

H. (No. 7) and S. (No. 5)

v.

EPO

132nd Session

Judgment No. 4418

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr W. H. H. (his seventh) and Mr D. M. S. (his fifth) against the European Patent Organisation (EPO) on 24 August 2012, the EPO's reply of 29 November 2012, the complainants' rejoinder of 8 January 2013 and the EPO's surrejoinder of 18 April 2013;

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 none of the parties has applied;

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

The complainants challenge the Administration's failure to respect the statutory time limit for the submission of documents to the General Advisory Committee (GAC) for the purposes of consultation prior to the adoption of a New Pension Scheme and a corresponding Salary Savings Plan for employees taking up their duties with the EPO on or after 1 January 2009.

On 21 October 2008 the Administrative Council adopted decisions CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08 and CA/D 18/08, introducing a New Pension Scheme with a corresponding Salary Savings Plan for employees entering the service of the European Patent Office, the EPO's secretariat, on or after 1 January 2009 and providing for lump-sum payments as partial compensation for the national taxation

of pensions (October 2008 decisions). The decisions entered into force on 1 January 2009.

Acting in their capacity as members of the GAC, the complainants filed, on 12 and 16 December 2008 respectively, appeals against the October 2008 decisions and proposal CA/80/08 Rev. 1 (which provided an overview of the project and the measures to be taken) with both the President of the Office and the Chairman of the Administrative Council. In their appeals they argued that the GAC consultation process, required prior to the adoption of the October 2008 decisions pursuant to Article 38 of the Service Regulations for permanent employees of the European Patent Office, was “fatally flawed”, because the statutory deadline for submitting the relevant documents to the GAC had not been observed. The complainants requested that the October 2008 decisions be withdrawn and claimed moral damages and costs. On 16 February 2009 the President rejected the complainants’ requests and forwarded the appeals to the Internal Appeals Committee (IAC) under the reference RI/191/08.

In parallel with the complainants’ appeals, mass appeals were lodged with the President of the Office and the Chairman of the Administrative Council by other EPO employees against the October 2008 decisions – the complainants did not join those mass appeals. Considering itself competent to examine the matter, the Administrative Council referred the mass appeals against the October 2008 decisions to its Appeals Committee*. On 6 October 2010 the Appeals Committee concluded that by claiming urgency and not respecting the GAC statutory consultation period of 15 working days, the Administrative Council had failed to comply with Article 38 of the Service Regulations and Article 1 of the GAC Rules of Procedure. The Appeals Committee recommended that the appeals be allowed for lack of a proper GAC consultation insofar as they concerned decisions CA/D 12/08, CA/D 13/08, CA/D 14/08 and CA/D 17/08, but that they be dismissed insofar as they concerned decision CA/D 18/08.

* The only exception being the appeals against decision CA/D 14/08, given that the Administrative Council agreed to modify the wording of the contested Article 1 of decision CA/D 14/08, as requested by the appellants and, in June 2009, it adopted decision CA/D 15/09 which revised decision CA/D 14/08, in particular its Article 1, so as to allow survivors of beneficiaries to be entitled to the lump-sum payment.

On 15 December 2010 the Administrative Council decided to reject the appeals as inadmissible and unfounded except for the claim relating to a flawed GAC consultation procedure. With regard to the latter, the Council considered that the GAC had not been properly consulted on decisions CA/D 12/08, CA/D 13/08, CA/D 14/08 and CA/D 17/08 and it therefore mandated the President to come back to it as soon as possible with a new set of documents after proper consultation of the GAC. However, it authorised the President to continue to apply the October 2008 decisions until final decisions were adopted. Ultimately, the 15 December 2010 decision was the object of a mass complaint to the Tribunal which was dismissed as irreceivable in Judgment 3427, delivered in public on 11 February 2015.

Prior to that, on 20 December 2010, the complainants wrote to the President asking him to reconsider his decision on their requests for redress in the light of the Administrative Council's decision of 15 December 2010. The Director of the Employment Law Directorate responded on 20 January 2011 that the complainants' request for moral damages and costs could not be granted, as the complainants had not suffered any injury that the reinitiating of the consultation process could not sufficiently redress. He added that a new consultation process would be carried out and that the Office's position paper on the complainants' appeals would be sent to the IAC within the next three months. Having received no news regarding the Administration's filing of a position paper, the complainants wrote to the Administration, respectively on 26 April and 26 June 2012, to inquire about the status of their appeals and the date on which the filing of the Administration's position paper should be expected. On 24 August 2012 the complainants filed their complaints with the Tribunal impugning the Administration's failure to take an express decision on claims notified to it on 12 and 16 December 2008 respectively.

The complainants ask the Tribunal to set aside the implied decision rejecting their internal appeals and to also set aside proposal CA/80/08 Rev. 1 and decisions CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08, CA/D 18/08. They claim moral damages and costs.

The EPO asks the Tribunal to dismiss the complaints as partly irreceivable and unfounded in their entirety.

CONSIDERATIONS

1. The complainants were, at relevant times, members of the staff of the EPO. They were also, at relevant times, members of the GAC. On 21 October 2008 the Administrative Council adopted several decisions concerning, generally described, pension and related arrangements within the Office. The complainants lodged, on 12 and 16 December 2008 respectively, appeals against those decisions. The appeals were directed to both the President of the Office and the Chairman of the Administrative Council.

2. The sole issue raised in each appeal was that there had been non-compliance with provisions which governed consultation with the GAC. As was apparent from the letters of appeal, the complainants accepted there had been consultation with the GAC but the allegation was that the documents to facilitate consultation had not been provided within the timeframe contemplated. The grievance was expressed in the letters of appeal in the following terms: “For this meeting [a meeting of the GAC on 16 October 2008], the deadline for submitting documents to the GAC for opinion was not observed. Moreover, the Office failed to make a case that the urgency of the subject matter was such that the GAC should deviate from its usual rules”. The scope of the grievance, and thus the subject matter of the appeals, was narrowly framed and confined to the question of compliance with the time limits for the provision of documents.

3. It is unnecessary to detail the events which followed. Suffice it to note that on 24 August 2012 the complainants each filed a complaint with the Tribunal against the implied rejection of their appeals which had not, by that time, been determined. The two complaints are based on the same facts and raise the same questions of law. They are therefore joined so that one judgment can be rendered.

4. The pleas of the parties were articulated in the complainants’ single brief (filed on 24 August 2012), the EPO’s reply (dated 29 November 2012), the complainants’ rejoinder (dated 8 January 2013) and the EPO’s surrejoinder (dated 18 April 2013). By the close of the written proceedings, which traversed a multitude of issues, it became tolerably clear and, importantly, having regard to the narrowly framed subject

matter of each appeal and the ensuing complaint, that the EPO accepted that the complaints were receivable (save in relation to one matter) and that there had not been consultation conformable with all the requirements of Article 38 of the Service Regulations.

5. The real remaining issue is what is the appropriate relief in the face of the conceded non-compliance with the applicable time limits for the consultation of the GAC. In their brief, the complainants seek, relevantly, the quashing of what they consider to be an implied rejection of their internal appeals, the quashing of the Administrative Council's contentious October 2008 decisions, moral damages and costs.

6. There are numerous judgments of the Tribunal concerning the legal consequences of the failure of an organisation to consult with representative bodies before decisions are made by the organisation and what relief should be granted.

7. In recent cases concerning the EPO where failure to consult had been established, on some occasions decisions have been set aside or quashed (see, for example, Judgment 3522) but, on other occasions, they have not (see, for example, Judgment 4385).

8. In the present case, unlike the case which led to Judgment 4385, cited above, there was no complete failure to consult. Rather, the grievance is that relevant documents to facilitate consultation were not provided in a timely manner. Article 1 of the Rules of Procedure of the GAC in force at the material time required, in a case such as the present, a notice convening a meeting of the GAC to be sent 15 working days before the date of the meeting. Article 1 also required the notice to be accompanied by an agenda and "where possible, by any documents submitted for discussion that [had] not been distributed already". The words "where possible" signify that the requirement to send documents was not absolute.

9. As a matter of fact, the documents for consideration by the GAC at its meeting on 16 October 2008 were not sent until 10 October 2008, contrary to the requirements of the Rules of Procedure of the GAC.

10. In its reply, the EPO framed, correctly, the test for assessing, in a case such as the present, whether a decision should be quashed as whether the decision was tainted only with a procedural flaw of lesser importance, citing Judgments 939, consideration 35, and 890 consideration 3.

11. In the present case, the Tribunal is not satisfied that the contentious October 2008 decisions should be quashed. The decisions were tainted only with a procedural flaw of lesser importance. While there was a procedural irregularity attending the meeting of the GAC on 16 October 2008, the complainants have not established any substantial prejudice from the late provision of the documents nor can it be said that the consultation process was truly compromised. Accordingly, the complaints will be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 4 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ