

**R.**  
**v.**  
**EPO**

**141st Session**

**Judgment No. 5184**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. R. against the European Patent Organisation (EPO) on 11 September 2020, the EPO's reply of 15 January 2021, the complainant's rejoinder of 27 April 2021 and the EPO's surrejoinder of 23 July 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the deductions that were made from his salary at weekends whilst he was on certified sick leave and under a partial incapacity regime.

The complainant is a patent examiner who took up his duties at the European Patent Office, the EPO's secretariat, in Munich, Germany, on 1 September 2001. As from 5 August 2016, he was placed on partial incapacity and worked at 70 per cent of the normal working time. For the remaining working time, he received an incapacity contribution fixed at 30 per cent of the normal salary.

The complainant was placed on certified sick leave from Friday 28 October 2016 until Thursday 3 November 2016. In his November 2016 payslip – which he received on 25 November 2016 – he noted that

some deductions were made from his salary. On 14 December 2016, he contacted Human Resources Services (HRS) to inquire about the withheld amounts in his November payslip. He did not receive a reply.

The complainant was placed again on certified sick leave from Monday 6 February 2017 until Monday 20 February 2017. In his February 2017 payslip – which he received on 27 February 2017 – he noted again the deductions made from his salary.

On 28 February 2017, the complainant submitted a request for review of his November 2016 payslip. On 15 March 2017, HRS provided him with a detailed explanation of his salary calculation for November 2016 “with retroactive effect for October [2016]”. HRS pointed out that, in addition to his incapacity at 70 per cent, the complainant had been placed on certified sick leave from Friday 28 October 2016 until Thursday 3 November 2016, which amounted to four days of full-time incapacity, including two weekend days. HRS informed him that the calculation in the payroll was made in calendar days so that the weekend was also recorded as a full-time absence for the calculation of the withheld amounts. HRS then explained the salary reduction rates applied in accordance with Article 62b(3) of the Service Regulations for permanent employees of the European Patent Office.

On 5 April 2017, the complainant requested further clarification, disagreeing with the recording of the 29-30 October 2016 weekend as a full-time sick leave absence. He asked for a meeting to discuss the matter, which was eventually held on 19 April 2017.

On 25 April 2017, the complainant was informed that his request for review was rejected as unfounded. It was confirmed that, in view of his situation as a partially incapacitated employee, the difference between working days and non-working days had no impact on his remuneration calculation.

On 24 May 2017, the complainant informed the Conflict Resolution Unit that he wanted to lodge an appeal against the 25 April 2017 decision. He further indicated that, “to avoid proliferation of procedures”, he also wanted to challenge the deductions made from his February 2017 payslip with the same appeal. The Conflict Resolution Unit responded on 31 May 2017, confirming that his request pertaining to

the February 2017 payslip was added to his appeal and that he did not need to submit a new request for review.

On 28 June 2017, the complainant lodged an appeal against his November 2016 and February 2017 payslips. He requested that the 25 April 2017 decision be set aside, that he be reimbursed the portion of his salary “unduly docked”, that he be awarded moral and material damages, as well as costs, and that the Appeals Committee award him “such other relief as [it] deems to be just, fair and equitable”.

On 20 December 2018, the Office submitted its position paper and considered the appeal as partly irreceivable and unfounded for the remainder.

In its opinion of 15 April 2020, the Appeals Committee noted that the 28 February 2017 request for review was submitted three days after the expiry of the three-month regulatory deadline and that the complainant could have submitted a second request for review against the February 2017 payslip in time. However, it decided not to take a “formalistic approach [which] would be tantamount to a procedural trap” and to consider that the appeal was receivable, except for the complainant’s claim on “such other relief [...] deem[ed] to be just, fair and equitable”, which was too vague to be considered as receivable. On the merits, the Appeals Committee’s majority considered that the Office had rightly applied the applicable rules in calculating the complainant’s salary and that the appeal was therefore unfounded. It recommended rejecting the appeal as partly irreceivable and unfounded for the remainder, and to award the complainant a payment of 150 euros in moral damages for the duration of the internal appeal procedure. One member of the Appeals Committee issued a dissenting view on the merits, noting that the Service Regulations did not establish clear rules for the calculation of salary of staff members under the incapacity regime in cases of additional sick leave. She recommended applying the most favourable calculation to the complainant’s individual situation and thus reimbursing him the portion of the salary and allowances unduly withheld and awarding him moral damages in the amount of 200 euros.

By a letter dated 15 June 2020, the complainant was informed of the decision of the Vice-President of Directorate-General 4 (DG4), acting by delegation of power from the President of the Office, to follow the Appeals Committee's majority recommendation to reject the appeal as partly irreceivable and unfounded for the remainder and to award him a total payment of 250 euros for the length of the internal appeal procedure. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to order the reimbursement of the portion of the salary and allowances unduly withheld, and to award him 1,000 euros in moral damages and costs, plus 3,800 euros as compensation for the undue length of the internal appeal procedure. Lastly, he seeks such other relief as the Tribunal deems to be just, fair and equitable.

The EPO asks the Tribunal to reject the complainant's last claim as irreceivable and to dismiss the complaint as unfounded in its entirety.

#### CONSIDERATIONS

1. The complainant challenges the decision of the Vice-President of DG4, taken by delegation of power from the President, dated 15 June 2020, which followed the majority opinion of the Appeals Committee and, accordingly, rejected his internal appeal against the deductions made on his salary in the November 2016 and February 2017 payslips, as partly irreceivable and unfounded for the remainder. Those deductions amount to six weekend days falling within two periods of sick leave where the complainant was under a partial incapacity regime.

2. The provisions of the Service Regulations that are relevant to the present case, and which were applicable at the material time, state as follows:

**“Chapter 3  
Absences for health reasons**

**Article 62  
General principles**

- (1) The present provisions on absences for health reasons offer a framework conducive to health recovery and return to work.

[...]

- (2) The system covers three phases:

- sick leave;
- extended sick leave;
- incapacity.

[...]

**Article 62a  
Sick leave**

- (1) A permanent employee who is unable for health reasons to perform all or part of his duties shall be entitled to sick leave subject to the conditions laid down in the present Article.

[...]

- (6) The President of the Office may verify by means of medical examinations whether the permanent employee’s state of health justifies sick leave. [...]

- (7) Sick leave shall be

- (a) granted for an initial period of up to a maximum duration of 125 working days, either in one unbroken period or in several periods within any rolling period of 18 consecutive months;
- (b) extended up to a total of 250 working days within any rolling period of 36 consecutive months, if at the expiry of the first period of sick leave a medical opinion confirms that the permanent employee is still unable to perform his duties.

Regardless of any working time arrangement or applicable salary deduction, for the purpose of computing sick leave accumulation, any absence on a working day shall be counted as a full day of sick leave.

- (8) A permanent employee on sick leave may be authorised to return to work [...]
- (9) During a period of full or partial sick leave a permanent employee shall retain the right to

- (a) the remuneration he would be entitled to if his health enabled him to perform his duties, subject to a 10% deduction of the basic salary and of the allowances payable under Articles 68 and 72 during the period mentioned in paragraph 7(b);
- (b) annual and home leave, it being provided that
  - leave taken during such periods shall be deducted in full days from his leave entitlement, irrespective of the percentage reduction in his working time,
  - taking fractions of days' leave is not allowed;
- (c) full benefits under the social security and pension schemes, including, where applicable, participation in the salary savings plan.

[...]

- (11) At the expiry of the applicable maximum period of sick leave, the rights and obligations of the permanent employee who is still partially or totally unable to perform his duties for health reasons shall be governed by the provisions of Article 62b.

[...]

**Article 62b**  
**Incapacity**

- (1) If a permanent employee has reached the applicable maximum period of sick leave set forth in Article 62a, paragraph 7 (b), a medical opinion shall be sought to determine whether he fulfils the condition of incapacity: being partially or totally unable to perform his duties or similar other duties which might reasonably be assigned to him, i.e. which correspond to his situation, his knowledge and his capabilities.  
In such case, he shall be partially or totally discharged from performing his duties by decision of the President of the Office.  
The proportion and period of time of such discharge from duties shall follow the medical opinion. In case of partial incapacity, any discharge from duties shall not exceed 80% of the normal working time. The minimum degree of incapacity for a total discharge from duties shall be 70%.
- (2) A medical opinion assessing incapacity shall be based on a medical examination of the permanent employee concerned. [...]
- (3) During a period of incapacity, the permanent employee shall be entitled to
  - (a) a proportion of his basic salary and of the allowances payable under Articles 68 and 72 equal to the time worked;

- (b) 70% of the basic salary and of the allowances payable under Articles 68 and 72 payable at his grade and step for the time he is discharged from duties for reasons of incapacity [...]
- [...]
- (5) A part-time arrangement approved in accordance with Article 56 before a period of incapacity shall remain unaffected. In such case:
  - (a) the proportion of any possible working time during incapacity shall be determined by reference to the normal, full-time working hours;
  - (b) incapacity benefits under paragraph 3 shall be payable only for the fraction of time defined as working time under the pre-existing part-time working arrangement and not worked for reasons of incapacity.
- (6) If during a period of partial incapacity, the permanent employee's state of health so requires and subject to the provision of evidence, he may temporarily be discharged from the entirety of his duties. His rights and obligations for such absence shall be determined by this Article. In addition, Article 62a, paragraph 6, shall apply.
- [...]
- (10) During a period of incapacity, the provisions in Article 62a, paragraphs 2 to 5, shall apply.
- [...]

#### **Article 65**

##### **Payment of remuneration**

- (1) (a) Payment of remuneration to employees shall be made at the end of each month for which it is due.
- (b) Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths and
  - where the actual number of days for which pay is due is fifteen or less, the number of thirtieths payable shall equal the actual number of days for which pay is due;
  - where the actual number of days for which pay is due is more than fifteen, the number of thirtieths payable shall equal the difference between the actual number of days for which pay is not due and thirty.
- (c) Notwithstanding the provisions of (b), where remuneration is not payable in respect of a complete month owing to participation in a strike, the monthly amount shall be divided into twentieths to establish the due deduction for each day of strike on a working day.

- (d) Notwithstanding the provisions of (b), where remuneration is not payable in respect of a complete month owing to unauthorised absence, the monthly amount shall be divided into twentieths to establish the due deduction for each day of unauthorised absence on a working day.

[...]"

3. In his first argument, the complainant alleges that the calculation of his remuneration for November 2016 and February 2017 is unlawful because the Organisation does not have the right to take into account, for the purpose of this calculation, the weekend days comprised in the periods of sick leave. According to him, Article 62b of the Service Regulations may not be construed to the detriment of staff members and conveys no express provision for the calculation of an employee's salary who is in partial incapacity in case of additional sick leave. Also, in his view, this provision cannot be combined with Article 65(1)(b) of the Service Regulations and its "thirtieth rule" for calculating the additional salary deduction to be made in case of sick leave, including weekends. On the contrary, he argues that Article 62a of the Service Regulations appears to be the relevant provision since it defines how sick leave days are counted and foresees that only working days are counted as sick leave days in case of partial incapacity. He concludes that an employee may therefore rightly rely on the fact that weekend days will not be considered in any calculation concerning sick leave days. The complainant adds that, because the rules at stake are not clear, in accordance with the Tribunal's case law, the most favourable calculation has to be applied in favour of the staff members and not of the Organisation.

The EPO contends that, when on sick leave, employees placed on partial incapacity – as is the case of the complainant – do not work and are thus de facto on full incapacity. They are entitled to an incapacity benefit for that period. No deductions are made *per se* on their salary. As neither Article 65 nor Article 62b of the Service Regulations foresee a specific method of remuneration calculation for employees placed on incapacity, the "thirtieth rule" provided by Article 65(1)(b) must be applied to them as well. Furthermore, the reference to Section E) of

Circular No. 367 of 11 May 2015, entitled “Absences for Health Reasons”, is irrelevant because it does not govern the calculation of the remuneration for the days of sick leave during a period of partial incapacity.

4. In light of those provisions, the Tribunal considers that Articles 62b(3) and 65(1)(b) of the Service Regulations govern the remuneration calculation of an employee which is on partial incapacity, and who must be considered as on total incapacity in case of additional sick leave. As the complainant’s monthly salary was not due in full, owing to his partial incapacity, it was consequently divided into thirtieths pursuant to Article 65(1)(b) of the Service Regulations. The distinction between working days and non-working days was therefore irrelevant since the whole remuneration had to be calculated in calendar days, thus also comprising weekend days.

Firstly, pursuant to Article 65(1)(b) of the Service Regulations, the remuneration must be divided into thirtieths where it is not payable in respect of a complete month. This is the case of an employee who is on partial incapacity. It follows that, for the calculation of the remuneration, time reductions apply to the month taken as a whole, including weekends and bank holidays, and not only weekdays. Article 62a(7) of the Service Regulations to which the complainant refers is irrelevant. This provision only applies “for the purpose of computing sick leave accumulation” and sets no relevant rules for the remuneration calculation. The complainant also errs when he affirms that Article 62a would be the only provision that applies to his situation. On the contrary, it is clear from Article 62a(11) that the complainant’s situation is governed only by Article 62b, namely Article 62a is applicable only to the extent that it is rendered applicable by Article 62b, which does not mention paragraphs 7 and 9 of Article 62a. It has also to be noted that Article 62b(10), which applies to the complainant due to his partial incapacity, only refers to Article 62a(2) to (6), and not (7) such as invoked by the complainant. The same can be said concerning Section E) of Circular No. 367, to which the complainant refers, because it only concerns the determination of the working time during partial incapacity by reference to the normal 40-hour working week.

Secondly, since Articles 62a, 62b and 65 of the Service Regulations do not provide a specific method of remuneration calculation for employees on incapacity and sick leave, the “thirtieth rule” foreseen by Article 65(1)(b) applies to them and Articles 62a and 62b cannot be considered as specific provisions which would derogate to this rule.

Thirdly, the fact that Article 65 of the Service Regulations was introduced before the adoption of the invalidity regime by the Administrative Council’s decision CA/D 2/15 is irrelevant considering that this provision concerns all situations in which the remuneration is not payable in respect of a complete month, such as in the case of partial incapacity. The wording of Article 65(1)(b) is indeed general and does not preclude its implementation in case of employees on partial incapacity and additional sick leave. Furthermore, the complainant errs when he considers that Article 65 of the Service Regulations would only concern cases of unauthorized absence or specific cases such as in the event of strikes (see Article 65(1)(c) and (d) mentioned above).

Fourthly, in compliance with Article 62b(3) of the Service Regulations, an employee placed on partial incapacity, who does not work and who is de facto considered as on full incapacity during the days of additional sick leave, has, because of the combined provisions of Articles 62b(3) and 65(1)(b), only a right to the payment of the incapacity benefit for the whole period of additional sick leave.

Fifthly, the complainant also errs when he contends that the “thirtieth rule” would be of a disciplinary nature, which is not the case.

Sixthly, the Tribunal considers, in the light of what has been stated above, that the applicable provisions establish clear rules for the calculation of remuneration of staff members on partial incapacity in case of additional sick leave.

In view of the foregoing, the complainant’s first argument must be rejected.

5. In his second argument, the complainant alleges a violation of the principle of equal treatment and non-discrimination, asserting that the EPO discriminated against him by not applying to him the rule which is applied for the calculation of the remuneration of employees

working at full capacity and who are placed on sick leave. For those staff members, there is indeed no recalculation of the remuneration for the month concerned.

The Tribunal recalls that the principle of equality of treatment requires that officials in identical or similar situations be subject to the same rules and that officials in dissimilar situations be governed by different rules defined so as to take into account of this dissimilarity (see, for example, Judgments 4983, consideration 9, 4277, consideration 21, and 4274, consideration 21). In view of the foregoing, the Tribunal considers that incapacitated employees working part-time, who benefit from a protective regime that permits them to keep part of their remuneration during their period of incapacity, and capacitated employees who are placed on sick leave are not in the same position in law and in fact. The former are not working on a full-time basis, the latter are. The former have already reached the applicable maximum period of sick leave determined notably by Article 62a(7)(b) of the Service Regulations, the latter have not. For remuneration purposes, there is consequently a logical difference in treatment according to the work which is produced. Therefore, no discrimination can derive from the different calculation methods of remuneration applied by the Organisation.

The second argument must also be rejected.

6. As the impugned decision is lawful and the complainant's main claim is without merit, the complainant is not entitled to any salary arrears, moral damages and costs. In conclusion, the complaint will be dismissed as unfounded in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 October 2025, Mr Michael F. Moore, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 10 February 2026 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

JACQUES JAUMOTTE

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.