

118th Session

Judgment No. 3346

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs W.H. H. (his third), L. R. (his seventh) and D.M. S. (his second) against the European Patent Organisation (EPO) on 26 August 2010, the EPO's reply of 20 December 2010, the complainants' rejoinder of 7 February 2011 and the EPO's surrejoinder of 16 May 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

A. The complainants are permanent employees of the European Patent Office – the EPO's secretariat. At the material time they were members of the EPO's General Advisory Committee (GAC) nominated by the Central Staff Committee (CSC).

At its 192nd meeting held from 29 January to 2 February 2007, the GAC examined a proposal by the President of the Office to amend the Pension Scheme Regulations. One of the consequences of the

proposed amendments was that the staff pension contribution rate would be increased from 8 per cent of basic salary to 9.1 per cent. On 7 February the GAC issued its opinion on the proposed increase, which it deemed to be “actuarially justified”. On 16 February the President submitted his proposal to the Administrative Council for decision. He informed the members of the Administrative Council in document CA/64/07, which was also made available to the staff through the Office’s intranet system, that “the GAC ha[d] given a unanimous positive opinion on the level of contribution needed”.

On 19 February the CSC issued a paper entitled “Consultation in the GAC on Pension contributions”, in which the GAC members nominated by the CSC explained in detail why they had agreed to subscribe to the GAC’s unanimous opinion on the proposal in question. A few days later, the President of the Office issued Communiqué No. 20, dated 22 February 2007, providing follow-up on various matters including the above-mentioned GAC consultation process. In this connection, he stated that the GAC members nominated by the CSC had given “a positive opinion on the proposal to increase pension contributions” and that “[a] unanimous positive opinion [had] therefore [been] achieved”.

By an e-mail of 26 February addressed to the President, the chairman of the CSC requested that two documents be submitted to the Administrative Council for its 109th meeting commencing on 6 March. The documents in question, by which the CSC sought to “set the record straight”, were a paper entitled “CSC response to CA/64/07” and the paper of 19 February mentioned above. In the event, these documents were not placed on the agenda for the Council’s 109th meeting, which took place from 6 to 8 March. At that meeting, the Council approved the President’s proposal to raise the pension contribution rate by decisions CA/D 3/07 and CA/D 4/07 of 8 March 2007.

On 13 March the complainants, together with several other GAC members nominated by the CSC, wrote to the President asserting that the opinion they had expressed in the context of the GAC consultation had been neither positive nor negative and that the information

provided in Communiqué No. 20 was therefore incorrect. They requested that the President issue a corrigendum to Communiqué No. 20, failing which their letter was to be treated as an internal appeal. The President decided not to grant this request, and the appeal was therefore referred to the Internal Appeals Committee (IAC), which registered it as appeal No. RI/42/07.

By letters of 3 and 4 May 2007 each complainant filed a second appeal, challenging his April 2007 payslip insofar as it reflected the increased pension contribution rate resulting from decisions CA/D 3/07 and CA/D 4/07. They contended that these decisions were flawed because the Administrative Council had been misinformed with regard to the GAC consultation process, and they requested that their pension contributions be restored to their former level. The complainants also claimed moral damages and costs. The President decided not to grant their requests and these appeals were therefore likewise referred to the IAC, which registered them together as appeal No. RI/65/07.

The IAC issued its opinion on appeal No. RI/65/07 on 16 June 2010. A majority of its members recommended that the appeal should be rejected as unfounded, but that each complainant should be awarded 250 euros in moral damages on account of the length of the proceedings. By letters of 11 August 2010 the complainants were informed that the President had decided to follow that recommendation, and it is that decision that they impugn in their complaints before the Tribunal. Their earlier appeals concerning Communiqué No. 20 (appeal No. RI/42/07) had in the meantime been dismissed by letters of 7 June 2010.

B. The complainants contend that the President distorted the GAC's opinion on the proposal to raise the pension contribution rate by describing it as "positive", and that he then prevented the CSC from clarifying the matter by ensuring that the documents that the CSC wished to submit to the Administrative Council were not placed on the agenda of the Council's 109th meeting. They assert that this misrepresentation of the GAC's opinion not only sabotaged the GAC

consultation process, thus rendering it formally flawed, but also seriously damaged their reputation in the eyes of the staff. They emphasise that in describing the proposed increase in pension contributions as “actuarially justified”, they were merely indicating that the assumptions made by the actuaries who had recommended an increase were plausible, not that they fully agreed with those assumptions or with the conclusion that an increase was necessary. In fact, the GAC had recommended that the proposed increase in pension contributions should be deferred until such time as it could be combined with improvements to the pension scheme, but the President chose to ignore this part of the GAC’s opinion.

The complainants ask the Tribunal to quash decisions CA/D 3/07 and CA/D 4/07, to restore their pension contribution rate to 8 per cent of basic salary with retroactive effect from 1 April 2007, to reimburse any pension contributions paid in excess of that rate, with interest, to quash the President’s decision not to issue a corrigendum to Communiqué No. 20, and to award them moral damages and costs.

C. In its reply the EPO argues that the President has the right to interpret the GAC’s opinions. Under Article 38(3) of the Service Regulations, the GAC is required to give a “reasoned opinion” on the proposals submitted to it. Such opinions may be positive or negative, and they may be adopted unanimously or by a majority, but they can hardly be neutral. They are meant to assist the President by contributing to the decision-making process, but they are not binding on the President. Moreover, they must be interpreted in the sense of producing effects, and not in the sense of producing no effect. It was up to the complainants to make their point of view clear in the GAC’s opinion. In this case, they did not express a clearly negative opinion and the only aspect of the proposal which the GAC intended to change was the timing of the entry into force of the increase in pension contributions. In these circumstances, the President was entitled to consider that the GAC had given a positive opinion on his proposal, and the complainants’ contention that the GAC consultation process was flawed is therefore unfounded.

The EPO points out that the documents provided by the CSC were not included on the agenda of the Administrative Council's 109th meeting because they were not submitted within the time frame stipulated in the Council's Rules of Procedure. However, it emphasises that the documents in question were in fact available to the Council members before that meeting and that the staff representatives who attended the meeting were able to express the views of the CSC on the proposal at issue.

D. In their rejoinder, the complainants reiterate their pleas. They observe that an opinion by the GAC that is neither explicitly positive nor explicitly negative can nevertheless be well reasoned, as required by Article 38 of the Service Regulations, and hence substantiated.

E. In its surrejoinder the EPO maintains its position in its entirety.

CONSIDERATIONS

1. These three complaints raise the same issues of fact and law and seek the same redress. It is therefore appropriate that they be joined to form the subject of a single judgment.

2. The complainants were Staff Committee Representatives on the EPO's General Advisory Committee (GAC). In January 2007, the GAC considered the President's proposal to amend the Pension Scheme Regulations that would, among other things, result in an increase to staff pension contributions. On 7 February, the GAC issued its opinion on the proposal to amend the Regulations.

3. Subsequently, on 16 February, the President issued a document addressed to the Administrative Council that was also made available online for staff members in which he explained the revisions he had made to his proposal to amend the Pension Scheme Regulations and noted the GAC's positive opinion. This will be discussed in more detail below.

4. On 19 February, the Central Staff Committee (CSC) circulated a paper it had authored entitled “Consultation in the GAC on Pension contributions”. On 22 February, the President issued Communiqué No. 20 in which he notes that “[i]n contrast to their previous stance, the members appointed by the Central Staff Committee gave a positive opinion on the proposal to increase pension contributions. A unanimous positive opinion was therefore achieved.” At this juncture, it is convenient to note that in mid-March, the GAC members appointed by the CSC asked the President to issue a corrigendum to Communiqué No. 20. The President refused the request.

5. On 26 February, the CSC Chairperson forwarded its 19 February paper and its response to the 16 February document to the President. The CSC asked to have the documents submitted to the Administrative Council. The Chairperson acknowledged that the submission was late but he explained that the CSC had only recently become aware of the content of the 16 February document. The CSC’s submission was struck from the provisional agenda for the 109th meeting of the Administrative Council because it was submitted less than eight days prior to the start of the meeting. However, the CSC’s submissions were circulated to the Council members for their information.

6. Although the CSC’s submissions were not included on the final agenda, in the context of the Administrative Council’s discussion of the proposed amendments to the Pension Scheme Regulations, the staff representatives in attendance were given an opportunity to address the proposed amendments and reference was made to the CSC’s written submissions.

7. The Administrative Council approved the amendments to the Pension Scheme Regulations at its 109th meeting.

8. The complainants, in their personal capacities, challenged the Council’s decision to increase pension contributions, as reflected

in their payslips. On 11 August 2010, the President endorsed the majority recommendation of the Internal Appeals Committee (IAC) and rejected their appeal. According to the complaint forms, this is the impugned decision, though the relief sought is directed to earlier decisions, namely CA/D 3/07 and CA/D 4/07 of 8 March 2007.

9. The complainants, in their capacities as staff representatives on the GAC, also launched an internal appeal challenging the President's Communiqué No. 20 in which he informed staff that the GAC members appointed by the CSC had given a "positive opinion" on his proposal. On 7 June, the President accepted the IAC majority opinion and rejected the appeal.

10. Although it is not indicated in the complaint forms that the 7 June decision is also impugned, in their brief, the complainants state that their complaints also concern "a closely related decision of the President [...] regarding Communiqué 20" and that they are "also directed to this related, final decision".

11. Without commenting on the procedural irregularity of this approach, it is substantively wrong. Having brought their internal appeal against Communiqué No. 20 in their staff representative capacities, the complainants are now attempting to appeal from the President's final decision in their personal capacities as staff members. As the legal analysis of receivability, merit and damages associated with a claim are inextricably linked to standing, complainants cannot adopt a different position on standing from the one initially taken on the internal appeal. Accordingly, the complainants' challenge to the 7 June decision will not be considered.

12. The complainants contend that the Administrative Council's decision to increase the pension contributions must be set aside for two reasons. First, they claim that the GAC consultation was fundamentally flawed. The President misrepresented the GAC's opinion regarding the proposed increase in pension contributions to the Council, thereby influencing its decision. At this point, it is

observed that, although the alleged errors are framed in terms of a flawed GAC consultation, the complainants do not contend that the consultation process itself was procedurally flawed. Rather, their argument is grounded on the alleged misrepresentation made to the Council.

13. The complainants' allegation of misrepresentation is rejected. The communication complained of is in the President's 16 February 2007 document addressed to the Administrative Council. In it he states that "unlike in the first consultation, the GAC has given [a] unanimous positive opinion on the level of contribution needed".

14. Although the complainants broadly frame the issue as a misrepresentation of the GAC's opinion, for the purpose of advancing their position, they conflate the opinion they claim to have had as Staff Committee representatives on the GAC and the GAC opinion. For example, the complainants state that they "categorically did not give a positive opinion on the proposal to raise pension contributions". The complainants add that "the President went too far in labelling [the complainants'] opinion on the rise in pension contribution rates as positive ...". This position ignores the fact that the GAC opinion was unanimous and the President's 16 February observations were confined to the GAC's opinion.

15. As to the content of the 16 February communication, the President reported on a renewed consultation with the GAC and its unanimous positive opinion specifically in relation to the "level of contribution needed". In relation to the level of the contribution, the GAC opinion states that the members were satisfied that "an increase of the pension contribution as proposed is actuarially justified". On the specific question of the level of the contribution, the complainants could have but did not give a minority opinion. It is clear that on the issue of the level of the contribution the GAC opinion was unanimous.

16. Further, given the complexity and the amount of controversy that always surrounds any proposed increase in pension contributions,

agreement on the level of contribution is, by any standard, positive and it was reasonably open to the President to characterize it as such. While it is true that the GAC opinion includes an additional observation on the part of the GAC members nominated by the CSC, this was in relation to the timing of the implementation of any increase in the amount of the contribution and had no bearing on the level of the contribution on which the President reported. As well, the opinion stated that the GAC members nominated by the CSC emphasized that the proposal was an opportunity to lay to rest a significant source of conflict in the Office.

17. In their second argument, the complainants claim that by delaying the submission of the CSC's paper disputing the President's 16 February report and explaining its position regarding the GAC consultation, the President ensured that no correction of his interpretation of the GAC opinion was given to the Administrative Council. This argument is also rejected. As the IAC majority opinion found, there is no evidentiary support for the assertion that the President deliberately delayed submitting the CSC document in an effort to cover up his alleged misinterpretation. By its own admission, the submission to the President was made on the last day for inclusion on the agenda.

18. More importantly, under the guise of correcting the President's interpretation of the GAC opinion, the CSC tried to advance a position that, according to the GAC's unanimous opinion, had not been taken. The CSC was given that opportunity during the discussion at the Administrative Council's meeting.

19. The Tribunal concludes that the complaints are without merit and will be dismissed.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 9 May 2014, 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 9 July 2014.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ