Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

119th Session **Judgment No. 3428**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr C. S., Mr J.-F. B. (his second), Mr A. O. G., Mr A. H., Mr L. M., Ms R. M., Ms M. M., Ms E. M., Mr A. P. (his second), Mr S. P., Mr F. S., Mr W. S., Ms V. U.-P., Ms C. V., Mr J. M. V. G. and Mr M. H. against the European Patent Organisation (EPO) on 14 March 2011 and corrected on 10 June, the EPO's reply of 20 September, the complainants' rejoinder of 27 December 2011 and the EPO's surrejoinder of 12 April 2012;

Considering the complaints filed against the EPO by Mr C. S. (his second), Mr J.-F. B. (his third), Mr A. H. (his second), Mr Y. K. (his second) and Mr W. S. (his second) on 4 July 2011, and by Ms V. U.-P. (her second) on 6 July, the complaint of Mr K. having been corrected on 11 October 2011, the EPO's reply of 20 January 2012, the complainants' rejoinder of 27 April and the EPO's surrejoinder of 13 August 2012;

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 and the pleadings may be summed up as follows:

A. On 21 October 2008 the Administrative Council of the EPO adopted decisions CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08 and CA/D 18/08 concerning the introduction of a new pension scheme

and a salary savings plan at the European Patent Office, the EPO's secretariat. All the complainants were recruited by the EPO after 1 January 2009, the date on which these decisions entered into force.

On 28 May 2010 Mr S., who had been asked to indicate whether he intended to transfer the pension rights he had acquired before joining the EPO, submitted a request for information to the Administration. The pension service replied to him by e-mail on 23 June. On 20 September Mr S. lodged an internal appeal with the President of the Office, in which he contended that Article 10 of the New Pension Scheme Regulations, concerning the pension rate, had been incorrectly interpreted and requested the cancellation of the "decision" of 23 June, amongst other relief. Mr G., Mr H., Ms M., Mr S. and Ms U.-P. associated themselves with this appeal. The matter was referred to the Internal Appeals Committee on 19 November 2010.

In the meantime, on 22 September 2010, Mr S. had also submitted an appeal to the Chairman of the Administrative Council, in which he complained of the new pension scheme's "lack of clarity" and called for the restoration of the previous scheme. The other complainants joined in this appeal. At its 126th meeting, held on 14 and 15 December 2010, the Administrative Council decided to forward this and a number of similar appeals to the President of the Office on the grounds that they had been "misdirected" to it. This is the decision impugned in the first case now before the Tribunal. The complainants were notified of the forwarding of their appeals to the Internal Appeals Committee by letters of 27 January 2011. They filed their complaints with the Tribunal on 14 March 2011.

On 6 October 2010 the Appeals Committee of the Administrative Council delivered an opinion on some 3,600 appeals which had been lodged in 2009 against the new pension scheme and Salary Savings Plan. It found that the General Advisory Committee had not been properly consulted about the proposed amendments to the pension scheme. On learning of this opinion, on 21 December 2010 Mr B. lodged an appeal with the Chairman of the Administrative Council in which he complained that the implementation of the Salary Savings Plan and new Pension Scheme Regulations had placed employees

recruited after 1 January 2009 in a worse position than employees who had taken up their duties before that date; he asked to have the former version of the Regulations applied to him. Mr S. joined in this appeal. On 4 January 2011 Mr S. lodged a similar appeal with which Mr H., Mr K. and Ms U.-P. associated themselves.

At its 127th meeting, held on 29 and 30 March 2011, the Administrative Council decided to forward these and several other similar appeals to the President of the Office on the grounds that they had been "misdirected" to it. This is the decision impugned in the second case presently before the Tribunal. The complainants were informed by letters of 6 June 2011 that the matter had been referred to the Internal Appeals Committee. They filed complaints with the Tribunal in July.

B. The complainants contend that the forwarding of their appeals to the President of the Office constitutes a final decision dismissing these appeals, for they consider that the President is not competent to set aside or amend a decision of the Administrative Council.

In the first case, the complainants seek the setting aside of decisions CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08 and CA/D 18/08 which, in their view, "cause them serious harm", and the payment of damages for moral injury. Subsidiarily they ask the Tribunal to order the EPO: to ensure that, when the capital built up under the Salary Savings Plan falls due for payment to them, it will be exempt from national income tax, as they were promised when they were recruited; correctly to interpret the concept of capping inherent in Article 10 of the new Pension Scheme Regulations, and to "find a solution to all the defects" in these regulations and the savings plan. Lastly, they claim costs.

In the second case, the complainants point out that, in breach of Article 38 of the Service Regulations for Permanent Employees of the European Patent Office, the General Advisory Committee had only four working days instead of 15 to give its opinion. They request that their submissions in the first case be deemed an integral part of those entered in the second.

They ask to have decisions CA/D 12/08, CA/D 13/08, CA/D 14/08, CA/D 17/08 and CA/D 18/08 set aside or, at least, not applied to them. They also claim moral damages and costs.

C. The Tribunal authorised the EPO to confine its replies to the issue of the receivability of the complaints.

The defendant first taxes the complainants with failing to exhaust internal means of redress. It submits that the decision to forward their appeals to the President of the Office does not constitute a final decision dismissing these appeals, and that it was in keeping with the case law according to which an appeal filed with the wrong authority must be redirected to the competent authority.

The EPO then objects to receivability on the grounds that the complainants are not challenging any individual decision adversely affecting them and that they therefore have no cause of action. It points out that Judgment 2953 establishes that a complainant cannot challenge a rule of general application unless and until it is applied in a manner prejudicial to him or her. It adds that, as the pension service's e-mail of 23 June 2010, which, it emphasises, did not constitute a decision, was addressed solely to Mr S., he alone was entitled to challenge it.

Lastly, the EPO contends that the complainants' claims for relief are also irreceivable: those seeking the setting aside of the disputed decisions of the Administrative Council, because the complainants have entered them for the first time in the proceedings before the Tribunal; and those presented subsidiarily, because they seek injunctions against it and because internal means of redress have not been exhausted.

D. In their rejoinders the complainants argue that the reference to Judgment 2953 is irrelevant and that, even if the disputed decisions of the Administrative Council are of general application, they nevertheless have a "serious legal effect", because they impose on them an unlawful pension scheme. In this respect they add that the nature of the disputed decisions has no bearing on receivability since, in their opinion, the receivability of a complaint is governed solely by

Article VII of the Statute of the Tribunal. They note that the Internal Appeals Committee, which is known for its "incredible delays", has taken no action on their appeals since they were forwarded to it and they say that, since no decision was forthcoming, they filed their complaints with the Tribunal in accordance with Article 109(2) of the Service Regulations and Article VII, paragraph 3, of the Statute of the Tribunal. Relying on Judgment 3053, they submit that when, as in the instant case, the only body competent to examine an appeal declines jurisdiction, this decision constitutes a final decision which may be impugned before the Tribunal.

The complainants request the joinder of their cases with a number of other similar cases.

E. In its surrejoinders the EPO maintains its position. It informs the Tribunal that, as soon as the complainants filed their complaints, it put their internal appeals "on hold" in accordance with the "principle of good governance". As far as the request for joinder is concerned, it says that the "procedural treatment" differs from one case to another.

CONSIDERATIONS

1. On 21 October 2008 the Administrative Council of the EPO adopted five 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 and a salary savings plan for permanent employees of the Office, which entered into force on 1 January 2009.

2. The complainants, all of whom were recruited by the Organisation after the latter date and who are therefore subject to this new scheme, are among numerous employees who have challenged the decisions in question in both internal appeals and complaints filed with the Tribunal.

3. On 23 June 2010, one of the complainants, Mr S., received an e-mail in response to a request for information which

he had sent to the Administration. In his opinion, this e-mail contained an incorrect interpretation of Article 10 of the New Pension Scheme Regulations, which concerns the pension rate. Thereupon he lodged a first appeal with the President of the Office, with which five other complainants associated themselves. On 22 September 2010 he submitted another appeal, addressed this time to the Chairman of the Administrative Council, in which he criticised the new pension scheme's "lack of clarity" and called for the restoration of the previous scheme. At its 126th meeting, held on 14 and 15 December 2010, the Administrative Council decided to forward this appeal, along with those of 15 complainants who had joined it and a number of other similar appeals to the President of the Office on the grounds that they had been "misdirected" to it. This is the decision impugned in the first of the two cases before the Tribunal.

4. In an opinion dated 6 October 2010 concerning the appeals of other employees, the Appeals Committee of the Administrative Council considered that General Advisory Committee had not been properly consulted prior to the adoption of the decisions setting up the new pension scheme and, with regard to the merits, that these decisions also appeared to be unlawful in several respects. On learning of this opinion, six of the complainants submitted new appeals to the Chairman of the Administrative Council on 21 December 2010 and 4 January 2011. In substance, these appeals sought the same remedies as their previous appeals, but they contained additional reasoning echoing the criticism expressed by the Appeals Committee. At its 127th meeting, held on 29 and 30 March 2011, the Administrative Council decided to forward these appeals, along with those submitted by other officials, to the President of the Office. That is the decision impugned in the second case before the Tribunal.

5. It must, however, be noted that in both cases the main relief sought by all the complainants is the setting aside of the "package of decisions" taken by the Administrative Council on 21 October 2008.

6. Almost all the complainants have asked for the convening of a hearing. In view of the abundant and sufficiently clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

7. The complaints have the same basic purpose, essentially raise the same issues of receivability and are based on similar facts. Moreover, they are closely interconnected in that some of them refer to the submissions in the others. Despite the reservation expressed in this regard by the defendant, the Tribunal therefore finds it appropriate to join them in order that they may form the subject of a single judgment (see Judgment 3291, under 5).

8. Some of the complainants have requested that these complaints also be joined with those related to other cases concerning the reform of the EPO pension scheme, but the conditions for such a joinder do not appear to be met. The Tribunal will not therefore grant this request.

9. The EPO which, as authorised by the Tribunal, confines itself in its submissions to dealing with questions of receivability, raises two main objections thereto.

10. The objection with the most far-reaching implications is that these complaints are directed against general decisions which the complainants may not directly impugn.

11. The Tribunal will not accept the complainants' surprising argument that questions pertaining to the nature of the impugned decisions and their cause of action to request the setting aside thereof have no bearing on the receivability of their claims. According to the complainants, the only requirements regarding the receivability of complaints laid down by the Statute of the Tribunal are those mentioned in Article VII, namely that all internal means of redress must have been exhausted, that a final decision must have been taken and that the time limit for filing a complaint with the Tribunal must

have been respected. However, these rules concern only the procedural aspect of receivability. Receivability is also governed by Article II of the Statute, which, by defining the nature of disputes which the Tribunal has competence to hear *ratione personae* and *ratione materiae*, establishes further rules of receivability pertaining to the substantive aspect thereof. Thus a complaint will be receivable only if it is directed against a decision which is of a kind that may be challenged before the Tribunal and if it is filed by an official who shows a cause of action (see, among innumerable examples, Judgments 1756, under 5, 1786, under 5 and 6, 2379, under 5, or 3136, under 11).

12. The aforementioned objection to receivability is undoubtedly well-founded. The decisions of the Administrative Council of 21 October 2008 which the complainants, as stated earlier, seek to impugn directly in their complaints, are regulatory texts or, in other words, general decisions governing all officials subject to them. As the Tribunal has consistently held, where such texts must ordinarily be followed by individual implementing decisions, as is the case here of employees recruited after 1 January 2009, they are not open to challenge before the Tribunal. When these texts are adopted, they affect the protected personal interests of individual employees only in theory, and it is not until a subsequent individual decision is taken that they produce a practical legal effect. It is only the latter decision which may form the subject of a complaint before the Tribunal, and if the official concerned wishes to challenge the regulatory text which affords the basis for it in law, he must plead the unlawfulness of that decision in this complaint (see, for example, Judgments 1786, under 5, 1852, under 3, 2379, under 5, 2822, under 6, 2953, under 2, and, for recent confirmation of this case law, the aforementioned Judgment 3291, under 8).

13. In the instant cases, at the time when the disputes were submitted to the Tribunal, the impugned decisions of the Administrative Council had not yet given rise to individual decisions affecting the complainants. In particular, the above-mentioned e-mail of 23 June 2010, which the complainants view as a decision adversely affecting

them, cannot be regarded as such. This e-mail, which merely provided Mr S. with some information by way of guidance, in response to a request to this effect, cannot in any way be equated with a decision establishing the amount of his pension and in practice had no legal effect on his situation. It was not therefore a decision that could be challenged before the Tribunal (see, for example, Judgment 764, under 4). This finding in respect of the addressee of the e-mail also applies *a fortiori* to the other complainants.

14. Moreover, the EPO's second fundamental objection to receivability, based on the fact that internal means of redress were not exhausted before the complaints were filed with the Tribunal, is also well-founded.

15. In the complainants' opinion, the Administrative Council alone was competent to consider their internal appeals, since they challenged decisions taken by that body. They therefore argue that it was wrong to forward these appeals to the President of the Office, who then referred them to the Internal Appeals Committee reporting to him, rather than submitting them to the Appeals Committee of the Administrative Council, if the Council intended to dismiss them. In their view, it follows that these referrals to the President must be deemed to be final decisions equivalent to a dismissal of their appeals.

16. Since, as stated above, the disputed general decisions of the Administrative Council did not directly and adversely affect the complainants and could therefore be challenged only when individual implementing decisions of the President gave practical effect to them, it was the latter authority who was competent to hear the appeals in question. This conclusion applies *a fortiori* to the appeals of persons who had submitted a parallel appeal to the President of the Office, as this approach conflicts with the general legal principle that a person cannot litigate the same matter in separate, concurrent proceedings. No final decisions have yet been taken in these cases, since all the internal appeals of the complainants were rightly forwarded to the President of the Office who, considering that *prima facie* they

should be dismissed, referred them to the Internal Appeals Committee. Such decisions can be taken only in the light of opinions which the Committee has not yet issued; indeed, the written submissions indicate that it stayed its consideration of the appeals in question pending the delivery of this judgment. It follows that the complaints are irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal, because the internal remedies available under the Service Regulations were not exhausted before the complaints were filed (see, on all these points, the aforementioned Judgment 3291, under 6, which cites Judgment 3146, under 10 and 12).

17. It is to no avail that the complainants try to counter this reasoning by relying on Judgment 3053 where, on the contrary, the Tribunal held that the Administrative Council had been wrong to decline jurisdiction to hear a similar appeal. As the Tribunal has already had occasion to explain in the above-mentioned Judgment 3291, under 7, this finding stemmed from the fact that in the case in question, the complainant was acting as a representative of the General Advisory Committee and was challenging regulatory texts which had not been submitted to that Committee in accordance with the Service Regulations, with the result that those texts were deemed adversely to affect the complainant. These special circumstances are completely lacking in the instant cases.

18. Nor do the complainants have grounds for submitting that their appeals have formed the subject of implied decisions of rejection which they may challenge under Article VII, paragraph 3, of the Statute of the Tribunal and Article 109(2) of the Service Regulations. In this connection, it must first be recalled that the rules governing the receivability of complaints filed with the Tribunal are established exclusively by its own Statute. Thus, the possibility of filing a complaint against an implied decision of rejection is governed solely by Article VII, paragraph 3, of the Statute, which states that "[w]hen the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it", the person concerned may have recourse to the Tribunal. Article 109 of the Service Regulations

could not therefore apply here. Moreover, that article unlawfully provides for a period of "two months" which is different, albeit only slightly, from the sixty days specified in the Statute. When, before the expiry of the latter time limit, an organisation forwards an appeal to the competent advisory appeal body or takes any other action to deal with it, this step in itself constitutes "a decision upon [the] claim" within the meaning of Article VII, paragraph 3, of the Statute of the Tribunal which forestalls an implied rejection that could be challenged before the Tribunal (see, on these points, Judgments 532, 762, 786, 2681, 2948 or 3034). As in this case there is no evidence that the EPO failed to meet the requirement of taking this step, there was no implied decision to reject the complainants' appeals.

19. The complainants' reliance on the case law established in Judgments 408, 1684, 2132 and 2443, according to which an exception to the rule that internal means of redress must be exhausted can be made if an appeal is not dealt with by the competent bodies within a reasonable period of time, is misplaced. In this connection, the complainants refer to the "incredible delays" with which the Internal Appeals Committee of the EPO usually considers the cases submitted to it, but it must be found that this criticism is irrelevant in the instant cases where the complainants waited for scarcely one or two months following the referral to the Committee before bringing the case directly to the Tribunal. Clearly the fact that their appeals were not examined during this brief interlude could not in any way be described as a breach of the Organisation's duty to deal with them within a reasonable period of time.

20. As internal means of redress have not been exhausted, the claims that the impugned decisions should be set aside are irreceivable, as is the request made by the complainants in the second case before the Tribunal that the Organisation should "at least" not apply the New Pension Scheme Regulations to them.

21. In the first case before the Tribunal the complainants requested subsidiarily that the Tribunal should order the EPO

"correctly to interpret the capping in Art[icle] 10 [of the New Pension Scheme Regulations]", to "guarantee that the sum in [their] [Salary Savings Plan] account […] will […] be exempt from all national taxation" and to "find a solution to all the defects" of these regulations and this plan. The Tribunal may not, however, issue such injunctions to an international organisation. Hence these claims are also irreceivable (see, for example, Judgments 1456, under 31, 2244, under 12, or 2793, under 21).

22. It follows from the foregoing that the complaints must be dismissed as irreceivable in their entirety, without there being any need for the Tribunal to rule on the other objections to receivability raised by the EPO, or to examine the complainants' submissions on the merits of the disputes.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

(Signed)

GIUSEPPE BARBAGALLO DOLORES M. HANSEN PATRICK FRYDMAN

DRAŽEN PETROVIĆ