C. C., E., G., J. and V.

v.

EPO

120th Session **Judgment No. 3517**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms N. D. C. C., Ms T. E., Ms M. G., Ms M. J. and Ms E. V. against the European Patent Organisation (EPO) on 18 September 2013 and corrected on 22 November 2013, the EPO's reply of 10 July 2014, the complainants' rejoinder of 10 September and the EPO's surrejoinder dated 24 November 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. Each of them was on maternity leave for some time in 2011.

On 11 December 2012 the Administrative Council adopted decision CA/D 17/12 on the payment of a collective reward to staff of the Office in active service during 2011. It provided that permanent or contract employees who were in active service during 2011 should be paid a collective reward, which would amount to 4,000 euros for each full-time staff member. Article 3 provided inter alia that 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*.

In December 2012, each complainant was informed of the amount that she would receive pursuant to decision CA/D 17/12. As deductions were made in respect of their periods of maternity leave, they received, with their salary for December 2012, an amount that was less than 4,000 euros.

On 6 March 2013 they wrote to the Chairman of the Administrative Council requesting a review of decision CA/D 17/12. They alleged that deducting the period of maternity leave from the total time taken into consideration for the purpose of calculating the amount due to them pursuant to that decision was discriminatory.

During its meeting held on 26 and 27 June 2013, the Administrative Council decided to refer to the President of the Office the requests for review of decision CA/D 17/12 which alleged adverse personal effects, and to reject as manifestly irreceivable those that merely contested the general decision, i.e. decision CA/D 17/12. That is the decision the complainants impugn before the Tribunal. By a letter of 12 July, each complainant was informed of the Administrative Council's decision.

On 13 September 2013 the Principal Director of Human Resources, on behalf of the President, wrote to the complainants to inform them that their request for review was rejected. She added that the decision could be contested by way of an internal appeal to the Internal Appeals Committee.

The complainants ask the Tribunal to order the EPO to quash the provision in Article 3 of decision CA/D 17/12 that provides that "[a]ny other form of leave or absence shall be deducted from the basic amount of EUR 4,000, proportionally *pro rata temporis*", to reimburse the deducted amounts for each of them, and to grant them moral damages and costs.

The EPO was authorised by the President of the Tribunal to reply only on the issue of receivability. It considers that the complaints are manifestly irreceivable and asks the Tribunal to make an award of costs against the complainants.

CONSIDERATIONS

1. On 18 September 2013 complaints were filed with the Tribunal by Ms C. C., Ms E., Ms G., Ms J. and Ms V.. The background is as follows. A decision was made by the Administrative Council of the EPO on 11 December 2012 (decision CA/D 17/12). 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. Of particular relevance to the complainants was that aspect of the decision which authorised a reduction of the amount by reference to periods of maternity leave.

These complaints raise issues very similar to issues raised in other complaints being dealt with at this session of the Tribunal. However no request was made for joinder with those other complaints. In addition, the Tribunal's reasons for judgment in this matter accord substantially with reasons given in other matters. Accordingly there will be some repetition. However these five particular complaints were filed together and common argument was put by the one legal representative so they should be joined for the purposes of giving one judgment.

An oral hearing as requested by the complainants is unnecessary as the complaints can be adequately dealt with on the written material.

The EPO challenges the receivability of the complaints. It is convenient to deal with this issue at the outset. Indeed, in a letter from the Registrar of the Tribunal, the EPO was informed that the President

of the Tribunal had authorised it to confine its reply to the issue of receivability.

2. In December 2012, the complainants were informed of the amounts they would be paid in implementation of decision CA/D 17/12 and that their payments would be reduced having regard to periods of maternity leave taken in 2011. The Tribunal infers that they were then paid the reward but not in full (that is to say, the full amount of 4,000 euros). In documentary evidence provided by the complainants in their brief, there is an undated letter to each complainant. The letter states "you are being paid" and then there is a reference to a percentage of the 4,000 euros. Earlier in each letter there is an amount in euros specified as the "Net collective reward". Indeed the complainants say in their brief they were paid part, but not all, of the collective reward.

By letter dated 6 March 2013, the complainants sought a review by the Administrative Council under Article 109 of the Service Regulations for Permanent Employees of the Office. The letter concluded:

> "The Claimants herewith request to review the decision CA/D 17/12 according to Article 109 of the Service Regulations, so as to correct the total time used for the calculation of the reward, so that the periods of maternity leave are not deducted of the total working time. The corrected quantity of the granted reward is to be paid to the Claimants as soon as possible."

At least in form, the complainants were seeking to have reviewed the Administrative Council's decision of 11 December 2012 adopting decision CA/D 17/12. However it is tolerably clear the substance of the grievance was the application of decision CA/D 17/12 to them when each was paid a portion of the reward in December 2012.

During its meeting of 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 but not those which were only concerned with the general decision. The complainants' requests for review were in the former category. The complainants were informed of the referral decision on 12 July 2013. In letters dated 13 September 2013 from the Principal Director of Human Resources, the complainants were told, in effect, that the EPO adhered to its decision to implement decision CA/D 17/12 in full and

thus had been right in deducting from the payment made to them, an amount referable to maternity leave taken during 2011. At the conclusion of the letters there was a section headed "Means of redress". At that point it was noted the decision could be contested by way of an internal appeal and reference was made to Article 110 of the Service Regulations and Article 4 of the Implementing Rules for Articles 106 to 113 of the Service Regulations.

3. The complainants' complaints were, as noted earlier, filed on 18 September 2013. The decision identified in the complaint forms as the impugned decision is a decision of 27 June 2013. That is to say, the decision of the Administrative Council made on 27 June 2013 to refer the complainants' requests for review to the President. That this is so is confirmed by the notation in the complaint forms that the complainants received notice of the impugned decision on 12 July 2013 which was the day on which, in fact, they were given notice of the referral decision.

4. The pleas of the complainants and the EPO failed to address, in a consistently focused way, what was the impugned decision and whether the complainants had exhausted internal means of redress in relation to that decision though the issue was raised by the EPO. This is important because Article VII of the Tribunal's Statute renders a complaint irreceivable if "the person concerned has [not] exhausted such other means of resisting [the decision] as are open to him under the applicable Staff Regulations".

5. As noted earlier, the request for review dated 6 March 2013 was, in form, to review CA/D 17/12 but in substance concerned the amounts each complainant had been paid by way of reward in December 2012. If a request for review was directed to the Administrative Council, as was the case here, the applicable Service Regulations (operating with effect from 1 January 2013) required the Administrative Council to make a "decision on the outcome of the review" within two months of, in effect, the meeting at which the Council first had the opportunity to consider the request for review (see Article 109(6)).

This did not occur but rather the requests for review were referred to the President.

6. Three aspects of the applicable Service Regulations should be noted. The first is that Article 109(7) provided that if no decision was taken on the request for review then, at the end of the two months, an implied decision rejecting the application for review was deemed to have been made. It is tolerably clear that the combined effect of paragraphs (6) and (7) of Article 109 was that this deemed rejection was a final decision which could then be challenged in the Tribunal directly under Article 113. If, on the other hand, a decision was in fact made by the Administrative Council within the two-month period, that was similarly a final decision which could then be challenged in the Tribunal directly under Article 113.

The question then becomes whether the decision of the Administrative Council in June 2013 to refer the requests for review to the President was a "decision on the outcome of the review" or, if it was not, was there deemed to be a rejection of the requests for review two months after the June 2013 meeting. If either of these propositions can be answered in the affirmative, then the complainants were entitled to commence proceedings in the Tribunal without taking any further steps by way of internal appeal. However, as noted earlier, the impugned decision is clearly identified by the complainants in the complaints filed with the Tribunal as the decision to refer the requests for review to the President. Thus it cannot be said that the complainants are impugning an implied decision arising from the operation of Article 109(7) that notionally would have been taken two months after the June 2013 meeting. So the remaining question is whether the actual decision taken (to refer the requests for review to the President) was a "decision on the outcome of the review".

7. The complainants rely, in their rejoinder, on Judgment 3053, which has some bearing on the answer to this question. In that case, the complainant challenged two decisions of the Administrative Council amending numerous Implementing Regulations. After the decisions had been made, the complainant wrote (by way of letter) to

both the President and the Chairman of the Administrative Council requesting that the two decisions be withdrawn and that in the event that this request was rejected, his letter should be treated as an internal appeal to be considered by either the Internal Appeals Committee or the Appeals Committee of the Administrative Council. The complainant appears to have taken this approach because he was uncertain as to which was the appropriate appeal body. The Tribunal concluded that the only body competent to hear the appeal was the Appeals Committee of the Administrative Council. Moreover the Appeals Committee was taken to have, in the Tribunal's view, declined jurisdiction by referring the appeal against a Council decision to the President. The Tribunal concluded, at consideration 6, that the decision declining jurisdiction was a final decision which may be properly the subject of a complaint to the Tribunal. Thus the Tribunal rejected an argument that the complaint was not receivable on the basis that internal remedies had not been exhausted.

8. However, in the present case, it cannot be said with the certainty evident in the earlier case, that the only body competent to hear the complainants' request for review was the Administrative Council. In the earlier case, the decisions impugned were decisions to amend Implementing Regulations which were decisions which did not require implementation by their application to individual circumstances. However, in the present case, the impugned decision (CA/D 17/12) was a general decision that required implementation and was, in fact, applied with adverse effects on each of the complainants. Accordingly it is not correct to say, in this case, that the only body competent to hear the complainants' requests for review was the Administrative Council. Thus the decision to refer the requests to the President was not a decision by the only body competent to hear an appeal (in this case, a request to review), to decline jurisdiction. Rather it was a procedural decision to place the request to review before the appointing authority which, at least in the Administrative Council's opinion, was the appropriate body to determine the request for review. Approached this way, it also cannot be said that the Administrative Council made a decision on the outcome of the review. Accordingly, Article 113 was not engaged.

9. At this juncture, the Tribunal is not considering the question of whether the referral decision was lawful but rather the narrower question of whether the complainants' complaints are receivable. They are not receivable if the complainants have not exhausted internal means of redress. If, as the Tribunal considers is the case, the referral decision was not a "decision on the outcome of the review" the question which arises is what was the true character of the decision which bears upon the issue of whether internal means of redress have been exhausted. The Tribunal concludes it was an individual decision for the purposes of Article 106. If so, then the complainants had to follow the review procedure under Article 109 which they did not do. Accordingly internal means of redress were not exhausted. The Tribunal acknowledges that this approach may appear artificial or unduly technical. However that flows from the decision taken by the complainants to quite explicitly impugn the referral decision in these proceedings in the Tribunal rather than the implementing decision.

10. Even if the Tribunal approached these complaints, as it has other complaints heard in this session, on the basis that in substance the impugned decision was the implementing decision, the complainants' position does not improve. That is because they did not bring internal appeals against the decision of 13 September 2013 to refuse the request for review and adhere to the decision to make the deductions from the awards paid to each complainant by reference to periods of maternity leave each had taken.

11. It may well be that the complainants were poorly advised as to the course they should follow after the Administrative Council's adoption of decision CA/D 17/12. Their real grievances were with the decisions taken by the Administration to pay them a proportion of the reward in December 2012 in implementation of decision CA/D 17/12. It would have been an entirely orthodox approach for the complainants to have focused on the application of the general decision to each of them, consistent with the Tribunal's jurisprudence. Had they focused on those decisions then they could have challenged a general decision (in this case decision CA/D 17/12) when it was applied to them with

adverse personal consequences (see, for example, Judgment 3291, consideration 8).

However they did not follow this course and the decision they seek to impugn in the Tribunal is another decision in respect of which they have not exhausted internal means of redress. Accordingly the complaints are, for this reason, irreceivable and, on that basis, should be dismissed. Thus the Tribunal does not address the merits of the complaints. However, the Tribunal notes that the complainants have referred, in their brief, to a decision of the European Court of Justice No. C-333/97, which may provide argument that the approach of the EPO to adjust the reward to the disadvantage of the complainants by reference to periods of maternity leave is questionable.

12. The EPO seeks a costs order against the complainant. 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 for costs.

In witness of this judgment, adopted on 21 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