

**113th Session**

**Judgment No. 3146**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr C.O.D. L. against the European Patent Organisation (EPO) on 5 October 2009 and corrected on 10 November 2009, the EPO's reply of 4 March 2010, the complainant's rejoinder of 7 June, corrected on 14 June, the Organisation's surrejoinder of 17 September 2010, the complainant's additional submissions of 30 May 2011 and the EPO's comments thereon dated 8 September 2011;

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 and the pleadings may be summed up as follows:

A. The complainant is a German national born in 1962. He joined the European Patent Office, the EPO's secretariat, on 1 November 1990 as an examiner at grade A1. He currently holds grade A4 and is serving in Vienna, Austria.

Following two proposals from the President of the Office, on 9 December 2008 the EPO's Administrative Council adopted decisions CA/D 27/08 and CA/D 32/08. The former decision revised

the salaries and other elements of the remuneration of permanent employees of the EPO by, inter alia, replacing as from 1 January 2009 the monthly basic salary scales in Tables 1 to 4 of Annex III to the Service Regulations for Permanent Employees of the EPO with monthly gross salary scales. The latter decision, which entered into force on 1 January 2009, amended the Regulation on Internal Tax by, inter alia, revising the tax rates and tax brackets.

Between 6 February and 6 March 2009, over 100 employees challenged the aforementioned decisions and their implementation. Their appeals were addressed variously to the President of the Office or to the Chairman of the Administrative Council, or to both.

By two letters dated 6 March 2009, which he sent to both the President of the Office and the Chairman of the Administrative Council, the complainant challenged decisions CA/D 27/08 and CA/D 32/08, respectively. Among other things, he asserted that his gross salary had been reduced by one third as a result of the implementation of decision CA/D 27/08 and that the combined effect of both decisions was an unacceptable reduction of his net salary.

In March 2009 the Administrative Council referred the internal appeals of other employees challenging the determination of salary and internal tax to the President of the Office, who then referred those appeals, registered under RI/14/09, to the Internal Appeals Committee for an opinion. By a letter of 20 April 2009 the complainant was informed that his appeals had also been registered under RI/14/09.

On 6 May 2009 he requested that his four internal appeals be treated independently of RI/14/09 and that the two appeals which he had submitted to the Administrative Council be considered by that body. At its 118th session held from 23 to 25 June, the Council determined that his appeals related to the implementation of decisions CA/D 27/08 and CA/D 32/08 and it therefore proposed to refer them to the President of the Office for further action, as proposed by the President herself in document CA/95/09 of 3 June 2009. By a letter of 15 July the Director of the Employment Law Directorate informed the complainant that the President had concluded that his

appeals were unfounded and had referred them, registered under RI/14bis/09 for the sake of clarity, to the Internal Appeals Committee.

On 14 December the complainant was informed that, by agreement of the Internal Appeals Committee, and pursuant to his request to have his appeals dealt with separately from those of other officials, his appeals would now be registered under RI/14ter/09. By an e-mail of 15 December he asked the Director of the Employment Law Directorate to clarify which of his appeals would be examined under RI/14ter/09, and by another e-mail of the same date to the Chairman of the Internal Appeals Committee he requested that all of his appeals relating to the determination of his salary and internal tax be joined. On 16 December 2009 the Chairman confirmed that the appeals registered under RI/14ter/09 would be examined in conjunction with six other related internal appeals which the complainant had filed previously.

In the meantime, on 5 October 2009, the complainant had filed the present complaint with the Tribunal, purporting to impugn, inter alia, the President's proposal of 3 June 2009 to have the Administrative Council decline jurisdiction with respect to his internal appeals, the Council's consequent decision in that respect, and the "illegal" reduction of his gross salary.

B. The complainant submits that the Administrative Council explicitly or, alternatively, implicitly rejected his appeals by referring them to the President of the Office. In his view, the President is not competent to amend decisions CA/D 27/08 and CA/D 32/08 because they were adopted by the Administrative Council. Consequently, he filed his complaint directly with the Tribunal within the prescribed time limits and it is therefore receivable.

He draws the Tribunal's attention to a document dated 28 July 2009 which he has appended to his complaint, and requests that it be considered part of his submissions.

The complainant makes numerous claims and allegations. In particular, he contends that the gross salary scales introduced with

effect from 1 January 2009 by decision CA/D 27/08 are too low. As a result, his gross salary has been unlawfully reduced by approximately one third and he has suffered material harm. He claims that the Office has breached his acquired right to a rise in salary. In his view, the implementation of decision CA/D 32/08 is problematic only to the extent that the calculation of internal tax is based on the incorrect gross salary scales. Also, he argues that the defendant has failed to explain the relationship between decisions CA/D 27/08 and CA/D 32/08, despite numerous attempts on his part to clarify matters.

He further contends that the Office has incorrectly calculated internal tax for more than 30 years and this did not change until 31 December 2008. However, as he benefited from this error he could not challenge it earlier. According to him, the Administrative Council and the Budget and Finance Committee failed to discharge their “control” functions properly. Had they exercised a reasonable level of care they would have detected the problems with the proposals that led to decisions CA/D 27/08 and CA/D 32/08 and would have refused to approve those proposals.

The complainant requests oral hearings. He asks the Tribunal to quash the gross salary scales in Tables 17 to 20 of decision CA/D 27/08, to order the defendant to replace them with newly calculated scales and also to order it to implement decision CA/D 32/08 based on those newly calculated scales. He seeks disclosure by the Organisation of the “raft of questions” posed by a national delegation concerning the proposal which led to decision CA/D 32/08. He refers to all claims made in all of his related internal appeals, including but not limited to, requests for recalculation of the gross salary scales taking into consideration the “‘logically correct’ internal tax”, changes to his 2008 annual income statement and monthly payslips, as well as payment of the corresponding amounts due to him. He seeks damages related to the alleged breach of duty of care by representatives of Member States in the Budget and Finance Committee and/or the Administrative Council and he claims material, moral and punitive damages, and costs.

C. In its reply the EPO submits that the complaint is irreceivable for failure to exhaust the internal means of redress. It points out that the internal appeals procedure is ongoing and no final decision has been taken yet. In addition, it notes that the document dated 28 July 2009 which the complainant has appended to his complaint relates both to a different pending internal appeal and to another complaint that he has filed with the Tribunal. In the defendant's view, the arguments and claims therein are not the subject matter of the present complaint and are therefore irreceivable.

According to the defendant, the impugned decision relates to a procedural issue, namely whether the Internal Appeals Committee is competent to examine the complainant's appeals. Referring to the Tribunal's case law, it asserts that appeals filed with the wrong authority should be forwarded to the correct authority for a decision. The Administrative Council properly declined jurisdiction and referred the appeals to the President of the Office, who then referred them to the Internal Appeals Committee. The complainant is ultimately trying to obtain a different payslip and, to that end, he claims that the salary scales should be amended. Thus, his appeals relate to the President's implementation of decisions CA/D 27/08 and CA/D 32/08, although they incidentally challenge the lawfulness of those decisions. Even though the President cannot amend the salary scales adopted by the Council, if, at the conclusion of the internal appeal proceedings, the President decides that the complainant's payslips must be reissued on the basis of amended salary scales, the Council will have to review those scales.

Subsidiarily, the EPO contends that the complaint is unfounded. It explains that the remuneration of permanent employees has always been based on basic salary. The complainant's basic salary was not affected by decisions CA/D 27/08 and CA/D 32/08, nor was it affected by amendments to Articles 64(2), 64(4) and 66 of the Service Regulations which came into force on 1 January 2009. He has therefore suffered no material harm and there has been no violation of his acquired rights.

The Organisation admits that gross salaries were calculated erroneously up until December 2008, but it asserts that this did not affect the amount of basic salary paid to the complainant or to other permanent employees.

It states that the proposals submitted by the President to the Budget and Finance Committee and the Administrative Council, which led to decisions CA/D 27/08 and CA/D 32/08, underwent the statutory consultation procedure stipulated by Article 38 of the Service Regulations and Article 1 of the Implementing Rule for Article 64 of the Service Regulations. Furthermore, they were examined by the General Advisory Committee in December 2008. Decisions CA/D 27/08 and CA/D 32/08, which respectively formalised the existence of gross salaries and revised the internal tax provisions, were properly elaborated, adopted and implemented, with no resulting adverse effect for the complainant.

Lastly, citing the Tribunal's case law, the Organisation opposes the complainant's claims for relief, asserting that it has acted lawfully and that the complainant has not suffered serious moral injury.

D. In his rejoinder the complainant develops his pleas and claims for relief. He maintains that his complaint is receivable under Article VII, paragraph 1, of the Statute of the Tribunal since the Administrative Council's decision to refer his appeals to the President of the Office constitutes a final decision. Alternatively, he contends that his complaint is receivable under Article VII, paragraph 3, of the Statute because the Council has failed to take a decision on the claims he put forward in his appeals concerning the reduction in his gross salary. He also asserts that he has suffered injury to his health as a result of pursuing his internal appeals and his complaints before the Tribunal. He asks the Tribunal to order the defendant to disclose additional information from disinterested third parties, including members of the Administrative Council.

E. In its surrejoinder the EPO maintains its position. In response to the complainant's claim for disclosure of additional information, it

submits that the exchanges between members of the delegations before the Administrative Council and the Office concerning the proposal which led to decision CA/D 32/08 are not relevant to the present case. In addition, there is no further pertinent information regarding the consultation with the General Advisory Committee. The Committee was simply provided with the President's proposals, which were openly discussed and then unanimously approved.

F. In his additional submissions the complainant appends a portion of the minutes of the meeting of the General Advisory Committee held in December 2008 which, in his view, is evidence of the defendant's failure to engage in proper consultation with that Committee.

G. In its final comments the Organisation submits that the General Advisory Committee is an advisory body which, among other things, is responsible for giving a reasoned opinion on any proposal to amend the conditions of employment of EPO employees. There is no requirement to consult it with respect to the lawfulness of proposed amendments. Moreover, the issues of the Office's erroneous calculation of gross salaries until December 2008 and the related reduction of gross salaries as from January 2009 are not relevant to an assessment of the lawfulness of the implementation of decisions CA/D 27/08 and CA/D 32/08.

#### CONSIDERATIONS

1. The complainant joined the Office on 1 November 1990 as an examiner at grade A1 in The Hague. He was promoted several times, most recently to grade A4, and currently works in Vienna.

2. In December 2008 the Administrative Council adopted decisions CA/D 27/08 and CA/D 32/08 which, inter alia, replaced the monthly basic salary scales in Tables 1 to 4 of Annex III to the Service Regulations with monthly gross salary scales as from 1 January 2009, and amended the Regulation on Internal Tax by revising the tax rates

and tax brackets. Over 100 EPO employees challenged the lawfulness of those decisions.

3. In two similar letters dated 6 March 2009, addressed to the President of the Office and to the Chairman of the Administrative Council respectively, the complainant challenged both the lawfulness of those decisions and their implementation, as reflected in his monthly payslips.

4. The Administrative Council referred the aforementioned internal appeals, filed by over 100 staff members, to the President of the Office, who then referred them to the Internal Appeals Committee, which registered them under RI/14/09. The complainant was subsequently informed that his appeals had also been registered under RI/14/09. He then requested that the appeals he had addressed to the Administrative Council be considered by that body instead. The Council, considering that his appeals related to the implementation of decisions CA/D 27/08 and CA/D 32/08, declined jurisdiction and referred them to the President, as she herself had proposed in document CA/95/09 of 3 June 2009. The President then referred them to the Internal Appeals Committee which registered them under RI/14bis/09. The complainant was notified of these decisions in a letter dated 15 July 2009 which stated, *inter alia*, that:

“[a]t its 118<sup>th</sup> meeting [held from 23 to 25 June 2009], the Administrative Council referred the internal appeals addressed to it to the President of the Office. After an initial examination of the case, the President of the Office has come to the conclusion that the appeal is unfounded. It has therefore registered the appeals (RI/14bis/09) and referred the matter to the Internal Appeals Committee for an opinion. For more details, please read CA/95/09.

You will be receiving details of the President’s decision in due course.”

This is the decision impugned before the Tribunal.

5. The complainant filed several other appeals on the same subject and was subsequently informed that they would be dealt with under one procedure before the Internal Appeals Committee and that

they were all registered under RI/14ter/09. Those appeals were still pending when he filed his complaint before the Tribunal on 5 October 2009, prior to the completion of the Internal Appeals Committee's proceedings. With regard to receivability, the complainant states that:

“[the] Administrative Council's decision [taken at its 118<sup>th</sup> meeting] to refer an appeal directed to itself to the President of the Office for further action has the effect of terminating this particular internal appeals procedure before itself. [...] Hence, the decision on CA/95/09 [...] constitutes a final decision by the Administrative Council in the meaning of Article 13 (2) of the European Patent Convention and Article VII(1) of the Statute of the Administrative Tribunal of the International Labour Organisation.”

The complainant submits alternatively that “since the Administrative Council, as the only competent body to take a decision on the matter, failed to take a decision upon any of the claims contained [in his appeals]” his complaint is to be considered receivable under Article VII, paragraph 3, of the Statute of the Tribunal.

6. He requests the Tribunal to accept the complaint as receivable under Article VII, paragraphs 1 or 3, of its Statute, to quash the gross salary scales in Tables 17 to 20 of decision CA/D 27/08 and to order the Organisation to replace them with newly calculated scales. He also asks the Tribunal to order the Organisation to implement decision CA/D 32/08 based on the newly calculated scales, to reissue corrected monthly payslips and his yearly income statement for 2008, and pay him any corresponding amounts due to him. He seeks hearings, and claims material, moral and punitive damages, and costs.

7. In support of his claims, the complainant makes a number of allegations. Firstly, he contends that the Administrative Council's decision to refer the appeals to the President constitutes a final decision in accordance with Article 13(2) of the European Patent Convention and Article VII, paragraph 1, of the Statute of the Tribunal, or alternatively, it constitutes an implicit refusal to take a decision on his appeals and consequently, his complaint is receivable in accordance with Article VII, paragraph 3, of the Statute of the Tribunal. Secondly,

he submits that the argumentation in decision CA/95/09 is flawed and it was presented with the intention of persuading the Administrative Council to follow the President's recommendation. Thirdly, the gross salary scales introduced with effect from 1 January 2009 resulted in a one-third reduction of his gross salary which, combined with the revised internal tax provisions, resulted in a net salary that was too low. Fourthly, the calculation of the internal tax and gross salaries up until 31 December 2008 was incorrect and decisions CA/D 27/08 and CA/D 32/08 were adopted to hide that fact. In addition, he argues that the Administrative Council and the Budget and Finance Committee failed to exercise their functions properly and as a consequence his acquired right to a salary increase was breached. Furthermore, he was prevented from presenting his point of view, in person, directly to the members of the Administrative Council and the new gross salary scales were not approved by the Advisory Group on Remuneration, nor were they properly debated internally. Lastly, he asserts that the process was probably carried out in such a way as to set procedural traps for employees so that their appeals would be considered irreceivable.

8. Since the complainant has presented his case extensively in his written submissions, and, as will appear, it turns on a preliminary question of law, the Tribunal sees no need to order hearings. The complainant's request for oral hearings is therefore rejected.

9. The preliminary question is whether the Administrative Council erred in law in refusing to entertain the appeals addressed to it by the complainant.

10. The Staff Regulations allow for appeals to the Administrative Council in respect of decisions of that Council and, also, to the President of the Office in the case of decisions by the President. The President implements decisions taken by the Administrative Council. Thus, where, as here, an employee challenges both the underlying decision of the Administrative Council and a decision of the President implementing it, a question arises as to the

course to be taken by the employee who wishes to file an internal appeal challenging both the underlying decision and the decision implementing it. It is clear that the jurisdiction of the Appeals Committee of the Administrative Council extends only to decisions taken by it. Hence it cannot entertain appeals with respect to decisions implementing its underlying decisions. However, it is well settled that a staff member who challenges an individual decision may, at the same time and in the same internal appeal, challenge the related underlying decision. Thus, it was said in Judgment 1786, under 5, in relevant part:

“the staff member must impugn an individual decision applying a general one and, if need be, may for that purpose challenge the lawfulness of the general one without any risk of being told that such challenge is time-barred.”

Similarly, it was said in Judgment 1329, under 7, in relevant part:

“Firm precedent has it – see for example Judgment 1000 [...] – that an international civil servant may, in challenging a decision that affects him directly, plead the unlawfulness of any general measure that affords the basis for it in law. The indisputable basis in law for the individual decisions challenged in this case is the Council’s decision of 20 December 1991 setting the rate of the rise in staff pay for 1992. The conclusion is that the complainants may plead the unlawfulness of the Council’s decision.”

It follows from what was said in Judgments 1786 and 1329 that, if an individual decision is set aside because of the unlawfulness of the underlying decision, the latter must also be set aside.

11. Although Judgment 1601, under 10 and 11, allows that “a complainant may challenge ‘a decision affecting a class of officials’”, it does not follow that an official may pursue separate appeals with respect to a decision of that kind and individual decisions affecting him that are based on a decision of the former kind. It is a general principle of law that a person may not submit the same matter for decision in more than one proceeding. Particularly is that so if separate proceedings are brought before separate bodies. That principle applies both in relation to original proceedings and appellate proceedings. As the complainant purported to lodge separate appeals before separate bodies, it was necessary for one of the appellate

bodies to defer to the other. As the Administrative Council could not determine the appeal with respect to the individual decisions affecting the complainant, it was incumbent on it to defer to the President of the Office and the Internal Appeals Committee, as they, and only they, have jurisdiction to determine all aspects of the complainant's appeals. Accordingly, the decision of the Administrative Council to refer the complainant's appeals to the President and the Internal Appeals Committee involved no error of law. That decision must stand.

12. In conclusion, as the Administrative Council's referral of the complainant's appeals to the President was lawful, and the President took the view that the appeals were unfounded and consequently forwarded the appeals to the Internal Appeals Committee for decision, and as that decision is still pending, the complaint is irreceivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal since the impugned decisions cannot be considered final as the internal means of redress have not been exhausted. To declare the complaint irreceivable causes the complainant no prejudice since he may appeal, if necessary, to the Tribunal, against the future decision of the President regarding the outcome of his pending internal appeals.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2012, Ms Mary G. Gaudron, Vice-President 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 4 July 2012.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet