

A. (No. 18)

v.

EPO

123rd Session

Judgment No. 3778

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr P. A. against the European Patent Organisation (EPO) on 12 September 2011 and corrected on 26 September 2011, the EPO's reply of 17 January 2012, the complainant's rejoinder of 20 February and the EPO's surrejoinder of 29 May 2012;

Considering Article II, paragraph 5, 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 complainant impugns the rejection of his internal appeal against the EPO's refusal to clarify his fiscal situation with the Dutch tax authorities, to settle a payment order issued to him by the latter for 2007, to reimburse him for the taxes he had already paid to the Dutch Tax Office for 2009 and ensure that no further such taxes be levied for subsequent years, and to award him damages and costs.

The complainant is a former permanent employee of the European Patent Office, the EPO's secretariat. He ceased his functions due to invalidity on 1 December 2005. On 28 November 2005 he filled out a Retirement Questionnaire indicating an address in the Netherlands as his future address up until 30 August 2006, and an address in Italy as his future address for tax purposes from 30 August 2006 onwards.

In an exchange of e-mails on 4 July 2006, the complainant sought and obtained confirmation that as far as the EPO was concerned he could move to Italy in July 2006 and still remain a fiscal resident of the Netherlands for the whole of 2006. In its e-mail the EPO nevertheless advised the complainant to check respectively with the Dutch and Italian authorities to ensure that there was not a problem at the national level. On 6 July 2006 the complainant filled out another Retirement Questionnaire indicating two different addresses in Italy as his future residential and fiscal addresses respectively. In the accompanying letter he explained that he would reside in Italy as from 24 July 2006 but that for fiscal purposes he would remain a resident of the Netherlands for the whole of 2006 and would become a fiscal resident of Italy only as from 1 January 2007. The complainant asserts that on 10 July 2006 he submitted a third Retirement Questionnaire indicating an address in Italy as his future fiscal address and explaining in the accompanying letter of the same date that his fiscal residence for 2006 would be in Italy and not in the Netherlands. The EPO denies having ever received this third Retirement Questionnaire or the accompanying letter. On 25 August 2006 the Pension Department sent to the complainant a calculation of his pension as from August 2006 stating in the attached letter that the Netherlands was being considered as his fiscal residence until the end of 2006 and Italy would be considered as such from 1 January 2007 onwards.

On 8 October 2009 the EPO informed the complainant that in response to a request from the Tax Office in The Hague, it would be notifying the Tax Office that the complainant had moved to Italy on 24 July 2006. The complainant replied that same day emphasising that his fiscal residence for 2006 was in Italy and requesting that the EPO inform the Tax Office in The Hague accordingly.

On 24 September 2010 the complainant wrote an e-mail to the President of the Office to inform him that as a result of the EPO's failure to clarify his fiscal situation with the Italian and Dutch tax authorities, he had received from the latter an order of payment of a substantial amount in taxes for 2007, although he was no longer a fiscal resident of the Netherlands during that year. He asked that the EPO resolve the issue of the said order of payment. By a letter of 7 October 2010, the

complainant filed an internal appeal requesting that the EPO resolve urgently the issue of the order of payment of 49,641 euros issued by the Dutch tax authorities, that it reimburse him with interest the 1,738 euros he had already paid to the Dutch tax authorities in taxes for 2009, that it take appropriate measures to prevent such payments from 2010 onwards and that it award him damages and costs.

On 8 October 2010 the Pension Department responded to the complainant's e-mail of 24 September 2010. Summarising his fiscal situation, it explained that it had not communicated any information concerning the complainant to the Dutch tax authorities for the period after 31 December 2006 and it advised him to resolve the issue directly with the relevant authorities. By an e-mail of the same day, the complainant asserted that the EPO had failed to provide the Dutch tax authorities with the correct information as regards his fiscal residence for 2006. He reiterated his request that the EPO clarify his fiscal situation with the Dutch tax authorities. By a letter of 3 December 2010, the Director of the Employment Law Directorate informed him that the President of the Office had decided to refer to the Internal Appeals Committee (IAC) his internal appeal filed on 7 October 2010.

In the numerous exchanges that ensued, the complainant reiterated that the difficulties he encountered were due to the EPO's failure to provide the Dutch tax authorities with the correct information and that this failure amounted to a violation of Article 28 of the Service Regulations for permanent employees of the European Patent Office. The EPO maintained that the complainant had only become a fiscal resident of Italy as from 1 January 2007, that it had not communicated any information to the Dutch tax authorities for the period after 31 December 2006 and that the complainant's difficulties with the Dutch tax authorities may have been due to the fact that he was still registered as residing in the Netherlands in 2009. It advised him to resolve the issue directly with the relevant authorities. The complainant asserted that he had taken every step to properly inform the Dutch tax authorities and he maintained his position as regards the EPO's improper handling of his situation. In mid-January 2011 he informed the EPO that if it did not take action to clarify his fiscal situation and to meet his requests, he would file a complaint

directly with the Tribunal. On 20 January 2011 he filed a complaint with the Tribunal, which he subsequently withdrew in October 2011.

The IAC rendered its opinion on 8 July 2011. It found that, as no false declaration could be detected on the side of the EPO, there was no direct link between the injury suffered by the complainant and his office or duties and hence the requirements of Article 28 of the Service Regulations had not been met. Moreover, as there was no infringement of the general duty of care owed by international organisations, the EPO was not liable for compensation under this count. The IAC recommended unanimously that the internal appeal be rejected as unfounded. By a letter of 26 August 2011, the Principal Director of Human Resources informed the complainant that, acting by delegation of power, he had decided to reject his internal appeal pursuant to the IAC's opinion. That is the impugned decision.

In the complaint the complainant asks the Tribunal to order the EPO to provide the Dutch tax authorities with the correct information regarding his fiscal residence based on the evidence which he has furnished. He claims reimbursement of the amounts paid by him to the Dutch tax authorities, namely 1,738 euros for the year 2009 and 2,348.72 euros for the year 2010. He also claims reimbursement of all amounts withdrawn at source by the Dutch tax authorities, including the amount of 587.18 euros for the first three months of 2011. He seeks material damages, moral damages in the amount of 10,000 euros and interest on all amounts due. In the rejoinder he states that, although he resolved the issues he had with the Dutch tax authorities, he lost money in the process, as claimed in his complaint. He therefore maintains his claims for material and moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part and unfounded in its entirety.

CONSIDERATIONS

1. By letter to the President, dated 7 October 2010, the complainant contended that the "malicious" information provided by the EPO to the Dutch and Italian tax authorities regarding his fiscal residence had caused him injury, as he had received an order of payment of 49,641 euros for

the year 2007 from the Dutch Tax Office in The Hague. He asked the EPO to: resolve this issue; refund him the amount of 1,738 euros which he paid to the Dutch Tax Office for 2009; take the necessary steps to prevent future requests from the Dutch Tax Office; and to pay him moral damages and costs. In the event that his requests were not met, he asked that his letter be treated as an internal appeal. His requests were rejected and his letter was registered as an internal appeal. In its opinion, dated 8 July 2011, the IAC unanimously recommended that the complainant's appeal be rejected as unfounded. In a letter dated 26 August 2011, the Principal Director of Human Resources, acting by delegated authority of the President and pursuant to the IAC's recommendation, rejected the complainant's appeal as unfounded on the merits. That is the impugned decision.

2. The complainant requests oral proceedings but he has not identified any issue to be addressed. Considering also the documentary nature of the evidence and the fact that the complainant has had ample opportunity to present his case both before the IAC and in his submissions to the Tribunal, the Tribunal rejects this request. As the complaint is unfounded on the merits, the Tribunal will not deal with any question of receivability.

3. In the present complaint, the complainant presents two main issues. First, that the EPO failed to assist him in communicating with the Dutch Tax Office in accordance with Article 28(1) and (2) of the Service Regulations, and second, that the EPO maliciously misinformed the Dutch Tax Office regarding his fiscal residence. In his rejoinder, the complainant states that his issue with the Dutch Tax Office has been resolved but that he maintains his claims for material and moral damages put forward in the complaint and that he claims costs.

4. The complainant, alleging unlawful behavior on the part of the EPO, raises a claim for damages. As the Tribunal has stated on several occasions, the complainant bears the burden of proof and she or he must provide evidence of the injury suffered, of the alleged unlawful act, and of the causal link between the unlawful act and the injury (see Judgments 2471,

under 5, and 1942, under 6). The complainant has not provided any evidence of those three elements in the present case.

5. The IAC pointed out in its opinion that the EPO did not breach its duty to assist the complainant in accordance with Article 28(1) and (2) of the Service Regulations (in connection with the question of the complainant's fiscal residence as raised by the Dutch Tax Office).

Article 28, under the heading "Assistance by the Organisation", provides in relevant part:

- "(1) If, by reason of his office or duties, any permanent employee, or former permanent employee, or any member of his family living in his household is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act.
- (2) If a permanent employee or a former permanent employee suffers injury by reason of his office or duties, the Organisation shall compensate him in so far as he has not willfully or through serious negligence himself provoked the injury, and has been unable to obtain full redress."

The alleged facts, regarding the supposed injury stemming from fiscal payment orders and from the Dutch Tax Office's investigation on the complainant's fiscal residence, do not fall under the provision of Article 28(1). Such acts of the Dutch Tax Office represent the fulfillment of a public tax office's obligation and do not have any criminal connotation. Moreover, as there is no direct link between the fiscal residence of a former employee and her or his office or duties, Article 28(2) cannot apply to a conflict raised in that regard. With reference to the alleged misrepresentation by the EPO, assuming, without deciding, that there is a duty of care of the type alleged towards a former employee, a breach of that duty could only be established if the EPO had negligently or maliciously given wrong information to the national tax authorities. The complainant has not shown any concrete evidence that the EPO gave any wrong information to the Dutch Tax Office. As the IAC stated in its opinion, in response to the request from the Dutch Tax Office the EPO had merely indicated that according to its records the complainant had moved to Italy on 24 July 2006. The Tribunal has not been presented with evidence that the EPO provided the Dutch Tax Office with any other information about the complainant's residence. There is evidence

that according to the EPO's records, the complainant moved to Italy on 24 July 2006. The records are based on information and documents provided by the complainant himself (for example the complainant's retirement questionnaires and his requests for reimbursement of relocation and travel expenses).

6. The complainant claims that an e-mail dated 26 September 2006, which was sent to him by the Personnel Department and which stated inter alia that "[a]ccording to our data, since you started drawing your invalidity pension, you and your family members are residing in Italy", was proof that the EPO accepted his residence as being in Italy for 2006. The Tribunal notes that, while this statement contradicts statements made by other departments in the EPO, all of those statements were based on the contradictory information provided to each of these departments by the complainant himself. The IAC also noted that the complainant had submitted several letters to the Dutch Tax Office with varying dates for his departure to Italy. The IAC noted, in particular, that "[i]n an undated letter to the Dutch tax office [...] the appellant had declared that he had been living abroad before July 2006, notably since July 2005. By letter dated 15th November 2010 to the Dutch tax office [...] the appellant had declared that he had been living in Italy from January 2006 onwards. By letter dated 16th December 2006 to the Dutch tax office [...] the appellant had declared that he had been living in Italy since December 2005." In fact, even in the present complaint the complainant has made several contradictory remarks regarding his residence. Some examples are as follows:

"On 9 October 2009, I answered the EPO stating that 'I moved to Italy in 2006, but my fiscal residence was Italy, for the whole year 2006'."

"I was living both in Italy and in Holland. I lived more than nine months, in 2006, in Holland and the [Dutch Tax Office] confirmed me that I was resident fiscally in Italy for that year (2006)."

"In fact, I underlined the fact that the [Dutch Tax Office] did not agree with the EPO, to have my fiscal residence, for the year 2006, in Holland if I had spent more than nine months in Italy."

"The EPO and the [Dutch Tax Office] agreed with me that from the year 2006 (included) onwards, I was resident in Italy and my fiscal residence was Italy."

7. The Tribunal notes that the confusion regarding the complainant's fiscal residence appears to stem mainly from the fact that the complainant was still registered at a Dutch municipality as a Dutch resident from 2006 onwards. As the EPO had neither an obligation nor any authority to deregister the complainant with the Dutch municipality, it stands to reason that the responsibility rested with the complainant himself.

8. As the complainant has presented no evidence that the EPO misinformed the national tax authorities, or that he suffered any injury stemming from the contested information that the EPO provided to the Dutch Tax Office, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 19 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ