116th Session **Judgment No. 3291**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr E. A., Mr G. A., Mr W. S. B., Mr R. B., Ms N. A. C., Mr J.-M. J.C. C., Mrs A. D., Mrs B. F., Mr S. G., Mr H. G., Mr J. H., Mr N.C. J., Mr P.-O. J., Mr S. J., Mrs B.M. W.M. K., Mr H.S. K., Mr L.T. K., Mr W.E. Kys, Mrs A. M., Mr D. M., Mr O. N., Ms E. P., Mr G. P., Mr E. R., Mr J. R., Mr D. S., Ms A. S., Mr J.U.G. S., Mr S.V. S. (his second), Mr I.H. T. (his sixth), Mr M.P. T. and Mrs M. W. (her second) against the European Patent Organisation (EPO) between 2 and 24 June 2009, the correction of some of the complaints having taken place between 29 June and 20 July, the supplementary information provided by Mr T. on 10 and 14 September 2009, the EPO's reply of 12 August 2011, the complainants having chosen not to file a rejoinder;

Considering the letters sent by Messrs C., K., N., S. and S. in August and September 2012 informing the Registrar of the Tribunal that they wished to withdraw suit and the letter of 22 April 2013 in which the EPO indicated that it had no objection to their withdrawal of suit;

Considering the complaint filed by Mr P. C. against the EPO on 19 June 2009, the EPO's reply of 23 February 2011, Mr C.'s rejoinder of 10 May, the EPO's surrejoinder of 17 August 2011, the e-mails of

17 October 2012 by which the Registrar informed the parties that further to their agreement the proceedings were suspended *sine die*, the e-mail of 27 March 2013 by which Mr C. asked that the proceedings be resumed and his submissions of even date, the EPO's comments thereon of 20 May, Mr C.'s observations of 14 June and the EPO's final comments of 17 July 2013;

Considering the complaint filed by Mr R. G. against the EPO on 6 May 2010, the EPO's reply of 23 February 2011, Mr G.'s rejoinder of 17 May and the EPO's surrejoinder of 22 August 2011;

Considering the second complaint filed by Mr R. G. against the EPO on 18 May 2010, the EPO's reply of 23 February 2011, Mr G.'s rejoinder of 8 April and the EPO's surrejoinder of 14 July 2011;

Considering the complaint filed by Mr R. P. against the EPO on 28 April 2010 and corrected on 17 May 2010, the EPO's reply of 12 August 2011, Mr P.'s rejoinder of 16 September and the EPO's surrejoinder of 14 December 2011;

Considering the second complaint filed by Mr R. P. against the EPO on 14 June 2010 and corrected on 5 July 2010, the EPO's reply of 23 February 2011, Mr P.'s rejoinder of 21 March and the EPO's surrejoinder of 28 June 2011;

Considering the third complaint filed by Mr R. P. against the EPO on 5 July 2010, the EPO's reply of 23 February 2011, Mr P.'s rejoinder of 21 March and the EPO's surrejoinder of 28 June 2011;

Considering the fourth complaint filed by Mr R. P. against the EPO on 9 December 2010, the EPO's reply of 9 May 2011, Mr P.'s rejoinder of 9 June and the EPO's surrejoinder of 19 September 2011;

Considering the complaints filed by Mrs A. D. (her second), Mr T. H., Mr A.C. K. (his third), Mr I.H. T. (his ninth), Mr P. O.A. T. (his fourth) and Mrs M. W. (her third) against the EPO on 7 May 2010, Mr H.'s complaint having been corrected on 29 October 2010,

the EPO's reply of 23 February 2011, the complainants' rejoinder of 7 April and the EPO's surrejoinder of 15 July 2011;

Considering the complaints filed by Mrs A. D. (her third), Mr T. H. (his second), Mr A.C. K. (his fourth), Mr I.H. T. (his tenth), Mr P.O.A. T. (his fifth) and Mrs M. W. (her fourth) against the EPO on 6 May 2010, those of Messrs H., K. and T. having been corrected on 10 June 2010, the EPO's reply of 12 August 2011, the complainants' rejoinder of 14 November 2011 and the EPO's surrejoinder of 27 February 2012;

Considering the eleventh complaint filed by Mr I.H. T. against the EPO on 31 May 2010, the EPO's reply of 23 February 2011, the complainant's rejoinder of 25 March and the EPO's surrejoinder of 4 July 2011;

Considering the twelfth complaint filed by Mr I.H. T. against the EPO on 6 September 2010 and corrected on 27 September 2010, the EPO's reply of 23 February 2011, the complainant's rejoinder of 22 March and the EPO's surrejoinder of 28 June 2011;

Considering the thirteenth complaint filed by Mr I.H. T. against the EPO on 23 September 2010, the EPO's reply of 23 February 2011, the complainant's rejoinder of 14 March and the EPO's surrejoinder of 22 June 2011;

Considering the fourteenth and fifteenth complaints filed by Mr I.H. T. against the EPO on 4 January 2011, the EPO's replies of 9 May, the complainant's rejoinders of 7 July and the EPO's surrejoinders of 14 October 2011;

Considering the applications to intervene in Mr T.'s twelfth complaint filed by Messrs A.C. K. and P.O.A. T. on 29 July 2011 and the EPO's comments of 26 September 2011;

Considering the application to intervene in Mr T.'s thirteenth complaint filed by Mr A.C. K. on 26 July 2011 and the EPO's comments of 10 August 2011;

Considering the applications to intervene in Mr T.'s thirteenth complaint filed by Messrs T. H. and P.O.A. T. on 29 July 2011 and the EPO's comments of 26 September 2011;

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;

CONSIDERATIONS

1. Fifty-six similar complaints (with five applications to intervene, and five requests to withdraw their complaints) have been brought before the Tribunal challenging general decisions taken by the Administrative Council (hereinafter "the Council") and, in some cases, also challenging their implementation by the President of the European Patent Office, the EPO's secretariat. The related internal appeals were filed with the Council and, with the exception of four cases, also with the President. All the appeals brought before the Council were forwarded to the President for decision, declining the jurisdiction of the Council's Appeals Committee (ACAC), as the Council considered that the decisions at issue were general decisions having no direct effect on the complainants. As such, the President was considered competent to decide based on the implementation of the decisions. The President considered all the appeals as unfounded and forwarded them to the Internal Appeals Committee (IAC) for opinion.

2. In their complaints, the complainants impugn the Council's decisions to refer their appeals to the President. The Council's general decisions against which their appeals were directed are the following:

I in cases: A. and [26] others v. EPO, C. v. EPO, and T. (No. 11) v. EPO:

(a) CA/D 32/08, dated 9 December 2008, amending the Regulation on Internal Tax by reducing the coefficients of the internal taxation schedule with effect from 1 January 2009 (in comparison to those applicable under CA/D 13/77);

(b) CA/D 27/08, dated 9 December 2008, revising inter alia the monthly basic salary scales in Annex III to the Service Regulations for Permanent Employees of the European

Patent Office (hereinafter "the Service Regulations") with effect from 1 January 2009;

II in cases: P. v. EPO, T. (No. 9) and [5] others v. EPO, and G. (No. 2) v. EPO:

(c) CA/D 14/09, dated 27 October 2009, regarding the setting up of a reserve fund for sickness insurance liabilities relating to pension recipients. The decision provided that Regulations for the Reserve Funds for Pensions and Social Security would apply to the reserve fund, that payments made into the Reserve Funds for Pensions and Social Security in accordance with CA/D 1/07, Article 4800, would be allocated to the reserve fund and that future payments into it would be made from the budget of the European Patent Organisation;

III in cases: G. v. EPO and T. (No. 10) and [5] others v. EPO:

(d) CA/D 13/09, dated 27 October 2009, setting up a reserve fund to "fund the Organisation's liability for lump-sum payments as partial compensation for the national tax levied on pensions paid under the Pension Scheme Regulations to former employees, who took up their duties with the European Patent Office before 1 January 2009, and to those entitled under them";

IV in cases: P. (No. 2) v. EPO, P. (No. 3) v. EPO, and T. (No. 13) v. EPO:

(e) CA/D 28/09, dated 10 December 2009, amending Articles 62 and 69 of the Service Regulations. The complainants contest particularly the amendment of Article 69(4) of the Service Regulations which previously provided that the dependents' allowance was to be granted "on application by the permanent employee, with supporting evidence, for children aged between eighteen and twenty-six who are receiving educational or vocational training". The amended version, as enshrined in Article 2(b) of the Council decision, provides that the dependents' allowance shall be granted

"on application by the permanent employee, with supporting evidence, for children who have not reached twenty-six years of age and are receiving educational or vocational training";

(f) the amendment of Circular No. 82, implementing CA/D 28/09;

V in case: T. (No. 12) v. EPO:

(g) CA/D 22/09, dated 10 December 2009, amending Articles 2, 35 and 38(a) of the Service Regulations along the lines of the President's proposal contained in CA/181/09 which, according to its wording, sought "to clarify that permanent employees and staff employed on contract may be appointed as chairmen or members" of the bodies defined in paragraph 1 of Article 2 of the Service Regulations and that they may also act as experts to these bodies;

VI in cases: P. (No. 4) v. EPO and T. (No. 14) v. EPO:

(h) CA/D 7/10, dated 30 June 2010, whereby the Council adopted the President's proposal contained in CA/66/10 Rev.1 for the amendment of Article 83 of the Service Regulations. This decision abolished the pay-as-you-go financing of the healthcare insurance scheme together with the 2.4 per cent capping guarantee for the contributions paid by employees and introduced the possibility to adjust them by a maximum of 10 per cent per year. The new system empowered the President to determine the contributions towards healthcare insurance on the basis of an actuarial study. The decision provided for a transitional period, until 2014, during which time employee contributions would not exceed the 2.4 per cent ceiling and any actual difference with the calculated rate would be borne by the Office;

VII in case: T. (No. 15) v. EPO:

(i) CA/D 4/10, dated 28 June 2010, amending Articles 77, 80 and 81 of the Service Regulations so as to abolish the existing regulations providing for the reimbursement of

the expenses incurred upon removal of staff between various places of employment (when taking up their service with the EPO and upon retirement). The amended articles allowed for predetermined lump-sum compensations, which may be revised by future presidential decisions.

3. The complainants whose appeals were filed with the Council and subsequently forwarded to the President for decision, contest those referrals. They submit that, as the contested decisions were taken by the Council, the President is not competent to provide the requested relief (to annul those decisions). They assert that the Council is the only body competent to handle their appeals in accordance with the relevant articles of the Service Regulations, and that the decision taken by the Council not to refer the appeals to the ACAC, but to refer them instead to the President, who then forwarded them to the IAC for opinion, is therefore to be considered a final decision tantamount to a rejection of their appeals and a confirmation of the earlier decisions.

4. The EPO, as authorised by the Tribunal, confines its replies to the issue of receivability. It points out that the complaints should all be declared irreceivable on the grounds that:

(a) the internal remedies have not been exhausted in accordance with Article VII, paragraph 1, of the Tribunal's Statute. It notes in this regard that the Council was correct in forwarding the appeals to the President for decision, who correctly referred them to the IAC for opinion (which is still pending); and

(b) the contested decisions of the Council are not individual decisions but rather decisions of general application, and cannot as such, be challenged unless and until they are applied in a prejudicial matter to each complainant (see Judgment 2953, under 2).

5. As the complaints all share the same issues of receivability, impugn general decisions, raise arguments similar to those decided in

Judgment 3146, and are based on the same or on similar elements, the Tribunal finds it appropriate to join them.

6. The Tribunal considers that the complaints must be dismissed as irreceivable. Consequently, the applications filed by interveners must likewise be dismissed, as the claims are the same. The reasoning set out in considerations 10 and 12 of Judgment 3146 suffices to dismiss all these complaints, regardless of whether they involved parallel appeals filed both before the Council and the President, or only appeals filed before the Council. The Tribunal refers to consideration 10 of Judgment 3146 with regard to the complaints involving parallel appeals, and to consideration 12 for the complaints where the internal appeal was brought only before the Council. These considerations read as follows:

> "10. The Staff Regulations allow for appeals to the Administrative Council in respect of decisions of that Council and, also, to the President of the Office in the case of decisions by the President. The President implements decisions taken by the Administrative Council. Thus, where, as here, an employee challenges both the underlying decision of the Administrative Council and a decision of the President implementing it, a question arises as to the course to be taken by the employee who wishes to file an internal appeal challenging both the underlying decision and the decision implementing it. It is clear that the jurisdiction of the Appeals Committee of the Administrative Council extends only to decisions taken by it. Hence it cannot entertain appeals with respect to decisions implementing its underlying decisions. However, it is well settled that a staff member who challenges an individual decision may, at the same time and in the same internal appeal, challenge the related underlying decision. Thus, it was said in Judgment 1786, under 5, in relevant part:
>
> > 'the staff member must impugn an individual decision applying a general one and, if need be, may for that purpose challenge the lawfulness of the general one without any risk of being told that such challenge is time-barred.'
>
> Similarly, it was said in Judgment 1329, under 7, in relevant part:
>
> > 'Firm precedent has it – see for example Judgment 1000 […] – that an international civil servant may, in challenging a decision that affects him directly, plead the unlawfulness of any general measure that affords the basis for it in law. The indisputable basis in law for the individual decisions challenged in this case is the Council's decision of 20 December 1991 setting the rate

> of the rise in staff pay for 1992. The conclusion is that the complainants may plead the unlawfulness of the Council's decision.'
>
> It follows from what was said in Judgments 1786 and 1329 that, if an individual decision is set aside because of the unlawfulness of the underlying decision, the latter must also be set aside.
>
> [11.] […]
>
> 12. In conclusion, as the Administrative Council's referral of the complainant's appeals to the President was lawful, and the President took the view that the appeals were unfounded and consequently forwarded the appeals to the Internal Appeals Committee for decision, and as that decision is still pending, the complaint is irreceivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal since the impugned decisions cannot be considered final as the internal means of redress have not been exhausted. To declare the complaint irreceivable causes the complainant no prejudice since he may appeal, if necessary, to the Tribunal, against the future decision of the President regarding the outcome of his pending internal appeals."

As set out above, the Tribunal considers that the Council's referrals to the President do not involve any error of law. With regard to the parallel appeals, it notes that in accordance with a general principle of law, a person cannot simultaneously submit the same matter for decision in more than one proceeding. With regard to the appeals brought only before the Council, the Tribunal finds that the Council acted correctly in forwarding those appeals to the President, given that the contested general decisions did not affect them directly and therefore could only be challenged with regard to their implementation and individual application as decided by the President.

7. The present cases must be distinguished from the one decided in Judgment 3053, where the Tribunal found that the Council was wrong in declining its jurisdiction. It must be considered that in that case the complainant was acting as a representative of the General Advisory Committee (GAC), which was directly affected by the general decision, as the proposals which led to the Council's impugned decision had not been submitted to the GAC for its opinion. Bypassing the GAC constituted an error of law regarding Article 38(3)

of the Service Regulations; that error of law being enough to vitiate the decision. The complainant was considered to have a cause of action because he was a member of the GAC, representing the GAC's interests. In the present cases, none of the complainants has been directly affected by the general decisions that they seek to challenge. One complainant filed his appeal as a member of the GAC (asserting that the decision CA/D 7/10 was taken without having provided the GAC with documents considered necessary). However, he could not be considered to have a cause of action as he did not represent the GAC as a whole. That is because the GAC was consulted and submitted its opinion, which shows that the majority did not agree that the documents submitted were insufficient. The question of insufficient documentation can, if necessary, be raised by staff members in future appeals challenging the individual decision (implementing the general decision) which directly affects them.

8. The Tribunal notes that allowing a complaint against a general decision which does not directly and immediately affect the complainant but which may have a direct negative effect on her/him in the future, would cause an unreasonable restriction of the right of defence, as staff members would then have to impugn immediately all general decisions which may have any connection with their future interests, on the basis that a general decision which is not challenged within the established time becomes immune from challenge. On this approach, once a general decision is considered immune, any complaint impugning the subsequent decision implementing it could not challenge the lawfulness of the underlying general decision. Considering this, the Tribunal is of the opinion that the approach illustrated by the recent case law (Judgments 2822 and 3146) is to be followed. According to that case law, a complainant can impugn a decision only if it directly affects her/him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her/him, but she/he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action.

9. In light of the above considerations, the complaints must be dismissed as irreceivable and the applications to intervene must also be dismissed. Therefore, there is no reason for the Tribunal to examine other issues regarding the receivability or the merits of the complaints which can, if necessary, be raised when challenging the future decisions of the President regarding the outcome of the pending internal appeals.

DECISION

For the above reasons,

1. The complaints are dismissed as irreceivable and the applications to intervene are also dismissed.

2. The withdrawal of suit by Messrs C., K., N., S. and S. is hereby recorded.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet