

B.
v.
EPO

120th Session

Judgment No. 3516

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. M. B. against the European Patent Organisation (EPO) on 24 September 2013, the EPO's reply dated 9 July 2014, the complainant's rejoinder of 2 October 2014 and the EPO's surrejoinder dated 9 January 2015;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat.

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

On 27 February 2013 he wrote to the Chairman of the Administrative Council requesting a review of decision CA/D 17/12 and to be paid moral damages “of a magnitude equal to the amount deducted from the individually paid reward”. Other staff members made a similar request around the same period of time.

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. By a letter of 12 July the complainant, together with the other staff members who had requested a review of decision CA/D 17/12, was informed of the Council’s decision.

By a letter of 13 September 2013 the Principal Director of Human Resources, on behalf of the President, wrote to the complainant to inform him that his request for review was rejected. She added that the decision could be contested by way of an internal appeal to the Internal Appeals Committee (IAC). On 17 September the complainant filed an appeal with the IAC challenging that decision.

On the complaint form he filed with the Tribunal, the complainant indicates that he is impugning a decision of 11 December 2012, which is the date on which decision CA/D 17/12 was adopted.

He asks 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 amount, and to grant him 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 complaint is manifestly irreceivable and asks the Tribunal to make an award of costs against the complainant.

CONSIDERATIONS

1. On 24 September 2013, a complaint was filed by Mr B. impugning, in terms, the decision of the Administrative Council of the EPO of 11 December 2012 (CA/D 17/12). The Administrative 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. The focus of the complainant’s complaint is the aspect of decision CA/D 17/12 which authorises a reduction of the amount of the reward by reference to periods of sick leave. This complaint raises issues very similar to issues raised in some other complaints being dealt with at this session of the Tribunal. However no request was made for joinder. 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.

The EPO challenges the receivability of the complaint. 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 complainant was informed of the amount he would be paid in implementation of decision CA/D 17/12 and that this payment would be reduced having regard to periods of

sick leave taken in 2011. He was paid this reduced amount. By letter dated 27 February 2013 addressed to the Chairman of the Administrative Council, the complainant sought a review under Article 109 of the Service Regulations for Permanent Employees of the Office. What the complainant was seeking to have reviewed by the letter dated 27 February 2013 was by no means clear from the letter. It was a standard form letter that, the Tribunal infers, was modified. Parts of the letter suggest that the review sought was of the Administrative Council's decision of 11 December 2012. Other parts of the letter suggest the impugned decision was the administrative decision to pay the complainant a reward reduced by an amount referable to the periods of sick leave that the complainant had taken during 2011. In the section of the letter containing the modification of the standard form letter, the complainant sought moral damages "of a magnitude equal to the amount deducted from the individually paid reward". It is tolerably clear this is a reference to the amount he had actually been paid. The better view is that the complainant's grievance was with the decision to pay him less than the 4,000 euros and this was the grievance which was the subject matter of his request for review.

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 complainant's request was in the former category. In a letter dated 13 September 2013 from the Principal Director of Human Resources, the complainant was told, in effect, that the EPO adhered to its decision to implement decision CA/D 17/12 in full and thus to deduct from the payment made to the complainant, an amount referable to the sick leave taken during 2011. At the conclusion of the letter 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. On 17 September 2013 the complainant filed an internal appeal against the decision of 13 September 2013.

3. The complainant's complaint was, as noted earlier, filed on 24 September 2013. While in form it is a complaint against the Administrative Council's decision of 11 December 2012, in substance it is a complaint about the application of that general decision to him. If, as the Tribunal considers is the case, his grievance was with the administrative decision to pay him less than the full reward of 4,000 euros, then notwithstanding the circuitous procedural path his grievance has taken, there was an unresolved internal appeal against the negative review of that decision not to pay him the reward in full. Thus the internal appeal of 17 September 2013 had not been resolved when the complainant's complaint was filed with this Tribunal. This fact founds, in part, the argument of the EPO about receivability, namely that the complainant has not exhausted internal remedies insofar as a decision has been made applying to him decision CA/D 17/12 with, as he alleges, adverse personal consequences. This argument must be accepted having regard to Article VII of the Tribunal's Statute, which 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". Moreover, in relation to a person in the position of the complainant, a challenge cannot be made in the Tribunal to a general decision which does not directly affect him unless and until it is applied with adverse personal consequences (see, for example, Judgment 3291, consideration 8).

Accordingly the complaint is irreceivable and, on that basis, should be dismissed. The complainant's attempt, in his rejoinder, to focus on the lawfulness of the referral of the internal appeals alleging adverse personal effects by the Administrative Council to the President is misconceived. One of many issues the complainant would confront is that it is not the decision either in form or in substance impugned in the complaint.

4. 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 complaint is dismissed, as is the EPO's counterclaim for costs.

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