed amount of financial support to defray some of the expenses incurred if an insured person's autonomy becomes seriously impaired on a long-term basis and he therefore requires help to carry out everyday activities; it shall not include any expenditure on medical fees associated with the treatment of an illness or resulting from pregnancy or an accident."

Paragraphs I(1) and (2)(a) of the Implementing Rules to Article 83a state:

> "(1) The following persons shall be insured on a compulsory basis:
>
> (a) permanent employees;
>
> (b) former employees in receipt of an invalidity pension or an outright retirement pension;
>
> (c) dependent children of insured persons under (a) or (b);
>
> (d) dependent children of insured persons under (a) or (b) in receipt of an orphan's pension following the death of the insured person under (a) or (b).
>
> (2) The following persons may be insured on a voluntary basis, provided the insured person under (1)(a) or (b) or an insured person under (3)(d) does not take an irrevocable decision to the contrary, and provided they are not themselves already insured under (1):
>
> (a) the spouse of an insured person under (1)(a) or (b) or of an insured person under (3)(d);
>
> […]"

4. The Chairperson of the Munich Staff Committee submitted an *amicus curiae* brief in support of the complainant's submission. It is stated in that brief that "the decision [of the Administrative Council of

28 June 2001 introducing the long-term care insurance scheme] and [Article 83a of the Service Regulations] merely refer to a 'voluntary basis' which seems incompatible with the requirement that the staff member actively renounce is [sic] only introduced in secondary regulations, and apt to lead to confusion". It is also stated that the Organisation was negligent in not actively seeking to obtain information regarding the income of employees' spouses. It is further submitted that, following criticism by the Organisation's auditors, staff were asked to inform the Office of their spouses' incomes, which "led to the discovery of several dozens more staff members who were not aware that their spouses were 'voluntarily' insured and that may now be facing retroactive contributions going back to 2001, the year of the introduction of the long-term care insurance".

5. The Tribunal finds that the complainant's claims are all unfounded on the merits and that there is therefore no need to treat the receivability of each claim individually. The Implementing Rules to Article 83a do not contravene or supplant that article but provide clarification of it. Furthermore, the Tribunal notes that the Implementing Rules are reasonable, introduced in the interest of staff members, and fulfil the Organisation's duty of care.

6. Although some might think that the word "voluntary" is not apt to describe a scheme that operates automatically unless a person opts out of it, there is no ambiguity in the Implementing Rules. Nor is there any conflict between Article 83a and those Rules. The Implementing Rules which require a staff member to explicitly renounce the insurance do not negate the voluntary nature of the insurance scheme. Moreover, Article 83a cannot be regarded as ambiguous as it expressly refers to the Rules for its implementation. Indeed, taken together, Article 83a and the Implementing Rules show clearly what is required and who is covered by the scheme. Furthermore, the Organisation provided a period of more than six months for all employees to consider the long-term care insurance coverage and, if necessary, to submit an irrevocable waiver

declaration which would be retroactive to the implementation date of 1 July 2001.

7. As the Organisation bears approximately two thirds of the insurance costs for each insured person, employee or spouse, and the full cost for the employee's children, it cannot be said that the practice of automatic coverage barring the filing of a waiver declaration is in the Organisation's interest. The automatic coverage applied by the Implementing Rules cannot be deemed unreasonable. It is clear that under the system chosen by the Organisation some staff members may be slightly financially penalised if they fail to opt out of the scheme, as their automatic coverage will entail consequent deductions from their salaries. However, in evaluating the possible outcome resulting from automatic coverage and that resulting from a lack of coverage, the Organisation evidently considered that the outcome could be worse in the latter situation as staff members who neglected to enrol their spouses in the long-term care insurance scheme could suffer the severe financial consequences of not being insured when the need arose, and the Tribunal cannot regard the Organisation's choice as unreasonable. Considering the cost to the Organisation, and the benefits to the employees, it cannot be said that the Organisation has not fulfilled its duty of care towards its staff members.

8. Regarding the minority opinion of the Internal Appeals Committee, the Tribunal points out that in allowing the complainant's request for more time to consider the possibility of her spouse being covered by the Office's long-term care insurance scheme, the Organisation reasonably believed that she needed time to decide whether or not to submit an irrevocable waiver declaration, whereas the complainant mistakenly thought that they were allowing her time to consider whether or not to enrol her spouse in the insurance scheme. As the Rules were clear in stating that unless a waiver declaration was submitted enrolment was automatic, the complainant should have realised that her inaction would be construed as consent. In addition, it should have been clear from her payslips that the monthly deductions were being made.

9. The complainant's claim that her case was treated differently from that of her colleague is unfounded. In the case in question the Organisation had failed to provide the employee concerned with the necessary information concerning the automatic enrolment for her spouse and had also failed to give her the waiver form and the income declaration form, and therefore recognised the retroactive effect of the employee's waiver as from the date of her marriage (two years after the insurance scheme provisions entered into force). Since, in the complainant's case, the Organisation had fully informed her and had also provided her with all relevant documents and forms relating to the long-term care insurance scheme, the two cases are not similar and it cannot be considered a breach of the principle of equal treatment that they were treated differently.

10. Considering the above, the impugned decision must stand and, as such, the complainant's claims for moral and punitive damages and costs must be dismissed as unfounded. The complaint must therefore be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet