

T. (No. 7) and M. (No. 10)

v.

EPO

120th Session

Judgment No. 3515

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr D. T. (his seventh) and Mr W. M. (his tenth) against the European Patent Organisation (EPO) on 18 September 2013 and corrected on 22 November 2013, the EPO's reply dated 4 April 2014, the complainants' rejoinder of 10 June and the EPO's surrejoinder of 10 September 2014;

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

Having examined the written submissions;

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

The complainants are permanent employees of the European Patent Office, the EPO's secretariat. In their capacity as staff representatives, they contest decision CA/D 17/12, adopted by the Administrative Council on 11 December 2012, which aimed at paying a collective reward to permanent or contract employees of the Office in active service in 2011. According to Article 3 of decision CA/D 17/12, the reward would amount to 4,000 euros for each full-time staff member, but reduced presence at work in 2011 due to absence other than part-time work would result in a correspondingly reduced individual reward. Any form of absence other than annual leave, home leave, leave taken on the basis

of flexitime or compensation hours, would be deducted from the basic amount of 4,000 euros proportionally *pro rata temporis*.

On 8 March 2013 Mr M., in his capacity as member of the Staff Committee and chairperson of the Berlin local section of the Staff Union of the Office (SUEPO), and Mr T., in his capacity as alternate member of the Staff Committee and member of SUEPO Berlin, together with other employees, filed a request for review of decision CA/D 17/12. They alleged that the decision was discriminatory with respect to certain employees, because periods of maternity leave, special leave, sick leave and adoption leave were deducted from the total time to be considered in calculating the reward payable under decision CA/D 17/12. By letters of 15 July 2013 the Chairman of the Administrative Council informed the complainants that the Council had decided to reject their request for review as manifestly irreceivable because they did not allege any adverse personal effects and their request was only concerned with the general decision contained in decision CA/D 17/12. He added that the Council's decision to reject their request constituted a final decision that could be challenged by filing a complaint with the Tribunal.

Each complainant impugns the decision of 15 July before the Tribunal. They request that Article 3 of decision CA/D 17/12 be quashed to the extent that it provides for deductions from the collective reward in respect of periods of maternity leave, special leave, sick leave or adoption leave, and that any such deductions be reimbursed to the staff members concerned. In addition, they claim moral damages for all staff members who have suffered unlawful discrimination as a result of the decision, further moral damages for any "past, present or future delay" in the adjudication of the dispute, and costs.

The EPO asks the Tribunal to dismiss the complaints as irreceivable and to make an award of costs against the complainants.

CONSIDERATIONS

1. On 18 September 2013, two complaints were filed impugning the rejection, by the Administrative Council of the EPO, of the

complainants' request for review of the Council's decision of 11 December 2012 (CA/D 17/12). Each complainant was a member or an alternate member of the Staff Committee in Berlin. The Council's decision was, in summary, to pay a collective reward to staff in active service during 2011. For full-time staff the amount was to be 4,000 euros though the amount was to be reduced if there had been reduced presence at work due to absences in 2011. Some leave was not to be treated as absences but periods of maternity leave, special leave, sick leave and adoption leave were to be treated as absences. It is this aspect of decision CA/D 17/12 that the complaints seek to challenge. The two complaints should be joined. The Tribunal rejects the complainants' request for an oral hearing as the matter can be resolved on the material provided in the pleas.

On 8 March 2013 the complainants and others requested a review of the decision pursuant to Article 109 of the Service Regulations. At its meeting on 26 and 27 June 2013, the Administrative Council decided to refer to the President those requests for review of decision CA/D 17/12 which alleged adverse personal effects and were not only concerned with the general decision in decision CA/D 17/12, the remaining requests for review being rejected as manifestly irreceivable. The requests for review of the complainants were in this latter category. The complainants were informed of this outcome in writing by letter dated 15 July 2013 from the Chairman of the Administrative Council and told they could challenge this decision in the Tribunal.

The relief sought in the complaints was the quashing of "the respective partial decision", namely that part of decision CA/D 17/12 permitting deduction from the amount otherwise payable to a staff member referable to periods of maternity leave, special leave, sick leave and adoption leave. In addition, reimbursement of such deducted amounts was sought, moral damages were also sought for each staff member who had been the subject of unlawful discrimination along with moral damages to the complainants for "any past, present or future delay in the adjudication of the present dispute" as well as costs.

2. The EPO challenges the receivability of the complaints. It does so on the basis that the complainants were challenging a decision of general application that had not been individually and prejudicially applied to them. It refers, in particular, to Judgment 1852, consideration 2, and Judgment 3291, consideration 8, and quotes passages from each. It also refers to Judgments 61, 92, 103 and 622.

In their rejoinder, the complainants refer to Judgment 1147, consideration 4, Judgment 1618, consideration 7, Judgment 2649, consideration 8, Judgment 2791, consideration 2, and Judgment 2919, consideration 5, in support of the proposition that a staff committee member can challenge a general decision which adversely affects staff or groups of staff. Also, and more specifically, they argue that even if a staff representative cannot challenge the substantive provisions of a general decision, the representative is always in a position to challenge a breach of procedure.

3. The complaints are irreceivable. The general decision in CA/D 17/12 is plainly a decision that would have required implementation. When that occurred staff aggrieved by the implementation could have pursued their grievances internally with the possibility, if the grievance was unresolved, of pursuing it before the Tribunal. However a staff representative cannot challenge a general decision governing all officials which will require individual implementing decisions. Judgment 3427 (at considerations 35 and 36) is a recent illustration of a case in which complaints were dismissed as irreceivable on this basis. To the extent that Judgment 2919 (which the complainants rely upon), indicates otherwise, it is at odds with the general jurisprudence of the Tribunal. There is an oblique reference in the complainants' pleas that there had not been proper consultation with the General Advisory Committee (GAC) and this is said to render the complaints receivable or at least the complaint of Mr T., who was a member of the GAC. However that issue was not raised in the internal application for review and cannot be raised in the Tribunal.

4. The EPO seeks a costs order against the complainants. While the Tribunal will not hesitate, in the future, to order a complainant to

pay the defendant organisation costs if the complaint is frivolous, vexatious, or completely devoid of merit, this is not such a case. No costs order will be made.

DECISION

For the above reasons,

The complaints are dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ