

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

V.
v.
EPO

123rd Session

Judgment No. 3796

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. V. against the European Patent Organisation (EPO) on 9 October 2015, the EPO's reply of 21 March 2016, the complainant's rejoinder of 28 June and the EPO's surrejoinder of 26 September 2016;

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 complainant challenges decision CA/D 10/14 of the EPO's Administrative Council, introducing a new career system.

In November 2014, after having consulted the General Consultative Committee (GCC), the President of the European Patent Office submitted a proposal for a new career system to the Administrative Council. Amongst other measures, the proposal involved replacing the existing grade structure, in which jobs were divided into categories A, B and C, with a new "single-spine" structure comprising 17 grades, each of which would have up to 5 steps, and amending the rules governing step advancement and promotion so as to place greater emphasis on performance, rather than seniority. On 11 December 2014 the Administrative Council adopted decision CA/D 10/14, endorsing the President's proposal.

On 27 February 2015 the complainant, a permanent employee of the European Patent Office, the EPO's secretariat, submitted a request for review of decision CA/D 10/14 to the Chairman of the Administrative Council, arguing that it was tainted with procedural flaws and that it breached his acquired rights and legitimate expectations, particularly with regard to advancement and promotion. He emphasised that although CA/D 10/14 was a general decision, it involved certain amendments to the Service Regulations which had an immediate adverse effect on him, and that he was therefore entitled to challenge it directly. He asked the Administrative Council to revoke CA/D 10/14 and to order the President to submit a new proposal after a proper consultation process. Between 18 February and 12 May 2015, similar requests for review were filed by 1,696 other employees.

In June 2015, in accordance with Article 18(1) of the Rules of Procedure of the Administrative Council, the President submitted an opinion on the requests for review to the Administrative Council under the reference CA/48/15. He argued that 64 of the requests should be dismissed as time-barred, and that the remaining requests, including the complainant's, should be dismissed as manifestly irreceivable on the grounds that they challenged a general decision which needed to be put into effect by means of individual decisions and, as such, had no direct adverse effect on the legal situation of the requesters.

At its 144th meeting on 24 and 25 June 2015, the Administrative Council decided to dismiss all of the requests for review of CA/D 10/14 as manifestly irreceivable for the reasons given by the President in CA/48/15. That is the decision that the complaint impugns before the Tribunal. He was notified of it by a letter of 14 July 2015 from the Chairman of the Administrative Council.

The complainant asks the Tribunal to quash the impugned decision, to quash decision CA/D 10/14 "to the extent that it impinges on [his] rights and obligations [...] without the need of individual implementation", and to award him moral and exemplary damages and costs. Should a new career system be needed, he asks the Tribunal to order the President of the Office to prepare a new proposal for the Administrative Council,

in cooperation with the staff representatives, paying due regard to acquired rights and legitimate expectations.

The EPO submits that the complaint is irreceivable because it is directed against a general decision which must be implemented by means of individual decisions, and because the complainant shows no cause of action. Subsidiarily, it submits that the complaint is unfounded on the merits.

CONSIDERATIONS

1. The Tribunal should address at the outset the question of what is the authority competent to deal with the request for review of the decision in accordance with Articles 107, 108 and 109 of the Service Regulations under Title VIII on “Settlement of Disputes”. These articles provide:

“Article 107

Request to take an individual decision

- (1) An employee, a former employee, or rightful claimant on his behalf may submit a written request that an individual decision relating to him be taken by the appointing authority which is competent to take such decision.
- (2) The competent appointing authority shall take a decision within two months. Where the competent authority is the President of the Office, this period shall start to run on the date of receipt of the request. Where the competent authority is the Administrative Council, this period shall begin on the date on which the request was submitted to the first meeting of the Council after its receipt, taking due account of any specific provisions applicable for the submission of documents to the Council laid down in Article 9 of the Rules of Procedure of the Administrative Council.
- (3) If at the end of this period the request has not been replied to, this shall be deemed to constitute an implied decision rejecting it.

Article 108

Procedures for the settlement of disputes

- (1) Any person to whom Article 106 or 107 applies may challenge an act adversely affecting him, or an implied decision of rejection as defined in Article 107, paragraph 3:
 - (a) through the review procedure;

- (b) through the internal appeal procedure;
 - (c) by filing a complaint with the Administrative Tribunal of the International Labour Organization.
- (2) The challenging of the decision shall not suspend its execution.
 - (3) The detailed conditions relating to each of the three consecutive procedures referred to in paragraph 1 are laid down in Articles 109 to 113 of these Regulations and in implementing rules thereto.

Article 109
Review procedure

- (1) A request for review shall be compulsory prior to lodging an internal appeal, unless excluded pursuant to paragraph 3.
- (2) It shall be submitted within a period of three months to the appointing authority which took the decision challenged. This period shall start to run on the date of publication, display or notification of the decision challenged. Where the request for review is against an implied decision of rejection within the meaning of Article 107, paragraph 3, it shall start to run on the date of expiry of the period for reply.
- (3) The following decisions shall be excluded from the review procedure:
 - (a) decisions taken after consultation of the Medical Committee or in accordance with the arbitration procedure laid down in Article 62, paragraph 13;
 - (b) staff reports referred to in Article 47a.
- (4) The competent appointing authority shall take a reasoned decision on the outcome of the review which shall be communicated to the person concerned in writing, indicating the means of redress available to challenge it.
- (5) Where the competent authority is the President of the Office, the decision on the outcome of the review shall be taken within two months as from the date of receipt of the request. Such decision may then be challenged through an internal appeal under the conditions laid down in Article 110.
- (6) Where the competent authority is the Administrative Council, the decision on the outcome of the review shall be taken within two months as from the date on which the request was submitted to the first meeting of the Council after its receipt, taking due account of any specific provisions applicable for the submission of documents to the Council laid down in Article 9 of the Rules of Procedure of the Administrative Council. Such decision shall be final within the meaning of Article 113, unless:
 - (a) it relates to a dispute concerning appointment by the Administrative Council, in which case it may be challenged through an internal appeal under the conditions laid down in Article 110;

- (b) the Administrative Council exceptionally decides otherwise following a request by the person concerned.
- (7) If at the end of the period of two months no decision has been taken on the request for review, this shall be deemed to constitute an implied decision rejecting it.”

2. After the complaint was filed, the Tribunal decided Judgment 3700, delivered in public on 6 July 2016. That decision has a material bearing on how this complaint should be resolved and consideration of that decision can be raised *ex officio*. In Judgment 3700, the Tribunal stated:

“11. In the present case the Administrative Council was not the ‘competent authority’, within the meaning of Title VIII of the Service Regulations concerning settlement of disputes, as amended by the Administrative Council’s decision CA/D 8/12, to examine the complainant’s request for review.

In this respect, the Tribunal notes that unlike most international organisations the EPO has two appointing authorities pursuant to Articles 10 and 11 of the European Patent Convention: the President, who appoints the vast majority of the staff (approximately 6,700) and the Administrative Council, which appoints the President, the Vice-Presidents (currently 5) and approximately 170 other employees who are members of the boards of appeal and whose independence is guaranteed by the fact that they are appointed by the Administrative Council. In reality, most decisions affecting staff members appointed by the Administrative Council are taken by the President, because these staff members are also subject to most of the provisions of the Service Regulations and are referred to under the generic expression ‘employees’. The only individual administrative decisions concerning these staff members that are taken by the Administrative Council are those relating to appointment and disciplinary matters. Decisions on all other matters are taken by the President, which is why the Service Regulations provide for the possibility that some staff may file appeals with different appointing authorities depending on which authority took the decision challenged.

It must also be borne in mind that the appeal system is essentially an individual one in nature and that, broadly speaking, a general decision may only be challenged in the context of an appeal against an individual decision implementing the general decision. In this context Article 107(1) of the Service Regulations, under Title VIII on settlement of disputes as amended by decision CA/D 8/12, identifies the appointing authority to whom a request for review of an individual decision may be submitted and the competent authority to deal with the review procedure by providing that ‘[a]n employee, a former employee, or rightful claimant on his behalf may submit

a written request that an individual decision relating to him be taken by the appointing authority which is competent to take such decision’.

12. In light of the above considerations, the meaning of the expressions ‘competent appointing authority’ (Articles 107(2) and 109(4) of the Service Regulations) and ‘appointing authority which took the decision challenged’ (Articles 109(2) and 110(1) of the Service Regulations), while not clear, should, having regard to the language and logic of Title VIII of the Service Regulations, be interpreted as meaning: (a) for employees appointed by the President, all requests for review must be lodged with the President and must be decided by the President; (b) for employees appointed by the Administrative Council, requests for review of individual decisions concerning them that were taken by the Administrative Council must be lodged with the Council and must be decided by the Council, whereas requests for review of individual decisions concerning them that were taken by the President must be lodged with the President and must be decided by the President. In the present case, as the complainant was appointed by the President, his request for review had to be lodged with the President.”

3. In the present complaint, the complainant was also appointed by the President and therefore his request for review also had to be lodged with and dealt with by the President. The President’s reasoned decision on the outcome of the review may be challenged, if necessary, before the Appeals Committee in accordance with Articles 109 and 110 of the Service Regulations. While the Administrative Council dismissed the request for review as irreceivable, it did so on the basis that the request concerned a general decision. However, this in effect dealt with the merits of the request. The Administrative Council should have recognised that it was not the competent authority at all and should have referred the request to the President.

4. The flaw identified above, stemming from the Administrative Council’s lack of competence to review the request according to the system referred to in Title VIII of the Service Regulations, warrants setting aside the impugned decision and remitting the matter to the Organisation in order for the President, as the competent authority, to take a decision on the complainant’s request for review within two months from the date of the delivery of this judgment. The President may consult the Administrative Council if he considers it desirable to do so having regard to the nature of the challenged decision.

5. Considering the substance of the decision, and the fact that the Tribunal has decided to apply the recent case law, the Tribunal will make no award of costs. In these circumstances, the request for an oral hearing is rejected.

DECISION

For the above reasons,

1. The decision notified to the complainant by letter dated 14 July 2015 from the Chairman of the Administrative Council is set aside.
2. The case is remitted to the EPO for the President to proceed in accordance with consideration 4, above.
3. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2016, Mr Giuseppe Barbagallo, Vice-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 November 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ