The Administrative Tribunal,

Considering the complaint filed by Mr C. T. against the European Patent Organisation (EPO) on 20 January 2005 and corrected on 16 March, the EPO's reply of 20 June, the complainant's rejoinder of 27 August and the Organisation's surrejoinder of 15 November 2005;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a German national born in 1953, joined the European Patent Office, the EPO's secretariat, on 1 May 1989. At the material time he was a patent examiner at grade A3 in the Berlin sub-office. In 1999 the cumulative amount of sick leave taken by the complainant, who suffers from a condition affecting his knee, was in excess of the 12 months allowed over a three-year period as set out in Article 62(6) of the Service Regulations for Permanent Employees of the European Patent Office. As a result, an Invalidity Committee was duly constituted in December 1999 to determine what action should be taken concerning any extended sick leave. This Committee, which took various decisions concerning the complainant over the years, found that he suffered from a "serious illness or handicap" and would require continual treatment, but that he could resume his duties full-time with effect from 1 January 2002.

During the course of a vacation in January 2003 the complainant had to undergo emergency surgery for his knee problems. Upon admission to hospital he contacted the EPO and requested "a period of extended sick leave" for his convalescence. Having received no response from the Organisation he contacted the Invalidity Committee. By a majority decision dated 20 and 21 January the Invalidity Committee approved the complainant's sick leave from 13 to 31 January 2003; the Committee member appointed by the President of the Office declined to sign the decision. However, in a letter of 6 March 2003 the Head of Administration at the Berlin sub-office informed the complainant that the duties and responsibilities of the Invalidity Committee had "expired" upon the finding that the complainant's capacity to work was "unrestricted" at the beginning of 2002, and that in order to obtain a decision concerning his sick leave from 13 to 31 January 2003 it would be necessary to constitute a new Invalidity Committee. The complainant was provided with the name of the medical practitioner appointed by the President of the Office to this new Committee and he was asked to provide the Office with the name of the medical practitioner he wished to appoint. The complainant appealed against this decision on 13 March in a letter to the Vice-President in charge of Directorate-General 4. In his appeal he argued that the former Invalidity Committee's mandate was still valid because his cumulative sick leave continued to exceed the maximum allowed under the Service Regulations.

By a letter of 22 August 2003 the Head of Administration informed the complainant that the period from 13 to 31 January 2003 was to be treated as extended sick leave.

In its report dated 14 September 2004 the Appeals Committee agreed with the complainant that the Invalidity Committee's mandate continued to be valid while an employee's maximum sick leave remained exceeded. However, since it did not consider that the complainant had suffered any injury by the EPO's actions, it recommended rejecting the appeal. In a letter of 18 October 2004 the Director of Personnel Management and Systems informed the complainant on the President's behalf that the latter had accepted the Appeals Committee's recommendation. That is the impugned decision.

B. The complainant argues that the Invalidity Committee dealing with his case could not have ceased to function because at all material times his cumulative sick leave exceeded the maximum entitlement. The purpose of an Invalidity Committee, once appointed, is to keep "the whole of the employee's health under comprehensive review" until the health condition improves to the point where the cumulative sick leave falls below the maximum

entitlement set out in Article 62(6) of the Service Regulations. The procedure adopted by the EPO – i.e. "the superfluous appointment of the new Committee" – renders the functioning of the Invalidity Committee "inefficient and impractical". There can be no justifiable grounds, other than loss of trust by the appointing person, for dissolving and reconstituting an Invalidity Committee at any time prior to the employee's health improving to the extent that the cumulative sick leave falls below the limit set out in the Service Regulations.

He asks the Tribunal to award him moral and other damages in the amount of 10,000 euros, to declare that an Invalidity Committee's mandate continues until the employee's cumulative sick leave falls below the maximum entitlement set out in the Service Regulations, and to award him at least 2,500 euros in costs.

C. In its reply the Organisation avers that the Service Regulations are not entirely clear on the issue of when an Invalidity Committee's mandate expires. However, it asserts that it is "standard practice" at the EPO for issues to be referred to the Committee by the President of the Office or, if at the request of the employee concerned, through the President. Consequently, an Invalidity Committee should not be convened without the President's knowledge. The medical practitioner appointed by the Office had doubts over the Committee's mandate and therefore did not sign the Committee's report; instead, he contacted the Office to let it know what had happened. Moreover, the Office no longer had trust in him and wished to replace him on the Invalidity Committee with its new medical adviser. This action is in keeping with the principle upheld by the Tribunal's case law that every party should have the possibility of replacing its appointee if there are important reasons for doing so. The Organisation admits that it would have been sufficient to simply replace its appointee to the Committee rather than constitute a new one.

In any event, the EPO argues that it caused the complainant no injury by reconstituting the Invalidity Committee, because it did so simply to have confirmation "in all due form" of the decision taken in January 2003 concerning the extended sick leave. It adds that it takes no issue with the complainant's request to have a declaration concerning an Invalidity Committee's mandate, provided that it is clear that such a Committee cannot be convened without having been invited to do so by the President or without the latter's knowledge.

D. In his rejoinder the complainant contends that Article 92(1) of the Service Regulations provides explicitly for his right to submit to the Invalidity Committee reports or certificates from any medical practitioner he has consulted. The EPO is attempting to limit this right by requesting that he first inform the President of the Office. He denies that it is "standard practice" that all requests concerning the Invalidity Committee should go through the President, as such a practice would contradict Article 90(2) of the Service Regulations. He notes that the Organisation now admits that it was incorrect for the Head of Administration to state that the Invalidity Committee's mandate had expired.

The complainant considers that he was placed in an unclear situation for several months while he awaited a decision from the new Invalidity Committee concerning his extended sick leave, and that the resulting "uncertainty and anxiety" did indeed cause him injury. He submits that the EPO should have replaced its appointee to the Invalidity Committee when it no longer had trust in him, rather than waiting until the Committee was called upon to take a new decision on the complainant's case. In his view, to suggest that the new Committee was set up merely as a "procedural rubber stamp" contradicts the position previously taken by the EPO that the decision of the former Invalidity Committee was invalid and without substance. He takes issue with the proviso that the EPO has asked to be placed on the declaration.

E. In its surrejoinder the EPO admits that there is no express provision in the Service Regulations requiring an employee to inform the President "in advance" that a new referral has been made to an Invalidity Committee, but states that in accordance with the "adversarial principle" each of the parties concerned must inform the other of any request made to the Committee. It contends that the obligation to inform the President is all the more justified as it is the EPO which bears the costs occasioned by an Invalidity Committee.

It says that the complainant has misunderstood the reason why it wished to replace its appointee to the Invalidity Committee; it was merely based on the desire to have its "official" medical adviser as its appointed member. The EPO maintains that constituting a new Committee caused the complainant no injury. Furthermore, there was no reason for him to doubt that the new Invalidity Committee would recommend that his hospitalisation and convalescence be regarded as extended sick leave, as "the need for and performance of an operation were in themselves evidence that there were medical grounds for the complainant's absence".

CONSIDERATIONS

1. The complainant was employed at the material time as a patent examiner at grade A3 in the Berlin sub-office of the European Patent Office, the EPO's secretariat. He seeks damages stemming from irregularities in proceedings before the Invalidity Committee.

2. The complainant suffered from a condition affecting his knee which required him to take more sick leave than he was entitled to under Article 62(6) of the Service Regulations. An Invalidity Committee was appointed in December 1999, to determine whether his sick leave should be extended.

3. By a decision of the Invalidity Committee it was found that the complainant could return to work full-time in January 2002. However, during the course of a vacation in January 2003 he underwent an emergency operation to treat his knee. Upon admission to hospital, he informed the EPO of the operation, and requested a period of extended sick leave in order to convalesce. The complainant did not receive a response from the EPO. He subsequently contacted the Invalidity Committee, which by a majority decision approved the complainant's sick leave to cover 13 to 31 January 2003. The Committee member appointed by the President of the Office did not sign the decision.

4. The EPO then informed the complainant that it was of the view that the Committee's mandate had expired in 2002 when it had reported that the complainant was fit to return to work and that the Committee accordingly had no mandate when it rendered its decision in January 2003. The EPO contended that a new Committee had to be constituted to deal with the complainant's operation in January 2003.

5. In April 2003 the complainant underwent further medical examinations. He was notified by a letter of 22 August 2003 that a newly constituted Committee granted him sick leave for the period from 13 to 31 January 2003.

6. The complainant alleges that the delay in receiving the decision of the Committee caused him unnecessary personal distress, anxiety and uncertainty. He underwent additional unnecessary medical tests. In addition, the complainant claims that he was unsure whether he could be subject to disciplinary sanctions for his absences from work, and that his convalescence from his operation was delayed.

7. The complainant therefore seeks moral damages and damages for pain and suffering, and loss of amenity totalling 10,000 euros. He additionally seeks a declaration that an Invalidity Committee continues in office until such time as the employee's aggregate period of sick leave falls below the maximum entitlement set out in the Service Regulations. He also seeks costs of at least 2,500 euros.

8. The Appeals Committee agreed with the complainant's argument to the effect that the Invalidity Committee'smandate did not end with its report on the end of the complainant's sick leave and his return to work, so that the Invalidity Committee was still competent to give a decision in January 2003. However, it went on to find that there was no evidence that the complainant had suffered any moral injury that would justify payment of damages and it recommended dismissing his internal appeal. By a letter of 18 October 2004 the complainant was informed that the President had accepted that recommendation. That is the impugned decision.

9. The EPO's initial position that the Invalidity Committee's mandate had expired has now been all but abandoned by it. At best the relevant provisions of the Service Regulations are ambiguous which would require that they be interpreted in favour of the employee, hence against the interest of the Organisation (see Judgment 2358).

10. In fact, the Appeals Committee's reasoning regarding the continuing competence of the Invalidity Committee is compelling. As the Appeals Committee noted, the Service Regulations do not expressly stipulate when an Invalidity Committee's mandate ends but Article 90(1) states that the Committee is responsible for determining action "to be taken at the expiry of the maximum period of sick leave provided for in Article 62, paragraph 6". It cannot be inferred from this provision that the mandate of the Committee ends when a staff member resumes duties, or when the sick leave ends. Rather, the Invalidity Committee begins its work when the maximum sick leave period has been exceeded, and it remains competent as long as the employee stays above the sick leave limit. As the Appeals Committee explained, this approach is necessary to ensure the continuity of proceedings when a staff member resumes duties but falls ill again. The Invalidity Committee members would be familiar with the employee's medical history, which facilitates efficient determinations. The Appeals Committee further noted that this interpretation preserves the independence of the Invalidity Committee, while allowing the

President of the Office or the staff member to replace a Committee member when there is an important reason to do so.

11. The Appeals Committee was also right to reject the argument that the Office could decide on the continued existence of the Invalidity Committee, arguing that such a power would infringe upon the Committee's independence. The Tribunal notes that the EPO provided no statutory source for such alleged power.

12. In short, it is clear that the first Invalidity Committee's report should have been accepted, as the Committee had not lost its mandate.

13. On the issue of damages, the EPO correctly notes that the complainant presented no basis for his alleged fear that he would face disciplinary proceedings. Nor is there evidence suggesting that the delay in receiving a decision from the Invalidity Committee affected his recovery. While the Appeals Committee held that the complainant failed to provide evidence of moral injury that would justify payment of damages for pain and suffering, the Tribunal recognises that since the complainant's invalidity decision was left in a wholly unjustified limbo for several months, the complainant doubtless suffered some preventable stress; he was also subjected to further and avoidable medical tests. His damages, though relatively minor, are real enough. The Tribunal assesses them at 1,000 euros. He is also entitled to costs in the amount of 2,000 euros. His claim for a declaration is not receivable since it is not for the Tribunal to issue injunctions against organisations.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The EPO shall pay the complainant moral damages of 1,000 euros and costs of 2,000 euros.

3. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.