114th Session **Judgment No. 3167**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms H. H.-H. against the European Patent Organisation (EPO) on 30 December 2009 and corrected on 29 January 2010, the EPO's reply of 10 May, the complainant's rejoinder dated 28 June, and the Organisation's surrejoinder of 19 October 2010;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1958, joined the European Patent Office – the secretariat of the EPO – in Munich on 1 September 2002 as an administrative employee at grade B2. She has since been promoted to grade B3. Following her marriage on 9 October 2003 she applied on 9 November for a household allowance using a form entitled "Declaration concerning household allowance". As supporting documentation she produced her husband's payslip for September 2003, which indicated a net monthly salary which was just under the limit for entitlement to the allowance set in Article 68(3) of the Service Regulations for Permanent Employees of the European

Patent Office. On the basis of this information, a household allowance was paid to her with effect from October 2003.

On 27 April 2006 the complainant was asked by the EPO Administration to provide her husband's salary statements for the last quarter of 2003, and for the years 2004 and 2005, which she did on 10 May 2006. On examination of those salary statements, the Administration realised that, as her husband's salary had increased in October 2003, the complainant had in fact never been entitled to a household allowance, and she had also been contributing too little for her husband's long-term care insurance. Consequently, the Administration contacted the complainant again on 15 May 2006 to inform her that it proposed to recover the unduly paid sums for the household allowance, as well as the insurance arrears, by not paying her salary for the month of May 2006, and by withholding the amount of 1,146.97 euros from her June 2006 salary.

In a letter dated 18 May 2006 to the President of the Office, the complainant requested "a written statement from the Office setting out its claims for recovery", specifying that those claims should be substantiated "in a comprehensible and verifiable manner". In the meantime, she would not agree to any deductions from her salary or other payments to the Office. She also stated that, should the Administration not grant her request, her letter should be considered as initiating an internal appeal. The Personnel Administration Department replied in a letter dated 13 June 2006, setting out the amounts to be recovered for the household allowance, and the long-term care insurance arrears, including a monthly breakdown of those amounts.

By a letter dated 5 July 2006 the Director of the Employment Law Directorate informed the complainant that the President considered that the requisite explanations had been provided in the letter of 13 June 2006, and that Article 88 of the Service Regulations, concerning recovery of undue payments, had been correctly applied to her case. Therefore, her request could not be granted and her appeal had been referred to the Internal Appeals Committee for an opinion. In an e-mail of 11 August the Administration sent the complainant a

more detailed explanation of the calculation of her household allowance. The decision to recover the amounts at issue was suspended pending the outcome of the internal appeal.

In the course of the proceedings before the Internal Appeals Committee, the Office corrected the amounts claimed for both household allowance and long-term care insurance, arriving at a total of 5,681.79 euros, including 4,186.68 euros for the household allowance and 1,495.11 euros for insurance arrears.

In its opinion dated 10 August 2009, the Internal Appeals Committee pointed out that the Office could be taxed with negligence for having continued to pay the complainant a household allowance for several years on the basis of obsolete data. In this connection, it noted that the Declaration concerning household allowance expressly informed employees that "[a]t the beginning of next year [they would] be requested to supply a declaration concerning this year". Nevertheless, a majority of the Committee's members considered that the Office was under no obligation to request such a declaration from employees, and that its failure to do so in this case was therefore not a bar to recovery of the overpayment. The majority took the view that it was the responsibility of each employee to inform the Office of any change in their family situation that was liable to affect their entitlements, and they drew attention to the fact that in signing the above-mentioned Declaration form the complainant had expressly undertaken "to give notice of any changes as soon as they occur". In light of the Tribunal's case law and of the relevant provisions of the Service Regulations, the majority held that the Office's claim to recover the overpayment was justified because the complainant knew, or ought to have known, that her husband's salary had increased, but failed to inform the Office of this. For the same reasons, the majority considered that the Office was also entitled to claim the unpaid insurance contributions. It therefore recommended rejecting the appeal.

In a minority opinion, one member of the Internal Appeals Committee took the view that the Office was not entitled to recover the sums in question. He emphasised that the complainant should not have to bear the consequences of the Office's negligence.

The complainant was informed by a letter of 9 October 2009 that the President had decided to follow the majority opinion and to dismiss her appeal as unfounded, whilst reimbursing reasonable costs. That is the impugned decision.

B. Concerning the household allowance, the complainant contends that it is clear from the wording of the Declaration form that the Administration was obliged to request from her an updated salary statement for her husband from the beginning of 2004. By failing to do so it breached its own rules. She submits that the majority opinion of the Internal Appeals Committee is incoherent to the extent that it stated that the Administration showed negligence by this omission, but then goes on to recommend full recovery of the "undue" payments.

The complainant concedes that she herself "is liable for not having informed the administration about the changes in the income of her spouse during the period between October 2003 and April 2004", which latter date she considers to be the "beginning of the next year" following her original declaration, on the basis of the wording in the Declaration form and the date – 27 April 2006 – of the Administration's request for updated salary statements for her husband. She argues that any decision on this case should seek to balance the negligence shown by her and that shown by the Administration, so that she should only be required to refund the amount unduly paid by the Administration between October 2003 and April 2004, i.e. a total of 200.90 euros.

Regarding the arrears in contributions for long-term care insurance for her husband, the complainant explains that, in accordance with Article 83a of the Service Regulations, and Article I(1)(a) of the Implementing Rules to Article 83a, she is insured on a compulsory basis, while under Article I(2)(a) of the same Implementing Rules, her husband is insured on a voluntary basis. In fact, however, spouses are insured automatically under this scheme, and the complainant asserts that the spouse's inclusion in the scheme "remains in most cases unknown to the staff member". Indeed, the contribution deducted

from her monthly salary for her husband's inclusion in the scheme was so small that it was barely noticeable.

In the complainant's view, because of the complexity of the scheme, the Administration should be required to request an explicit decision from the staff member as to whether the spouse is to be insured, and also to request on an annual basis the spouse's salary statements. In this case, the Office did not verify her husband's salary level until May 2006, which is clearly contrary to principles of good administration and to the Office's duty of care. Its negligence in this respect is sufficiently great to justify a rejection of any claim for arrears, in conformity with the minority opinion of the Internal Appeals Committee.

The complainant asks the Tribunal to reduce the amount of household allowance to be recovered from 4,186.60 euros to 200.90 euros, and to rule that she shall not be liable for payment of any long-term care insurance arrears in respect of her husband. She also claims 3,000 euros in costs.

C. In its reply the EPO notes that the complainant contests neither the fact that the overpayments were not due to her, nor the amounts at issue. However, it submits that her argument that she should be exempted from reimbursing the household allowance except in respect of the first seven months is without merit. The Organisation recalls that, under Article 88 of the Service Regulations, "[a]ny sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it". It submits that in this case it is undisputed that there was no due reason for payment of the household allowance. Thus, in light of Judgment 2230 and Article 88, once the complainant was made aware of the mistake, the amount overpaid became recoverable. As rightly stated in the majority opinion of the Internal Appeals Committee, the Office was under no obligation to request an updated salary statement for her spouse on an annual basis. Moreover, the complainant herself was under an obligation

to give notice of any changes in her husband's income, and this obligation existed for the entire period concerned, not only for the first seven months. The defendant considers that, even if the complainant was not familiar with the details of the household allowance, she could not have been unaware that an increase in her husband's salary would affect it.

The EPO further contends that the claim for recovery is in no way prejudiced by the fact that it was not brought until almost three years later. Indeed, the Tribunal has established that in the absence of specific provisions establishing a prescriptive period for recovery of payments, the general principle of law that a sum paid in error may be recovered applies. In this case, the Administration requested reimbursement as soon as it discovered the mistake upon receipt of the updated salary statements for the complainant's husband.

The Organisation emphasises that the complainant has been given the option of choosing payment terms which would avoid imposing upon her a heavy financial burden, and that it has not yet proceeded with any recovery from her salary. Furthermore, it has not claimed any interest on the amounts to be recovered, so that the complainant has been able to benefit from interest accrued on such amounts, which constitutes adequate compensation for any inconvenience caused.

With respect to the long-term care insurance contributions, it observes that the complainant has never stated that her husband should not have been included in the scheme, nor has she ever taken any steps to cancel his coverage.

The EPO explains that the long-term care insurance scheme allows a staff member's relatives to be insured automatically in case the staff member cannot or does not insure them, and it is based upon the principle of solidarity between staff and the EPO. There is, therefore, no substance to the complainant's contention that the system is at odds with good administration and an employer's duty of care. In this case, as the complainant took no decision not to insure her husband, he was automatically insured under Article I(2)(a) of the Implementing Rules to Article 83a of the Service Regulations. Under Article II(4) of those Implementing Rules the complainant was liable

to pay a supplementary contribution, since her husband's gross salary was greater than the basic salary for grade B3, step 3. In March 2003 an explanatory brochure on the long-term care insurance scheme was made available to staff members. This brochure sets out the calculation mechanism for spouses whose income exceeds the basic salary at grade B3, step 3. The EPO submits that the scheme is therefore based on legal provisions which have been publicly notified to staff members, and that the complainant cannot claim to have been unaware of the rules applicable to her case.

Moreover, the complainant never submitted the relevant income declaration form for spouses whose income is greater than the basic salary of grade B3, step 3, (Form E), despite the fact that the Personnel Administration Department had provided her with such a form following her marriage. The Administration was therefore entitled to presume that her husband's salary was lower than the basic salary of grade B3, step 3, and that no supplementary contribution was due. Even though the deductions for long-term care insurance contributions were relatively small, her payslips contained a list of the deductions applied, so that she cannot validly argue that she was unaware of the contributions payable for her husband.

Lastly, the EPO argues that, in the case of both the household allowance and the insurance arrears, there are no special circumstances which would make it unfair or unjust to require payment of the amounts in question.

D. In her rejoinder the complainant presses her pleas. Concerning the recovery of the household allowance, she notes that the new Declaration form for this allowance, issued in November 2009, no longer contains the statement to the effect that the staff member will be requested "[a]t the beginning of next year [...] to supply a declaration concerning this year". This, she argues, supports her contention that, on the basis of the previous version of the Declaration form, the Administration was under an obligation to request updated salary statements from employees on an annual basis. Had it done so, the problem of overpayments in her case would not have arisen.

With regard to the long-term care insurance arrears, the complainant submits that the scheme is not sound, since a staff member may not be aware of his/her spouse's income level, or the spouse may not agree to divulging such information. This would then lead to unequal treatment of staff members who cannot provide such information vis-à-vis those who can. She considers that the Administration should verify the income level of spouses on a regular basis, and if the staff member does not respond, the spouse's insurance should be cancelled. She asserts that the Administration never sent her the form for spouses with income above the threshold level (Form E), which would have alerted her to the "voluntary insurance" of her husband and to the consequences of his income level on her contributions.

E. In its surrejoinder the EPO maintains its position and stresses that it has not yet deducted any amounts from the complainant's salary and is not seeking recovery of interest. It underlines that Article 88 of the Service Regulations is the core provision in this case, and submits that the complainant has not provided any arguments against its application. In its view, in accordance with the case law, the Administration has duly complied with the principles of sound management and with its duty of care both in its claims for recovery and in the terms it proposed. It explains that the statement in the Declaration form for the household allowance referred to in the rejoinder has been deleted because it was in contradiction with the applicant's undertaking in the same form "to give notice of any changes as soon as they occur", and was therefore misleading. This fact does not, however, support the complainant's case, since the requisite conditions for recovery of the household allowance are met.

The EPO rejects the argument that the long-term care insurance scheme leads to unequal treatment. Firstly, this argument is not relevant to her case, since the complainant did not appear to have any problems providing the relevant information once it was requested of her. Secondly, where a staff member or the latter's spouse does not wish to provide such information, they are free to submit an

irrevocable decision not to be insured. Since the persons concerned are free to choose, there is no risk of unequal treatment.

The Organisation disputes the complainant's assertion that she was never provided with Form E, the Personnel Administration Department having confirmed before the Internal Appeals Committee that it did provide her with the form following her marriage. It also notes that Form E is attached to Circular No. 266, which provides all relevant explanations for staff members.

CONSIDERATIONS

1. Following her marriage, in October 2003 the complainant applied for a household allowance by submitting a "Declaration concerning household allowance", which she signed and dated 9 November 2003, along with her husband's payslip for September 2003 as supporting documentation. The Declaration states, under the table regarding the husband's salary information, "I certify that the above information is correct and undertake to give notice of any changes as soon as they occur". Under the signature line, there is an additional note in small print which reads: "At the beginning of next year you will be requested to supply a declaration concerning this year". That text has been removed from more recent versions of the Declaration. As her husband's net monthly salary for September 2003 was just below the limit set in Article 68(3) of the Service Regulations for entitlement to household allowance, the complainant was granted a household allowance with effect from October 2003.

2. The Administration wrote to the complainant on 27 April 2006 noting that she had not sent her husband's updated payslip as agreed. She was asked to provide her husband's salary statements for the last quarter of 2003, and for the years 2004 and 2005 in order to adjust her household allowance and calculate her long-term care insurance contributions.

The complainant sent the requested information on 10 May 2006 and was informed by the Administration on 15 May that the

recalculation resulted in a "negative" salary. Therefore, if acceptable, she would not receive any salary in May 2006, and an amount of 1,146.97 euros would be deducted from her salary for June 2006.

By a letter of 18 May the complainant requested a reasoned and explicit explanation from the Office regarding its proposed claims for recovery and expressed her disagreement to any deduction from her salary until the claims had been clarified. Otherwise, she asked that her letter be considered as initiating an internal appeal. On 13 June she was notified of the amounts due, how they were calculated, and the reasons why they were due. She was also asked to indicate her preference with respect to a repayment schedule. However, as it seems that the complainant did not agree, by a letter of 5 July 2006 she was informed that the matter had been referred to the Internal Appeals Committee for an opinion and the Office suspended its efforts to recover the amounts due, pending the outcome of the appeal.

3. The complainant impugns the President's decision, notified to her by letter dated 9 October 2009, to follow the majority opinion of the Internal Appeals Committee and to reject the main claims of her appeal as unfounded. The letter of 9 October specified that:

> "the President agrees with the majority opinion that you were aware that your spouse's salary would affect both the amount of your household allowance and the contribution for your spouse's medical insurance. Therefore, and as also provided by the terms of the application for household allowance, you bore the obligation to inform the Office periodically of any changes in your spouse's salary. Contrary to the minority's opinion, it is considered that you should have provided this information to the Office on your own initiative. In view of the above, the President has considered that the Office is entitled to recover the aforementioned amount under Art. 88 of the Service Regulations. As the majority recommended, this recovery shall be arranged in monthly instalments so that it does not put undue financial burden on you."

The President rejected her request for moral damages but accepted that she would be paid "reasonable legal costs".

4. The final amount requested from the complainant was 4,186.68 euros for the recovery of the overpayment of the household

allowance and 1,495.11 euros for the arrears in contributions to the long-term care insurance scheme.

5. The complainant submits that the Office breached its own rules by failing to request all necessary information regarding her husband's salary at the beginning of each year. She asserts that such negligence invalidates the Office's request for recovery of the amounts due; however, she concedes that she "is liable for not having informed the administration about the changes in the income of her spouse during the period between October 2003 and April 2004". She contends that the total amount due as repayment for the household allowance must be calculated at 200.90 euros (28.70 euros x 7 months), taking into account the Office's failure to act in conformity with the Declaration form and her own contributory negligence. As for the payment of arrears in contributions to the long-term care insurance scheme, the complainant asserts that due to the small amounts which were deducted from her monthly salary (1/3 of 1.2 per cent of 6 per cent of the basic salary) "she could hardly become aware of the 'voluntary' insurance of her spouse" as such a "small amount is hardly to be noticed in the payslip by the employee". She states that:

> "[t]he Office has a duty [to] explicitly inform the employee about a presumptive decision in case of his inaction and there is a duty of the Office to regularly (e.g. yearly) request the presentation of payslips from the spouse in order to calculate the supplementary contributions for the long-term care insurance."

6. Moreover, the complainant contends that the Office neither informed her explicitly that her husband was enrolled automatically in the insurance scheme, nor did it "supervise the income of [her husband] until May 2006", which she believes is "in clear conflict to good administration and the duty of care owed by the Office". In her view, "[t]he grade of negligence on the side of the administration is grave enough to reject the payment of arrears in supplementary contributions in its entirety in conformity with the minority opinion of the [Internal Appeals Committee]".

7. The Tribunal notes that the complainant signed the Declaration, mentioned above, which included the explicit obligation "to give notice of any changes as soon as they occur". That clearly illustrates that she should not have waited for the Office to request the information, but that she had an explicit obligation to supply it with updated information as changes occurred. Having failed to do so, the complainant breached a specific obligation to inform the Office, which caused the overpayment and is enough to justify the Office's request for recovery of the overpaid sums. The additional note on the Declaration which reads: "At the beginning of next year you will be requested to supply a declaration concerning this year" did not in any way mitigate or cancel out the obligation articulated in the above-mentioned statement. While that obligation is the primary basis for the recovery of overpayment, it should be noted additionally that Article 88 of the Service Regulations – the general rule regarding the recovery of undue payment – also supports the Tribunal's conclusion that the complaint is unfounded. Article 88 provides:

> "Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

During the month preceding their marriage, the monthly salary of the complainant's husband was just under the limit for entitlement to a household allowance. Once his salary exceeded that limit in October 2003, the complainant should have been aware that she was no longer entitled to a household allowance. As the complainant does not argue that she did not know what her husband's salary was from time to time, any household allowance payments received from October 2003 clearly fall under Article 88 of the Service Regulations. Consistent case law holds that it is a general principle of law that any sum which has been paid in error may be recovered, save where such recovery is time-barred (see for instance Judgment 2899, under 20, and the case law therein). That the Organisation failed to ask for yearly updates concerning the complainant's husband's income was an unfortunate administrative error but was not grave enough to negate the Office's right to request recovery of overpaid sums when the overpayment was

discovered. The Tribunal notes that the Office requested the recovery as soon as the overpayment was discovered, that it was fair in its dealings with the complainant in requesting the recovery and attempting to set an acceptable recovery schedule which would not impose a heavy financial burden on her, and that it did not request any payment of interest on the amounts due.

8. The complainant argues that she should not have to pay arrears for contributions to her husband's long-term care insurance as she finds his automatic inclusion in the scheme to be "in conflict with good administration and duty of care" and because she believes the Office's negligence in not requesting updated salary information was serious enough to cancel out her obligation to pay the sum requested. Article 83a of the Service Regulations relevantly 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."

The insurance allows a staff member's immediate family to be insured automatically in case the staff member cannot or does not insure them. As the Tribunal stated in a recent case against the EPO:

> "The automatic coverage applied by the Implementing Rules cannot be deemed 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." (See Judgment 3019, under 7.)

9. Indeed, the complainant was compulsorily insured under Article I(1)(a) of the Implementing Rules to Article 83a of the Service Regulations. As she did not act explicitly to exclude her spouse from the scheme, he was therefore automatically insured under Article I(2)(a).

Article I(1)(a) states:

> "(1) The following persons shall be insured on a compulsory basis:
>
> (a) permanent employees;
>
> […]".

Article I(2)(a) provides:

> "(2) The following persons may be insured on a voluntary basis, provided the insured person under (1)(a) […] 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) […]".

Since the complainant's husband's gross salary exceeded the limit of the basic salary for grade B3, step 3, she was obliged to pay a supplementary contribution to the scheme. The Tribunal notes that the complainant contests the payment of the supplementary contribution but does not directly contest her spouse's enrolment in the scheme. Furthermore, the Office has published all information relative to the long-term care insurance scheme and has duly notified its employees. The complainant cannot now contend that she was not aware of the contributions paid into the scheme as they were listed in each of her payslips. Her argument that the amount was so minimal as to remain unnoticeable does not hold water: the complainant had a duty to know the Office's rules, regulations and decisions which concern her, and an obligation to verify her payslips. As with the overpayment of the household allowance detailed above, in breaching her obligation to follow the rules properly and in due time, the complainant was directly responsible for the debt which accrued with regard to the supplementary contributions that she should have been paying all along. Considering the above, and in accordance with the Internal Appeals Committee's calculation of the amount due, the Office has the right to request payment of 1,495.11 euros in arrears for contributions to her husband's long-term care insurance and 4,186.68 euros with respect to the household allowance.

10. The complaint, which is devoid of merit under all heads, must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Michael F. Moore
Catherine Comtet