

**107th Session**

**Judgment No. 2857**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr L. R. M. against the European Patent Organisation (EPO) on 6 November 2007 and corrected on 15 November 2007, the EPO's reply of 6 March 2008, the complainant's rejoinder of 17 April and the Organisation's surrejoinder of 1 August 2008;

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. The complainant is a Spanish national born in 1966. He joined the European Patent Office – the EPO's secretariat – on 1 March 1990 as a patent examiner.

In document CA/46/01 of 25 April 2001 the President of the Office put forward a proposal to cancel the Office's contract with the external insurance broker covering the risks of death and permanent invalidity. It was explained therein that the increase in the number of staff members made self-insurance actuarially acceptable and that it

would be more economical. The method of calculating premiums would be modified. The external insurance broker's way of determining the level of premium, by differentiating between the employees who joined the Office before 10 June 1983 and those who joined on or after that date, would no longer be applied. Instead, all employees, regardless of when they joined the Office, would be entitled to basic cover equivalent to the cover enjoyed by employees who joined on or after 10 June 1983. Employees who joined before that date would therefore be seen as enjoying supplementary cover. Thus the contribution rate for basic cover would be applied to all employees, a supplementary contribution being required of those who joined before 10 June 1983 to guarantee the financing of the supplementary cover that they would enjoy.

By decision CA/D 7/01 of 28 June 2001 the EPO's Administrative Council approved the proposal. To that end, the Council's decision established, *inter alia*, implementing rules for Article 84 of the Service Regulations for Permanent Employees of the European Patent Office, which set provisional contribution rates for death and total permanent invalidity insurance for the period from 1 January 2002 to 31 December 2004, and stipulated that a review would be conducted at the end of that period in order to make an adjustment for the 2002-2004 period and to fix the provisional contribution rates for the following period.

On 8 November 2004 the Administration sent to the General Advisory Committee (GAC) a review of the provisional contribution rates for the period 2002-2004 and invited it to give an opinion on the text of a draft circular setting out the final contribution rates for that period and the provisional rates for 2005. The review indicated that the provisional contribution rates for the period 2002-2004 were not high enough to cover the benefits paid. Article 38 of the Service Regulations provides that the GAC shall give a reasoned opinion on any proposed amendment to the Service Regulations or the implementing rules thereto. It is composed of members appointed in equal numbers by the President of the Office and by the Staff Committee; at the material time the complainant was one of the members appointed by the Staff Committee. During the GAC's

meeting held in late 2004, the Staff Committee's appointees expressed concern at the proposed increase in costs and asked for additional information. The Administration did provide them with further information, but they considered it to be insufficient to give a reasoned opinion. The President was so informed on 7 December 2004.

By Circular No. 283, issued on 13 December 2004, the Vice-President in charge of Directorate-General 4 informed staff that, on the basis of the data as at 30 September 2004, the provisional contributions would be insufficient to cover the payment of benefits for 2002-2004. Consequently, an amount of approximately 7.5 per cent of one month's basic salary would be recovered by means of a deduction from the salaries in December 2004, and an additional minor adjustment would be made in the first quarter of 2005 if the final calculation as at 31 December 2004 differed from the amount recovered.

By a letter of 14 January 2005 the complainant contested the aforementioned circular arguing that the increase in the contribution rates was illegal and unfounded and that the GAC had not been properly consulted as it had not received the information it had requested. He asked the President to revoke Circular No. 283 and to reimburse him the amount withdrawn from his salary in December 2004 on the basis of that circular. He also requested that the contribution rates concerning permanent invalidity insurance be recalculated in a way that acknowledged the opinion expressed by the members of the GAC appointed by the Staff Committee. He sought moral damages and costs. On 25 February 2005 the complainant was informed that the President had decided to reject his request and that the matter had consequently been referred to the Internal Appeals Committee.

In its opinion of 28 March 2007 the Internal Appeals Committee held that Circular No. 283 should be set aside retroactively as it was tainted with serious procedural irregularities. Consequently, the relevant parts of the notice of 21 April 2005 that set the final contribution rates for 2002-2004 and of Circular No. 292 that fixed the provisional contribution rates for 2005-2007 would be set aside. In particular it observed that important information was not made

available to the GAC to enable it to form a reasoned opinion. The Committee recommended that the Office should submit a new proposal for the final contribution rates for 2002-2004 to the GAC for opinion and then to the Administrative Council for decision. The Committee considered the complainant's claims for damages to be unfounded, but it recommended that his substantiated costs be reimbursed. By a letter of 25 May 2007 the Director of Administration and Systems informed the complainant that the President had decided to endorse these recommendations.

The President consulted the GAC again, on 13 August 2007, and provided it with document GAC/DOC 48/2007, containing the proposed final contribution rates for death and permanent invalidity insurance for 2002-2004 and the provisional rates for 2005-2007. It was specified that the provisional rates for the period 2005-2007 had already been published in Circular No. 283 of 13 December 2004 and that they were currently in force. On 28 September 2007 the GAC submitted to the President an opinion signed only by the members whom she had appointed, who indicated that they agreed with the proposals set out in document GAC/DOC 48/2007. Attached to this opinion was a statement signed by the members appointed by the Staff Committee, explaining why they were again unable to give a reasoned opinion. They pointed to the unexplained discrepancies in the figures communicated by the Office and its failure to provide them with additional information despite their repeated requests.

The complainant filed the present complaint with the Tribunal on 6 November 2007, considering that the Office's decision to submit document GAC/DOC 48/2007 to the GAC amounted to a "*de facto* rejection" of his internal appeal.

B. The complainant submits that, when consulted in August 2007, the GAC was not provided with sufficient and adequate information to give a reasoned opinion on the proposed adjustment to be made to the contribution rates for the death and permanent invalidity insurance. He asserts that the documents produced by the Office contained discrepancies and that it was unable to explain or justify them when asked by the GAC to do so. The complainant therefore contends that

the second consultation process was a “farce” and that it should be considered as procedurally flawed. He considers that the President’s failure to consult the GAC properly, as recommended by the Internal Appeals Committee, amounts to a “*de facto* rejection” of his internal appeal. In his view, such a decision should have been substantiated, in particular because it had a negative financial impact. In addition, he accuses the Office of bad faith.

The complainant asks the Tribunal to quash the “impugned decision” and to annul Circular No. 283 *ab initio*. He seeks reimbursement of all amounts levied by the Office on the basis of the aforementioned circular as well as interest thereon at a rate of 8 per cent per annum. In his capacity as a member of the GAC, he claims moral damages in the amount of one euro per staff member whom he represented at the relevant time, as well as punitive damages. He also claims costs.

C. In its reply the EPO submits that the complaint is irreceivable on several counts. The President’s final decision on the complainant’s appeal was communicated to him by a letter of 25 May 2007. Since his complaint was not filed within ninety days of the notification of that decision, it is time-barred under Article VII, paragraph 2, of the Statute of the Tribunal. Alternatively, given that he considers that the Organisation failed to implement the recommendations of the Internal Appeals Committee, he could have challenged the individual decision (i.e. his salary payslip) taken on the basis of the decision adopted by the Administrative Council following the second consultation of the GAC, but again he failed to do so within the ninety-day time limit. In any case a document submitted to the GAC by the President is not an individual appealable decision within the meaning of Article 106 of the Service Regulations. Consequently, the complainant has not exhausted the internal means of redress.

The Organisation replies subsidiarily on the merits. It contends that the GAC has received adequate information on the method followed to calculate the contribution rates, and it lists the documents that were forwarded to the GAC during the second consultation. In

its view, by providing these documents the Office addressed the criticisms voiced by the Internal Appeals Committee. With regard to the alleged discrepancies in the figures provided, it states that it has already explained that the differences were due to the fact that the period under review in each document varied slightly.

As to the allegation of bad faith, the defendant stresses that, in accordance with the Tribunal's case law, such an allegation must be proved, and it observes that the complainant has produced no evidence to support his allegation. It adds that, in accordance with Article 10(1) of the European Patent Convention, the President is responsible for the Office's activities to the Administrative Council. Consequently, he or she has to strike a balance between the interests of the staff members and those of the Office, and manage the Office's resources soundly. It argues that in the present case the complainant's interest in being repaid the amounts withheld had to be weighed against the fact that, in the process of rectifying the procedural flaws that led to the annulment of Circular No. 283, it might transpire that the amounts withheld were in fact correct. It would not have been wise to overburden the Administration by ordering it to proceed with the reimbursement without being sure that the amounts deducted were not accurate. The EPO emphasises that, by decision CA/D 32/07 of 14 December 2007, the Administrative Council set the final contribution rates for the period 2002-2004, and that these rates show that no adjustments were to be made in the complainant's favour.

As regards the claim for costs, the Organisation indicates that the President had decided to endorse the Internal Appeals Committee's recommendation and to reimburse the complainant the reasonable costs he incurred. However, it could not make the payment because the complainant did not produce the requested supporting documents. It consequently asks the Tribunal to order that the complainant bear his costs.

D. In his rejoinder the complainant presses his pleas. He contends that he has exhausted internal remedies since the Internal Appeals Committee has rendered an opinion on the contested Circular No. 283 of 13 December 2004, which the President has "*de facto* rejected". He

argues that there are no new grounds or facts that would justify filing a new internal appeal. Contrary to the EPO's contention, he maintains that the information forwarded to the GAC during the second consultation was incomplete and thus insufficient to allow its members to give a reasoned opinion. He adds that the explanations provided concerning the discrepancies in the figures were mere assertions which were not supported by relevant data. Relying on the case law, he reiterates that the Office was under an obligation to provide the GAC with the necessary information on which to base a "reasoned opinion". In his view, the Office's repeated failure to do so shows that it intended to manipulate the GAC and thus acted in bad faith.

E. In its surrejoinder the Organisation maintains its position. It reiterates that the GAC received adequate information and points out that further detailed data were submitted, as requested by the Internal Appeals Committee.

## CONSIDERATIONS

1. The complainant joined the European Patent Office in March 1990 as a patent examiner. He was, at the material time, a member of the GAC appointed by the Staff Committee. The GAC is a joint body responsible for giving reasoned opinions *inter alia* on any proposal to amend the Service Regulations or to make implementing rules thereto, or on any proposal which concerns the whole or part of the staff.

2. In document CA/46/01 of 25 April 2001 the President of the Office proposed that the contract with the external insurance broker covering the risks of death and permanent invalidity be cancelled, explaining that due to the increase in staff, self-insurance had become actuarially acceptable and would serve to cut out the insurance company's profit margin. By decision CA/D 7/01 of 28 June 2001 the Administrative Council adopted *inter alia* implementing rules for Article 84 of the Service Regulations setting out the provisional contribution rates for death and total permanent invalidity insurance for the period from 1 January 2002 to 31 December 2004, at which

time a review would be conducted to fix the contribution rates for the following period and to make adjustments as necessary for the 2002-2004 period. On 8 November 2004 the Principal Director of Personnel sent to the GAC a review of the provisional contribution rates for death and permanent invalidity insurance for the period 2002-2004 and invited it to give an opinion on the text of a draft circular which set out the final contribution rates for that period and the provisional rates for 2005. According to the review, the provisional contribution rates for 2002-2004 were not high enough to cover the benefits paid. While the GAC members appointed by the President expressed a positive opinion on the proposal made, those appointed by the Staff Committee declared themselves unable, for lack of information, to give a reasoned opinion. The President was so informed on 7 December 2004. By Circular No. 283 of 13 December 2004 the staff were informed that the provisional contributions were not sufficient to cover the benefit payments and that an estimate of the rates necessary to finance the benefits had shown that an amount of approximately 7.5 per cent of one month's basic salary would have to be recovered; consequently, this amount would be deducted from the retroactive salary adjustments to be paid in December 2004.

3. The complainant considered the deduction from his December salary and the subsequent increase in the contribution rates to be illegal and contested the aforementioned circular on 14 January 2005. The matter was referred to the Internal Appeals Committee for opinion. The Committee unanimously recommended that the appeal be allowed in part to the extent that Circular No. 283 be deemed marred by serious procedural irregularities and set aside with retroactive effect; consequently, the relevant parts of the notice of 21 April 2005 (setting out the final contribution rates for 2002-2004) and of Circular No. 292 (setting out the provisional contribution rates for 2005-2007) should also be set aside. It noted in particular that the GAC "was not in a position to establish whether the Office correctly applied the premium-calculation methodology agreed in CA/46/01 on the basis of the documents available to the GAC during its deliberations". Therefore the Internal Appeals Committee

recommended, inter alia, that the Office resubmit the contributions for the period 2002-2004, first to the GAC and then to the Administrative Council for final decision.

By a letter dated 25 May 2007 the complainant was notified of the President's decision to accept the unanimous recommendation of the Internal Appeals Committee to allow his appeal in part by setting aside Circular No. 283 retroactively and the relevant parts of the notice of 21 April 2005 and Circular No. 292.

4. Before the Tribunal the complainant challenges the “*de facto* rejection” of the Internal Appeals Committee's recommendation stemming from the later submission to the GAC of documents which were deemed, by the members appointed by the Staff Committee, to be insufficient to allow them to give a reasoned opinion.

He contends that by submitting document GAC/DOC 48/2007 (which was also deemed, by the members of the GAC appointed by the Staff Committee, to be insufficient to allow them to form a reasoned opinion) to the GAC for review, the Organisation demonstrated a “reversal of the decision to comply with the recommendations of the [Internal Appeals Committee], and therefore [...] a *de facto* rejection of the appeal”. The complainant claims that by endorsing the Internal Appeals Committee's opinion in May 2007 the President of the Office had promised to provide the GAC with the information necessary to give a reasoned opinion; the fact that the Organisation did not produce that information is evidence that it had acted “with a conspicuous element of bad faith”. The complainant argues that his complaint is receivable since he had contested Circular No. 283 in his internal appeal and the President of the Office has “*de facto* rejected” it. In his view, this is tantamount to subjecting a dispute to a “perpetuum mobile” in favour of the Organisation, which is contrary to the principle of due process.

5. The Organisation states that the complaint is irreceivable as time-barred because the complainant should have impugned the President's decision within ninety days of receiving notification of it on 25 May 2007. It submits that the complaint is also irreceivable for

failure to exhaust internal means of redress. It explains that the complainant's concept of a "*de facto* rejection" has no legal basis and that the submission of a document by the President of the Office to the GAC is not an individual decision which can be appealed within the meaning of Article 106 of the Service Regulations, but that the complainant could have put forward in an internal appeal the argument that the GAC had not been properly consulted.

6. The Tribunal is of the opinion that the complaint is receivable. Considering that the President of the Office endorsed the Internal Appeals Committee's recommendations (which specified, inter alia, that the GAC was given insufficient information to make a reasoned opinion), and also that the members of the GAC had requested specific information which they deemed necessary in order to form their opinion, it stands to reason that when the Office agreed to resubmit the documentation to the GAC for opinion it should have included everything that was requested by the GAC when it was consulted the first time, unless it was able to show that that information was not available. Instead, by resubmitting the incomplete documentation to the GAC, the Office changed its previous decision to endorse the Internal Appeals Committee's recommendation in full into a decision to endorse the Committee's recommendation only in part. Obviously, if the complainant had received notice of a decision to endorse the recommendation only in part, he could have then brought his case directly to the Tribunal but since he was informed that it had been decided to endorse the recommendation, he rightfully awaited the execution of that decision. When the members of the GAC appointed by the Staff Committee, which included the complainant, informed the President of the Office on 28 September 2007 that they did not have sufficient information to form a reasoned opinion, the complainant was implicitly informed of the *de facto* change in the Office's position and correctly filed a complaint with the Tribunal within ninety days from that date. He did so on 6 November 2007, thereby respecting the time limit laid down in Article VII, paragraph 2, of the Statute.

7. Further the complaint is partially founded. Having reviewed the documents submitted to the GAC the first and the second time, the Tribunal is of the opinion that while the EPO tried to elaborate on its previous submissions, there is not enough difference between the documents to consider their submission as a new decision to be appealed before the Internal Appeals Committee especially given that the information contained in those documents did not allow the GAC to give a reasoned opinion.

8. Therefore, the EPO must consult the GAC again with the information requested previously by that committee. Specifically, it would be necessary first to show the basis for the estimated contribution rate calculations as listed in document CA/46/01 (which was approved by the GAC and the Administrative Council) leading to the switch from an external insurance broker to self-insurance, and then to show the basis for the final calculations of the contribution rates for the period 2002-2004. Having specified the basis for the calculations, the EPO can then easily point out what elements caused the drastic increase in the contribution rates; whether they be due to an unexpected increase in the number of invalidity cases or to an increase in costs per invalidity case, or any other reason. Having that information presented to it, the GAC should be able to form its opinion. When asking for approval of contribution rates, it is not enough to show that the current numbers are mathematically correct and that the increase in contributions is balanced by the payment of benefits; it is necessary to show how one arrives at those numbers. This implies that the EPO must also submit to the GAC information regarding the previous period which shows the payment of benefits per annum according to the group of staff, the number of invalidity cases in each group and any other information that would be useful in clarifying the reasons for the drastic increase in the contribution rates.

9. The conclusion is that the impugned decision shall be set aside and Circular No. 283 shall be annulled *ab initio*. The Organisation shall pay one euro in moral damages to each staff member represented by the complainant at the relevant time. The

Tribunal is of the opinion that the Office tried to supply the GAC with detailed information; the fact that the documents submitted were deemed insufficient does not prove that the Organisation acted in bad faith. Consequently, the Tribunal shall not order the award of punitive damages requested by the complainant. As the complainant succeeds he is entitled to costs set in the amount of 800 euros. The case is to be sent back to the EPO which must submit the documentation and information as indicated in consideration 8 above, first to the GAC and then for final decision in accordance with the established procedure. If it is later concluded that adjustments have to be made in the complainant's favour, the Organisation will have to repay the wrongly deducted amounts levied by the Office plus 8 per cent interest per annum. The complainant's claim for refund of "any and all additional premiums or part thereof perceived under Circular No. 283" with payment of 8 per cent compound interest per annum is denied. To refund all amounts plus interest immediately would cause an unfair detriment to the Organisation in terms of the heavy administrative and financial burden attached to such an undertaking, while offering an unjustified enrichment to the complainant. Although in Judgment 2110, the Tribunal ordered the EPO to repay to the complainants in that case the excess withheld, the present case is different. In the case that led to that judgment, it was clear that there would be an excess. It is not clear that there will be an excess in the present case. That being so, it is sufficient that the Organisation be obliged to make reimbursement together with interest if it finally emerges that an adjustment should be made in the complainant's favour.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. Circular No. 283 of 13 December 2004 is annulled *ab initio*.
3. The case is sent back to the Organisation so that it may follow the procedure set out under 8 and 9, above.
4. The EPO shall pay one euro in moral damages to each staff member represented by the complainant at the relevant time.
5. It shall pay the complainant costs in the amount of 800 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2009, Mr Agustín Gordillo, Judge 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 8 July 2009.

Agustín Gordillo  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet