

107th Session

Judgment No. 2858

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr W. H. H. against the European Patent Organisation (EPO) on 21 August 2007 and corrected on 22 October 2007, the EPO's reply of 25 February 2008, the complainant's rejoinder of 25 April, the Organisation's surrejoinder of 4 August 2008, the complainant's additional submissions of 30 March 2009 and the EPO's final comments thereon of 17 April 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 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 British national born in 1966. He joined the European Patent Office – the EPO's secretariat – in April 1989 as an examiner.

By decision CA/D 7/01 of 28 June 2001 the EPO's Administrative Council approved a proposal to cancel the Office's contract with an external insurance broker covering the risks of death and permanent

invalidity and to resort instead to self-insurance. 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 laying down 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. It was therefore proposed that an amount of approximately 7.5 per cent of one month's basic salary be recovered. Article 38 of the Service Regulations provides that the GAC shall give a reasoned opinion on proposed amendments 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 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 on the proposed text. 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 benefit payments. Consequently, an amount of approximately 7.5 per cent of one month's basic salary would be recovered by means of a deduction from 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.

The complainant wrote two letters to the President on 1 February 2005, including one in his capacity as member of the GAC by which he asked him to annul Circular No. 283 retroactively on the grounds that it was procedurally flawed. According to the complainant, the consultation of the GAC had not complied with the applicable rules and the President had acted *ultra vires* in issuing the above-mentioned circular. As a staff member of the Office he requested in the second letter that the deduction from his salary effected in December 2004 on the basis of that circular be reimbursed, that the contribution rates for the invalidity insurance be restored, with effect from 1 January 2005, to the levels indicated in the implementing rules for Article 84 of the Service Regulations, and that the amounts deducted from his salary over and above those levels be reimbursed. He was informed by a letter of 28 February 2005 that the President had decided to reject his requests and that the matter had consequently been referred to the Internal Appeals Committee.

By a notice dated 21 April 2005 the Vice-President of Directorate-General 4 informed staff that, in accordance with Circular No. 283, the final contribution rates for 2002-2004 had been determined. The provisional rates having been underestimated, a minor deduction would be made to the basic salaries paid during the period under review. The corresponding amount would be withheld from salaries in April 2005. On 19 October 2005 the Vice-President issued Circular No. 292 informing staff that the provisional rates for 2005 laid down in Circular No. 283 would apply for the three-year period from 2005 to 2007.

In its opinion of 23 March 2007 the Internal Appeals Committee held that Circular No. 283 was tainted with serious procedural irregularities. Indeed, two of the GAC's members were not permanent employees, and important information, which was available to the Office, had not been forwarded to the GAC. Moreover, since the implementing rules setting the provisional contribution rates for the period 2002-2004 had been established by the Administrative Council

in its decision CA/D 7/01, the decision concerning the subsequent adjustment of those rates likewise fell within the competence of the Administrative Council. Accordingly, the President did not have the authority to issue Circular No. 283. The Committee unanimously recommended that the circular should be set aside with retroactive effect and that the Office should forward a new proposal for the final contribution rates for 2002-2004 to the GAC for opinion and then to the Administrative Council for decision. If that procedure led to the conclusion that the Office's calculations had to be adjusted in the complainant's favour, then the Office would be obliged to reimburse the amounts wrongly deducted from his salary, together with appropriate interest. However, the Committee considered that the Office was not obliged to effect any immediate reimbursement of the amounts paid by staff members pursuant to Circular No. 283. It also recommended that the relevant part of the notice of 21 April 2005 and of Circular No. 292 be set aside; since they were taken on the basis of Circular No. 283 they are also procedurally flawed. Lastly, it held that the complainant should be awarded 500 euros in moral damages, because his rights as a member of the GAC to be provided with sufficient information had been infringed, and that his substantiated costs should be reimbursed.

By a letter of 25 May 2007 the Director of Administration and Systems informed the complainant that the President had decided to allow his appeal in part, in accordance with the opinion of the Internal Appeals Committee. Consequently, Circular No. 283 and the relevant parts of the notice of 21 April 2005 and of Circular No. 292 would be set aside retroactively and the Office would proceed with a new consultation of the GAC and would refer the matter to the Administrative Council for decision. Nevertheless, the Office would refrain at this stage from reimbursing the contributions paid, and reimbursement would be made only if the Administrative Council decided to adjust the contribution rates in favour of staff. Moreover, the contribution rates as laid down in Circulars Nos. 283 and 292 and in the notice of 21 April 2005 would temporarily remain applicable. That is the impugned decision.

B. The complainant points out that both the Internal Appeals Committee and the President agreed that Circular No. 283 should be set aside. However, they both refused to draw the legal consequences of such decision. In his view, the fact that the circular was set aside with retroactive effect means that it has never existed; consequently, the contribution rates for death and invalidity insurance that applied prior to the entry into force of the circular should remain in force until the Administrative Council decides otherwise, after a valid consultation of the GAC. The salary deduction made in December 2004 on the basis of the contested circular should be reimbursed as well as the excess contributions levied. He contends that he should be entitled to receive interest on all the amounts claimed.

According to the complainant, the President's decision to reimburse his contributions only in the event that the Administrative Council decides to adjust the contribution rates in favour of staff is "grossly inadequate", as it enables the President to rectify the procedural defects *a posteriori* at no cost to the Organisation. Indeed, on the basis of that decision, the President could consult the relevant bodies several years later whilst in the meantime retaining monies deducted from staff members' salaries on the basis of a circular that was set aside.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to annul Circular No. 283 *ab initio*. He also requests that the EPO reimburse the amount deducted from his salary in December 2004 as well as the contributions paid in excess of the rates applied prior to the entry into force of the circular. He further seeks interest at a "suitable" rate on the sums due, and costs.

C. In its reply the EPO argues 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 has to strike a balance between the interests of the staff members and those of the Office, and he must manage the Office's resources soundly. 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 withheld were not accurate. The Organisation points out that, as required by the Internal Appeals Committee, the GAC was again consulted in 2007 on the proposed retroactive increase of the contribution rates for the period 2002-2004, and that the Administrative Council subsequently issued decision CA/D 32/07, which sets the final contribution rates for 2002-2004. The EPO submits that the final rates did not show that the Office's calculation had to be adjusted in the complainant's favour.

In addition, the Organisation stresses that the complainant has already received appropriate compensation, i.e. 500 euros in moral damages, for the fact that his rights as a member of the GAC were infringed.

D. In his rejoinder the complainant submits that Administrative Council decision CA/D 32/07 of 14 December 2007 does not justify the Office's decision to withhold 7.5 per cent of his basic salary in December 2004 or to raise the contribution rates for the period 2005-2007. Indeed, prior to 14 December 2007, there was no legal basis for either of these measures as Circular No. 283 had been set aside with retroactive effect and decision CA/D 32/07 had not yet been adopted. He contends that, even if the amounts withheld turned out to be correct, he would be entitled, like the other staff members, to be awarded interest at a "punitive rate" of 8 per cent per annum on the amounts illegally retained until 14 December 2007 by the EPO.

According to the complainant, the amount recovered in 2004 and the contributions deducted for the period 2005-2007 were not accurate. Referring to Judgment 2110, he argues that when determining the contribution rates for the permanent invalidity insurance, the EPO should have drawn a distinction between staff members recruited before 10 June 1983 and those recruited after that date, instead of making a distinction between the rate applicable to basic insurance and that applicable to supplementary insurance. He explains that as a result

of the method used to determine contributions, staff members recruited after 10 June 1983 are “subsidising” the invalidity insurance of staff recruited prior to that date. He indicates that the contribution rate for basic insurance is the same for all staff members and does not take into account the fact that the basic insurance coverage for staff recruited after 10 June 1983 had a surplus budget whereas the budget for basic insurance coverage for staff recruited before that date was in deficit.

With respect to his claims for relief, he specifies that an interest rate of 8 per cent per annum would be “suitable” and he seeks 1,000 euros in costs.

E. In its surrejoinder the EPO maintains its position. It rejects the complainant’s assertion that staff members recruited after 10 June 1983 are “subsidising” those recruited before that date. It draws attention to an opinion provided, at its request, on 31 July 2008 by the actuary who advised the Office when it decided to introduce self-insurance for death and permanent invalidity risks. According to the actuary, it would not be justified to distinguish between staff recruited before and after 10 June 1983 for the purposes of basic insurance, since there is no difference in coverage regardless of the date of appointment. It adds that the Board of Auditors certified the Organisation’s accounts for 2004 without qualification.

F. In his additional submissions the complainant contests the actuary’s opinion of 31 July 2008 indicating that the latter took part in the drawing of the actual system and therefore lacks objectivity. According to the complainant, the Tribunal should not take into consideration that opinion.

G. In its final comments the Organisation states that the actuary’s opinion is relevant and should be examined by the Tribunal. It explains that since the complainant had questioned the actuarial method used pursuant to the introduction of the new system, which was drawn in part by the actuary, it was logical to consult him.

CONSIDERATIONS

1. The complainant joined the European Patent Office in April 1989 as an examiner. At the material time he was a member of the GAC nominated by the Staff Committee.

2. By Circular No. 283, issued on 13 December 2004, staff members were informed that the provisional contribution rates for death and total permanent invalidity insurance for the period from 1 January 2002 to 31 December 2004 were not sufficient to cover the benefit payments. Consequently, an amount of approximately 7.5 per cent of one month's basic salary would have to be recovered. They were informed that it would be deducted from salaries in December 2004.

3. The complainant impugns the decision of 25 May 2007 – by which he was notified of the President's decision to accept the unanimous recommendation of the Internal Appeals Committee to allow his appeal in part – insofar as it does not provide that the contribution rates for death and invalidity insurance existing prior to the issuance of Circular No. 283 should be reinstated and that the salary deductions made pursuant to Circular No. 283, as well as the excess contributions levied, should be reimbursed with interest.

4. He contests the fact that the Organisation withheld, for almost three years, monies deducted from staff members, both in the form of a lump sum and increased contributions. He submits that there was no legal basis to do so and that the Internal Appeals Committee's recommendation not to order immediate reimbursement allowed the Office to "get away [...] at zero cost [...] and to the obvious detriment of staff". In his view the amount recovered in 2004 and the contributions deducted between 2005 and 2007 were not accurate. Further, he contends that staff members recruited prior to 10 June 1983 and those recruited after that date are not treated equally in the insurance scheme.

5. The EPO argues that in order to manage the Office's resources soundly, the President must strike a balance between the interests of the staff and those of the Office. Consequently, the interest of the complainant in being reimbursed 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 could appear that the amounts withheld were in fact correct. Moreover, account had to be taken of the administrative workload generated by this reimbursement, which could turn out to be wrong if a later decision confirmed that the amounts withheld were accurate. The EPO points out that the Board of Auditors certified the Organisation's accounts for 2004 without qualification and that after further consideration of the GAC, the Administrative Council unanimously approved the auditors' report. Therefore, as no "obvious detriment of staff" can be found, there is no justification for the EPO to pay "interest at a punitive rate" when the amounts levied turned out to be correct.

6. The Tribunal is of the opinion that the complaint is unfounded. The President acted correctly in endorsing the opinion of the Internal Appeals Committee and deciding that "[a] corresponding reimbursement of the contributions paid [would] be made only if the Administrative Council decide[d] to adapt the contribution rates in favour of the staff". While it is true that "the quashing or reversing of a decision may result in that decision being deprived of all legal consequences or effects" (see Judgment 2324, under 6), the Tribunal notes that in the present case the complainant had the security of an insurance cover for death and permanent invalidity during the time period regulated by the now quashed decision and consequently there was "no obvious detriment of staff" following the decision suspending reimbursement of the amounts deducted together with appropriate interest, pending a new calculation of the contribution rates made in accordance with applicable rules. To rule instead that the EPO has to refund all amounts together with 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 a possible unjustified enrichment to the complainant. Although by Judgment 2110, the Tribunal ordered the EPO “to repay to the complainants the **excess** withheld plus interest” (emphasis added), the present case is distinguishable. Firstly, it was clear in the case that led to Judgment 2110 that, because no distinction had been made between the different groups of employees, there would be an excess. Secondly, in the present case, the EPO undertook to reimburse the complainant with interest if adjustments were eventually to be made in his favour.

7. Regarding the claim on the validity of the new calculations for the contribution rates, the Tribunal notes that this is a new claim as it is not listed under the relief claimed in section 4 of the complaint form nor does it fall under any of the listed claims in his brief. Furthermore, as the President of the Office endorsed the recommendation of the Internal Appeals Committee (which included the resubmission of the contribution rates), the new calculations may change as a result of the new proceedings, therefore this claim cannot now be considered by the Tribunal as impugning a decision, much less a final decision within the meaning of Article VII of the Statute of the Tribunal.

DECISION

For the above reasons,

The complaint is 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