110th Session **Judgment No. 2972**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr R. B. and Mr D. B. against the European Patent Organisation (EPO) on 5 December 2008 and corrected on 16 January 2009, the EPO's reply of 4 May, the complainants' rejoinder of 6 July, and the Organisation's surrejoinder of 15 October 2009;

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 none of the parties has applied;

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

A. The complainants, both of whom have Dutch nationality, are permanent employees of the European Patent Office – the EPO's secretariat – who work in the security services as security officers at the EPO's premises in The Hague. Mr B. joined the EPO in April 1991 and Mr B. in January 1990. They were informed respectively on 28 March 1991 and 9 January 1990 that, in accordance with the Presidential Instruction of 18 January 1979, they would receive a flat-rate allowance (commonly known as the "Van Benthem allowance")

amounting to 34.37 per cent of their monthly basic salaries for work performed outside normal working hours and on non-working days.

On 10 May 2005 the President of the Office issued Guidelines for shift work in security services, which superseded the above-mentioned Presidential Instruction as from 1 January 2006. From that date, night shifts were outsourced and the new normal working hours for security staff were from 7.30 a.m. to 4 p.m., Monday to Friday. Security staff in The Hague were required to perform their duties in a permanent shift pattern concentrated from 7 a.m. until 10 p.m., Monday to Friday, and from 7 a.m. to 3.30 p.m. on Saturdays, Sundays and public holidays. The hours worked were considered as shift work within the meaning of Article 58 of the Service Regulations for Permanent Employees of the European Patent Office, according to which permanent employees doing shift work are entitled to compensation in the form of time off or of payment per hour of shift work performed. Employees who, like the complainants, choose financial compensation, receive an allowance which represents either 0.01 per cent or 0.04 per cent of the annual basic salary per hour, depending on when shift work is performed. Article 5 of the Guidelines provides for transitional measures applicable to those holding a post on 1 January 2006 consisting of the payment of a temporary, digressive allowance, which aims at alleviating the sudden financial impact that the outsourcing decision might have.

The complainants were notified on 18 May 2005 that the Presidential Instruction of 1979 would be replaced by the Guidelines for shift work as from 1 January 2006 and they received additional information concerning the reorganisation of the security services. On 16 August the complainants wrote to the President challenging the decision of 18 May, each alleging that there were no convincing reasons for changing their working arrangements, in particular given that the premises in The Hague would remain open after 10 p.m. in 2006. They both asserted that they had an acquired right to continue to work under the previous arrangements and to be paid a flat-rate allowance for shift work performed outside normal working hours. Consequently, they each requested that the Presidential Instruction

remain applicable and that they be awarded moral damages, plus interest, and costs. They added that, in the event that their requests were rejected, their letters should be treated as initiating internal appeals.

In its opinions of 23 June 2008 the Internal Appeals Committee, to which the matters had been referred, noted that decisions concerning internal restructuring fall within the President's discretion and that, in accordance with Article 55(3) of the Service Regulations, the President is entitled to determine the working hours of permanent employees engaged in particular duties, such as security staff, after consulting the relevant joint committee. It observed that in this case the relevant committee had been consulted. The Committee also noted that Article 55 of the Service Regulations, according to which working hours may be modified, constitutes a condition of employment; thus, the complainants had no acquired right to work night shifts. It nevertheless found that the Office had acted in breach of the principles of the protection of legitimate expectations and proportionality when deciding to abolish the Van Benthem allowance on the basis of the Guidelines. Having received the allowance for several years, the complainants were entitled to expect that they would not, following restructuring, incur any loss of nominal earnings as long as they were doing shifts outside normal working hours. According to the Committee's calculations, despite the payment of the transitional allowance, the complainants would be earning 10 to 20 per cent less in the long term than if they were still in receipt of the Van Benthem allowance. In each case the Committee unanimously held that, by virtue of its duty of care, the Office should guarantee that the complainants receive their nominal salary as at 31 December 2005, factoring in the last salary adjustment. This meant that the formula for calculating the allowance payable by virtue of Article 5 of the Guidelines had to be adjusted to ensure that the sum of the transitional allowance, the monthly basic salary and the standard shift allowance would be no less than the complainants' monthly nominal salary on 31 December 2005, that is to say the basic salary plus the Van Benthem allowance. The Committee recommended inter alia that the complainants should be reimbursed the sums not paid, plus

interest, backdated to 1 January 2006. It also recommended that the complainants be paid their costs. A minority of the Committee's members considered however that the complainants should be awarded moral damages.

By letters of 21 August 2008 each complainant was informed that the President had decided to allow their respective appeals in part. Consequently, as from 1 January 2006, the transitional allowance paid under the Guidelines would be calculated in such a way that, in total, the monthly basic salary, the regular shift work allowance and the transitional allowance would correspond to the nominal value of their monthly salary on 31 December 2005 (i.e. basic salary plus the Van Benthem allowance taking into account the last salary adjustment). The respective arrears would be paid to them as soon as possible with 8 per cent interest per annum. The nominal guaranteed salary would be paid in the above manner until such time as the total of the basic salary, shift allowance and transitional allowance due under the amended Guidelines exceeded this amount. The President further decided that the complainants should be reimbursed reasonable costs, but that all other claims should be rejected. The complainants each impugn their individual decision of 21 August 2008.

B. The complainants submit that the reasons given for introducing the Guidelines were "specious and fallacious" and that, following their entry into force, the situation in the security services has deteriorated. They explain that between 1 January 2006 and 21 August 2008 the "temporary allowance" which replaced the Van Benthem allowance was progressively reduced in line with new increased salary scales and, in the case of Mr B., also as the result of a promotion. Thus, the sum of the basic salary and the "temporary allowance" showed a shortfall compared to the nominal salary in December 2005. This shortfall was made up in part by the complainants working extra hours.

They dispute the interpretation of the Office as to what the guarantee of a nominal salary implies. They assert that, further to the impugned decision, the guarantee has been interpreted as effectively freezing their earnings for an indeterminate period. They contend that they are entitled to expect that no loss of nominal earnings will be

incurred as long as they continue working outside normal working hours. The only reasonable and just interpretation of the guarantee of a nominal salary must be that the guaranteed nominal salary is a minimum. The complainants also argue that, having received an allowance for shift work performed outside normal hours for several years, they had a legitimate expectation of continuing to increase their earnings by working outside normal hours and on non-working days. To support their view, they point out that the Guidelines provide for different additional rates for hours performed on weekends and public holidays.

The complainants further contend that they have an acquired right to perform night shifts, particularly given that night shifts were not abolished, but merely outsourced, following the restructuring of the security services. Mr B. worked night shifts for 17 years and Mr B. for 18 years, and their salaries were calculated on that basis; consequently, their financial planning took that element into consideration. They also claim an acquired right to be remunerated in accordance with the long-standing Van Benthem allowance. They point out that the Presidential Instruction of 18 January 1979 and the individual decisions of 9 January 1990 and 28 March 1991 indicated that the allowance was granted for shift work performed outside normal working hours and on non-working days; no reference was made to night shifts. Since they still work shifts outside normal working hours, they argue that they are entitled to receive an amount equivalent to the Van Benthem allowance.

The complainants ask the Tribunal to order the "reinstatement of the Van Benthem agreement" as from 31 December 2005 and payment of "shift work compensation" in addition to the nominal guaranteed salary. They seek acknowledgement by the Office that night shifts were not abolished and that they are now prevented from performing such shifts despite the fact that, in other departments in The Hague, permanent staff perform night shifts. In addition, they ask to be awarded moral damages and costs.

C. In its reply the EPO contends that the complaints are irreceivable as they were filed more than ninety days from the date of notification of the decision of 21 August 2008.

On the merits, firstly it submits that a decision concerning internal restructuring falls within the President's discretion and that, in accordance with Article 55(3) of the Service Regulations, the latter is entitled, after due consultation of the relevant joint committee, to determine the hours of the working day and, if appropriate, the hours to be worked by certain groups of permanent employees engaged in particular duties. Secondly, it denies any breach of acquired rights. The Service Regulations do not confer on staff the right to work night shifts and, contrary to the complainants' assertion, there was no such entitlement upon recruitment; consequently, they could have no legitimate expectation in that respect. The Organisation stresses that Article 55(3) of the Service Regulations was already in force at the time of their recruitment and, consequently, the complainants could not have been unaware that it constituted a condition of their employment. Thirdly, it argues that it has fulfilled the duty of care it owes to its staff in granting the complainants, as from 1 January 2006, a nominal guarantee on their salary at 31 December 2005. It therefore rejects the findings of the minority of the members of the Internal Appeals Committee concerning the award of moral damages, explaining that it made serious efforts to find a suitable solution for the complainants.

D. In their rejoinder the complainants assert that the complaints are receivable since the date to be taken into consideration is the date of receipt of the notification of the impugned decision. They assert that each of them received their individual decision in mid-September 2008, as indicated in the letter of 5 December 2008 that they addressed to the Registrar of the Tribunal, pointing out that the Organisation has not challenged their statement regarding the date of receipt.

On the merits, they stress that the vacancy notice for their posts indicated that the function included working at night. Thus, night shifts constituted a condition of their employment and were an essential factor in the acceptance of their respective offers of employment.

E. In its surrejoinder the EPO withdraws its objection to receivability. It maintains that the reasons for restructuring the security services were comprehensible and justified and that the reasons for replacing the Presidential Instruction of 18 January 1979 were objective. It adds that, in any event, the Instruction was not part of the complainants' conditions of employment as they were given a standard offer of appointment in which no reference was made to the said Instruction, which they did not receive until after they had accepted their respective offers. The Organisation reiterates that the nominal guaranteed salary was paid until such time as the sum of their respective basic salary, shift allowance and transitional allowance due under the amended Guidelines exceeded this amount. Subsidiarily, it adds that, according to the Tribunal's case law, an organisation is free to determine the pay of its staff provided that certain requirements arising from general principles of international civil service law are met. Given that the Guidelines ensure objective, stable and foreseeable results, there is no reason to contest them.

CONSIDERATIONS

1. The complainants joined the EPO as security officers in 1990 and 1991, respectively. Each had answered a vacancy notice indicating that the work included work at night and on weekends. No mention was made of that requirement in the contracts that they signed when entering service. When they joined, each was informed that he would receive a flat-rate allowance, known as the "Van Benthem allowance", equal to 34.37 per cent of his basic monthly salary for working "outside normal working hours and on non-working days". (Translated from the French text of decisions of 9 January 1990 and 28 March 1991, applicable to the complainants individually.)

2. Until the end of December 2005, the complainants each worked rostered shifts, including night shifts, and each was paid the Van Benthem allowance. Following consultation with the Local Advisory Committee, it was decided that, as from 1 January 2006,

the work performed by security officers on night shift would be outsourced, the Van Benthem allowance abolished, and new Guidelines introduced for shift work. Under those Guidelines, security staff were required to work a permanent shift pattern between 7 a.m. and 10 p.m., Monday to Friday, and between 7 a.m. and 3.30 p.m. on Saturdays, Sundays and public holidays, with normal working hours defined as between 7.30 a.m. and 4 p.m., Monday to Friday. Shift work was to be compensated in accordance with Article 58(2) of the Service Regulations. So far as is presently relevant, Article 58(2) provides for time off in lieu or for 0.01 per cent of annual basic salary per hour for shift work between 7 a.m. and 10 p.m., outside normal hours, on working days, and 0.04 per cent per hour for shift work between 10 p.m. and 7 a.m., on working days, and for shift work on non-working days. It appears that it was agreed at an early stage that the complainants would receive monetary compensation rather than time off in lieu. And it appears from the Guidelines that the maximum shift allowance that would be payable was 11.02 per cent of monthly basic salary. The Guidelines also provided for the payment of a reducing transitional allowance until 2010 or until it was, in effect, absorbed by increases in basic salary.

3. The second complainant received 0.05 euros more by way of monthly salary in 2006 but received 145.27 euros less in 2007. It appears that, but for the decision now impugned, he would have received 290.53 euros less by way of monthly salary in 2008 and 428.83 euros less in 2009. In the case of the first complainant, he received 117.35 euros less by way of monthly salary in 2006 and 259.05 euros less in 2007 and, it appears, that he would have received 265.67 euros less in 2008 and 192.19 euros less in 2009. The differences are or would have been even greater for the years 2007, 2008 and 2009 if calculated by reference to increases in basic salary that have occurred since 2006.

4. In August 2005 the complainants lodged internal appeals with respect to the decisions to apply the Guidelines to them. Each claimed an acquired right to work night shifts, payment of the Van

Benthem allowance, moral damages, interest and costs. In each case, the Internal Appeals Committee unanimously recommended that, so long as the staff member concerned was working shifts outside normal working hours, the transitional allowance should be adjusted so that "the sum of the transitional allowance, the monthly basic salary and the standard shift allowance was no less than [his] monthly [...] salary on 31 December 2005 ([…] factoring in the last salary adjustment)". In each case, it was also unanimously recommended inter alia that the complainant be paid his costs but that otherwise the appeal be rejected. A minority also recommended payment of at least 2,000 euros as moral damages. In each case, the President of the Office accepted the unanimous recommendation with respect to the adjustment of the transitional allowance and costs but otherwise rejected the appeal. The complainants were so informed by letters dated 21 August 2008. Those are the decisions impugned in the complaints before the Tribunal by which the complainants maintain the claims made in their internal appeals.

5. The main argument advanced by the complainants is that they have an acquired right to work night shifts and, in consequence, to receive payment of the Van Benthem allowance calculated by reference to their basic salary as adjusted from time to time. Alternatively, they argue that they have an acquired right to the Van Benthem allowance, calculated by reference to their basic salary, by reason that they continue to work "outside normal working hours and on non-working days", as specified in the individual decisions made with respect to them when or shortly after they joined the EPO.

6. An acquired right is breached when "an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on" (see Judgment 2682, under 6). An acquired right may derive "from the terms of appointment, the staff rules or from a decision" (see Judgment 2696, under 5). In the case of each complainant, a decision was taken when or shortly after he joined the

EPO that he would be paid the Van Benthem allowance for working "outside normal hours and on non-working days". Thus and contrary to the submissions of the EPO, the fact that that was not specified in the employment contracts is not determinative of the question of acquired rights. However, there is a difficulty with the notion that the complainants have an acquired right to work night shifts.

7. At all relevant times, Article 58 of the Service Regulations has conditioned the performance of regular shift work "at night, on Saturdays, Sundays or public holidays" on "the exigencies of the service or safety rules". Obviously, the exigencies of the service may vary from time to time. Further, an international organisation "necessarily has power to restructure some or all of its departments or units, including by the abolition of posts, […] and the redeployment of staff" (see Judgment 2510, under 10). The notion of redeployment is apt to include not only assignment to different posts, but also the assignment of new or different shift work patterns. Of course, a decision to assign different shift work patterns may be challenged on the same ground as any other discretionary decision. It is suggested in the present case that the decisions now in issue should be set aside on the grounds that the Local Advisory Council was not properly consulted before the new Guidelines were introduced, that the decisions were not taken in good faith and involved unequal treatment. However, there is no evidence to support any of these propositions and they must be rejected.

8. Once it is accepted that an organisation has a right to assign new or different shift work patterns, it follows that a particular shift work pattern cannot constitute an acquired right. However, that consideration does not apply to an allowance. It was recognised in Judgment 666 that "an allowance may form an essential part of the official's contract [...] and its abolition would therefore constitute breach of [an] acquired right". However, it was also said in that case that an official "has no acquired right to the actual amount of the allowance or to continuance of any particular method of reckoning it. Indeed, he must expect these to change as circumstances change". The decisions now in question operate to maintain an allowance in excess

of what would be paid if only Article 58(2) of the Service Regulations were applied, but less than what would be paid if, in accordance with the decisions made with respect to each complainant when or shortly after he joined the EPO, it were to be calculated at 34.37 per cent of basic monthly salary as adjusted from time to time. Given that circumstances have changed insofar as the complainants no longer work night shifts and, given also that they have not acquired a right to do so, it is impossible to conclude that they have an acquired right to an immutable allowance calculated at 34.37 per cent of basic monthly salary.

9. Although the complainants do not have an acquired right to an immutable allowance calculated at 34.37 per cent of their basic monthly salary, it appears that the EPO has at all stages accepted that they are entitled to some transitional allowance that would cushion the effect of an immediate reduction in earnings. The precise basis on which it accepted that obligation is not clear. However, the Internal Appeals Committee based its recommendation on the complainants' legitimate expectations. In the present case, there was a long-standing practice of requiring the complainants to work night shifts and of paying them a substantial allowance on that account. As there was a continuing need for the performance of security work at night, the complainants presumably expected that the practice would continue indefinitely. However, that expectation was not supported by the Staff Regulations and was at odds with the EPO's right to assign different patterns of shift work. Leaving aside any question of legitimate expectation, the EPO must have known that the complainants had entered into financial obligations on the basis of the practice which was long-standing. In a context where there was a continuing need for security work to be performed at night, it had a duty of care to ensure that the new arrangements did not cause financial hardship to them.

10. The obligation to ensure that the new arrangements did not cause financial hardship to the complainants was and is entirely independent of the EPO's obligation to pay the complainants the full amount of their basic salary as adjusted from time to time. The latter

obligation is fundamental and there is no basis on which any part of basic salary can be set off against the obligation to ensure that there was no hardship to the complainants as a result of the changed shift patterns. Neither the transitional allowance as originally paid to the complainants nor that subsequently paid in accordance with the recommendations of the Internal Appeals Committee preserved the complainants' basic salary as adjusted from time to time. The only reasonable way the EPO could discharge its duty of care to cushion against financial hardship was to pay by way of allowance the difference between the actual amount of the Van Benthem allowance as at 31 December 2005 (1,206.32 euros in the case of the first complainant and 1,354.54 euros in the case of the second) and the shift allowance payable in accordance with Article 58(2) of the Service Regulations until such time as the shift allowance should equal or exceed the actual amount of the Van Benthem allowance paid on 31 December 2005. It follows that the decisions of 21 August 2008 will be set aside and orders made for the payment to each complainant for so long as he works shifts outside normal working hours, of an allowance in accordance with these reasons less those sums already paid in accordance with the recommendation of the Internal Appeals Committee. The EPO must pay interest on the resulting differences at the rate of 8 per cent per annum from due dates until the date of payment.

11. As the EPO has at all stages accepted that some provision had to be made to cushion the effect of the new work practices, moral damages are not warranted. The EPO must pay each complainant costs in the amount of 750 euros.

DECISION

For the above reasons,

1. The decisions of 21 August 2008 are set aside.

2. The EPO shall pay each complainant an allowance and interest in accordance with consideration 10 above.

3. It shall also pay each complainant costs in the amount of 750 euros.

4. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 29 October 2010, 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 2 February 2011.

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