T. (No. 7), S. (No. 10) and K. (No. 6)

v.

EPO

120th Session **Judgment No. 3538**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr P. O. A. T. (his seventh), Mr H. S. (his tenth) and Mr A. K. (his sixth) against the European Patent Organisation (EPO) on 30 May 2011 and corrected on 8 July, the EPO's reply of 28 November 2011, the complainants' rejoinder of 10 April 2012, supplemented on 27 April, and the EPO's surrejoinder of 31 July 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 may be summed up as follows:

Mr K. and Mr T. are permanent employees of the European Patent Office, the EPO's secretariat, who challenge their April 2007 pay slip showing an increase in their pension contributions. Mr S., a former permanent employee who retired on 1 August 2010, also contests his pay slip for April 2007.

On 8 March 2007 the Administrative Council adopted decision CA/D 3/07, which, inter alia, increased the employees' pension contribution rate from 8 per cent to 9.1 per cent of their basic salary as from 1 April 2007. On the same day it adopted decision CA/D 4/07, which provides that, as from 1 April 2007, the reserve Fund for

Pensions shall be allocated payments under the budget of the EPO equivalent to the Office's contributions to the pension scheme at the rate of 18.2 per cent of the basic salaries paid, plus employees' contributions to the pension scheme at the rate of 9.1 per cent of the basic salaries paid, after deduction of the pensions actually paid.

Each complainant wrote to the Chairman of the Administrative Council and to the President of the Office on 20 July 2007 contesting their April 2007 pay slip. They requested that the decision to increase the contribution rate from 8 per cent to 9.1 per cent be annulled, and that they be reimbursed the excess amount of contributions deducted together with 8 per cent compound interest. They also claimed moral damages and costs.

On 30 July the Chairman of the Administrative Council informed the complainants that the Council had declined jurisdiction and referred the matter to the President. Mid-September the Director of Employment Law informed them that the President considered that the appropriate provisions had been applied and that their requests for review therefore could not be granted. The Director added that, given that the requests addressed to the President and the Chairman of the Administrative Council related to the same issue, they would be examined together by the Internal Appeals Committee (IAC).

In the course of the internal appeal proceedings the complainants asked to be awarded moral damages for undue delay in those proceedings. The complainants requested the reimbursement of their travel expenses to attend the hearings in The Hague and Mr K. further requested to be granted two days of special leave for having had to attend the two hearings. Mr T. requested one day of special leave and the payment of his travel expenses.

Having heard the complainants, the IAC issued its opinion on 30 December 2010. It found that the appeals were unfounded as there was no evidence to suggest that the increase in the contribution rate was unlawful. The complainants failed to raise any convincing doubts about the plausibility of the Office's methodology for evaluating the pension scheme. It nevertheless recommended that each complainant be awarded 500 euros in moral damages for undue delay in the

internal appeal proceedings, that Mr K.be granted one day of special leave, and that Mr K. and Mr S. be reimbursed the travel expenses incurred for attending the hearings in The Hague. By a letter of 3 March 2011 each complainant was informed that the President had decided to reject their appeals as unfounded and that they would not be awarded moral damages for undue delay, because the President considered that the overall duration of the appeal proceedings was reasonable in light of the complexity of the case and the fact that several appeals had been filed on that matter. Mr T.'s requests to be granted special leave and travel expenses in relation to the hearings were rejected as unfounded on the ground that he had not attended the second hearing. On the other hand Mr K., who attended the second hearing, was granted one day of special leave and he was informed that the travel expenses incurred in that respect would be reimbursed insofar as such payment had not yet been effected. Mr S. was granted reimbursement of his travel expenses insofar as such payment has not yet been effected. Each complainant impugns the decision contained in the letter of 3 March 2011.

The complainants ask the Tribunal to quash the impugned decision. They also ask it to quash the decision to increase their pension contribution rate from 8 to 9.1 per cent, "with maintenance of the [total] pension contributions at 24%; or, in the alternative, maintenance of the contribution rate at 27,3%, whereby Complainants' pension contribution rate remains at 8%, as decided in 1991 by the Administrative Council (CA/D 12/91) and President (Communiqué No. 188)". They further seek reimbursement of the excess contributions deducted plus 8 per cent compound interest, moral damages (5,000 euros each for Messrs S. and T., and 50,000 euros for Mr K.), and costs to cover "out of pocket expenditures". In addition, they request the Tribunal, pursuant to Article 11(1) of its Rules, to order an independent expert to provide an opinion on the increase of the pension contribution rate "if the claims are not granted in the written procedure".

The EPO asks the Tribunal to dismiss the complaints as partly irreceivable and otherwise unfounded. It adds that if the Tribunal decides that the EPO should reimburse the contributions, the corresponding

monthly payments should only accrue interest as from their due dates (simple interest, no compound interest should be ordered), and it considers that 8 per cent interest is excessive, stressing that the Tribunal currently awards interest at 5 per cent.

CONSIDERATIONS

1. The complainants, Mr T., Mr S. and Mr K., are or were employees of the EPO. In March 2007 the Administrative Council of the EPO accepted a recommendation of the President to increase the total rate of contribution to the EPO pension scheme to 27.3 per cent of basic salary as of 1 April 2007. This was reflected in the April 2007 payslips of the complainants by an increase of their individual contribution from 8 per cent to 9.1 per cent. They challenged their payslips, which culminated in a report of the Internal Appeals Committee (IAC) dated 30 December 2010 recommending the appeals be rejected as unfounded, though it recommended each complainant be paid 500 euros in moral damages for the length of the internal appeal proceedings. On 3 March 2011 the President wrote to the complainants indicating he had decided to accept the recommendation to reject their appeals as unfounded but to reject the recommendation to award moral damages. This is the decision impugned by each complainant.

2. One matter should be noted at the outset. The complainants took the approach, in their brief, of annexing the submissions they had made in the internal appeal and, in effect, adopting them in their brief (by incorporation by reference) though they advanced additional arguments concerning the reasoning of the IAC. This practice of complainants or defendants of simply adopting arguments contained in a document prepared for an internal appeal and annexing them to their legal briefs is entirely inappropriate. Parties to proceedings in the Tribunal should articulate fully and completely the arguments they advance to the Tribunal in their brief, reply, rejoinder and surrejoinder. Annexing and adopting submissions advanced in internal

appeals without setting out those arguments afresh runs the risk of obscuring the issues in the proceedings before the Tribunal and, potentially, creating false issues (see, for example, Judgment 2264, consideration 3).

3. Much of the argument developed in the brief (as opposed to the arguments in the submissions made in the internal appeal) involves a misconceived challenge to the processes adopted by the IAC and, more fundamentally, its role as the body to hear the appeal. The complainants challenge their payslips and, in doing so, seek to challenge a decision of the Administrative Council. However the payslips, and the amounts the complainants were required to pay by way of contribution to the pension scheme, were acts and decisions of the Administration for which the President is the responsible person and against whom any internal appeal should be maintained. Accordingly it was appropriate for the IAC to hear and determine the complainants' internal appeals against their payslips.

4. Three procedural issues need to be addressed. The first is that the complainants seek an oral hearing if their claims are not granted on the written material, presumably under Article 12 of the Tribunal's Rules. However they do not, as Article 12 requires, identify any witness they want the Tribunal to hear nor the issues the witness or witnesses would address. Accordingly this request is rejected.

The second issue is that in their rejoinder the complainants seek an order for an expert enquiry under Article 11 of the Tribunal's Rules if their claims are not granted on the written material. The EPO objects to this request on procedural grounds, namely that this claim was not raised in the complaint brief and is irreceivable. However this point is unsustainable (see Judgment 3209, consideration 13). Nonetheless, the request is misconceived. Plainly enough there is a power vested in the Tribunal to order measures of investigation that might include an expert enquiry. However this power fundamentally serves to assist the Tribunal in resolving issues raised by the parties and supported by the evidence adduced by the parties. For example, it is a power that might be used if expert evidence was adduced by both

the complainant and the defendant organisation but there was some unresolved difference of opinion between the experts. In such a case either the Tribunal of its own motion might order an expert enquiry or might do so on the application of a party. However, Article 11 does not create a mechanism intended to enable one party to make good a case which is otherwise deficient. This appears, in substance, to be the basis of the complainants' request. It should be rejected.

Lastly, the complainants requested the joinder of these complaints with other complaints concerning the increase in the pension contribution. However those other complaints were dealt with in the previous session of the Tribunal so the question of joinder is moot, though the complaints of the three complainants are joined for the purpose of rendering one judgment.

5. The Tribunal noted earlier that the way the complainants structured their pleas carried the risk that issues would not be properly identified. A convenient way of seeking to identify the issues (other than the three procedural issues just dealt with) is to consider the relief the complainants seek in their rejoinder. Firstly they seek an order that the decision to increase their pension contributions from 8 to 9.1 per cent be quashed *ab initio* with the maintenance of the total pension contribution rate at 24 per cent. Having regard to the pleas, they contend that such an order should be made because either the Administrative Council's decision to increase the contributions was unlawful or the application of that decision to their payslips was unlawful.

The second order they seek is the maintenance of the total contribution rate at 27.3 per cent whereby their own pension contribution rate remains at 8 per cent. Whether and why such an order can or should be made is entirely obscure. If the Administrative Council's decision and its implementation were unlawful the first order might be justified. However if those decisions are lawful, it is not the Tribunal's role to make some alternative decision, which this second order contemplates, as if the Tribunal can exercise the powers of the Administrative Council. It cannot. Nothing further need be said about this claim.

The third order the complainants seek is an order for moral damages in the amount of 5,000 euros for the complainants Mr S. and Mr T.. Having regard to the pleas, this is because of the "grief the Complainants have suffered in consequence of the impugned decision, and in light of the very real loss of life quality and loss of health for being forced to work on an increasing number of appeals". This is the way the claim is expressed in paragraph 241 of their rejoinder. This claim is without substance save in relation to the alleged delay in the internal appeals. The complainants have elected to challenge the increase to the pension payments decided upon by the Administrative Council. Plainly it is their right to do so. However the personal consequences for them of taking this course cannot be attributed to the EPO by way of an award of moral damages. Again, nothing further need be said about this claim, save with respect to the alleged delay in the internal appeal. This is discussed later.

The fourth order the complainants seek is an order for moral damages in the amount of 50,000 euros for the complainant Mr K.. Having regard to the pleas, this is because of "the health problems Mr K. has incurred as a result of pursuing the internal appeal which led to this Tribunal application. Mr K. believes those health problems are the product of the unreasonable pressure he has suffered in pursuing this appeal." Again, this is the way the claim is expressed in paragraph 241 of the complainants' rejoinder. It is not suggested in the pleas that the "pressure" is anything other than self-induced pressure arising from Mr K.'s decision to be involved in challenging the increase to the pension contribution rate (as well as challenges to a multiplicity of other decisions or actions of the EPO). In particular, the complainants complain that Mr K. was not given time off work to prepare this and other challenges. However they do not point to any legal right to time off. No doubt the pursuit of this and other challenges is likely to have been extremely demanding of Mr K. and the other complainants, particularly in the face of the committed defence of the decision to increase the pension contributions by the EPO (and other decisions and actions they have challenged). However Mr K. is exercising a legal right, as is the EPO in defending its decisions. Any personal consequences on Mr K. cannot be attributed

to the EPO by way of an award of moral damages. Again nothing further need be said about this claim.

6. The last two orders can be dealt with together. The complainants seek costs including out-of-pocket expenses, and some reimbursement for the time and trouble entailed in prosecuting their complaints. This is quantified in the sum of 3,000 euros for each complainant. The complainants also seek an order for costs for legal representation, translations not done by the Office and other miscellaneous costs. As their complaints are to be dismissed, their right to orders of this type is substantially diminished though not entirely eliminated. The Tribunal returns to this question at the conclusion of this judgment.

7. The claim for relief reflected in the first and third orders sought by the complainants raises the principal issue of substance in these proceedings. The following is the relevant background. In September 2006 a body called the Actuarial Advisory Group reported on the EPO pension scheme. The report recounted, at the outset, the history of the Group in the following terms. In 1992 the President established the Actuarial Advisory Group, consisting of three independent actuaries, to advise the EPO on the conditions to be met in order to ensure the equilibrium of the pension scheme. The Group had reported every three years and more recently every two years. In 2006 the President asked the Group to make recommendations regarding the future service contribution requirements and the equilibrium of the pension scheme balance sheet. The President also asked the group to examine long-term care insurance claims and especially the contribution rate to be applied.

In its report of September 2006 the Actuarial Advisory Group recommended increasing the global pension contribution rate from 24 per cent to 27.3 per cent and maintaining the long-term care contribution rate at its current level of 1.2 per cent. It also recommended that a further actuarial study should be made in three years' time, as at 31 December 2008. There was consultation with the General Advisory Committee (GAC) about this recommendation though the complainants

do not concede the consultation was appropriate or adequate. Nonetheless the President proposed that the recommendation of the Actuarial Advisory Group be accepted by the Administrative Council and that the Council increase the rate of contribution as recommended. This occurred and the implementation of this decision led to the payslips the complainants impugned in the proceedings leading to these complaints.

8. As noted earlier, the method the complainants have elected to use to present their arguments runs the grave risk that issues will be obscured or misunderstood. The first general point of possible substance raised by the complainants was to the effect that each had a contractual relationship with the EPO and it was not open to the EPO to unilaterally alter the terms of the contract and, to the extent that the applicable regulations permitted changes to pension contributions, that should have been drawn to the attention of each staff member at the beginning of their employment. This point really focuses on whether the implementation decision of deducting the pension contribution at a higher rate from each complainant's payslip was lawful. Moreover, the complainants argue that, properly construed, the relevant regulations did not authorise the Administrative Council alone to increase contributions. This point really focuses on the lawfulness of the underlying general decision that would, if correct, affect the lawfulness of the implementation decision.

9. The answers to these propositions are straightforward. Firstly, there was no legal obligation on the EPO to draw to the attention of every new staff member all or particular regulations that might impact on the ongoing employment of that staff member. Secondly, Article 33 of the European Patent Convention authorised the Administrative Council to amend the Pension Scheme Regulations that, in turn, authorised amendments to increase the contribution. The complainants' arguments to the contrary should be rejected.

10. As to the complainants' argument that there had been a violation of an acquired right, it should be rejected. The decision of

the Tribunal in Judgment 1392, in which a similar argument was rejected, was not as narrowly cast as suggested by the complainants and provides firm precedent for the rejection of this argument. As the Tribunal said (at consideration 34):

> "[A] pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits."

11. It is to be recalled that the Administrative Council made its decision to increase contributions on the basis of advice that had been provided by the Actuarial Advisory Group constituted by three actuaries. An actuary is a highly skilled professional who would ordinarily acquire the knowledge to undertake the work of an actuary during years of tertiary study at a high level. The same can be said of engineers in diverse fields of engineering, doctors in diverse fields of medicine and other professionals. Study and experience create expertise.

12. It is often the case that a court will be required to adjudicate on an issue where the opinion of an expert is an essential element in determining the outcome. Obvious examples would be the cause of illness and the prognosis of a staff member claiming some type of sickness benefit or sickness leave. Expert medical opinions would ordinarily underpin a court's determination of whether an entitlement to the benefit or leave was established. It would be in rare cases indeed that a court would determine such issues on the basis of arguments advanced by non-experts in the field in question, however intelligent or knowledgeable they may be in other fields of human endeavour.

13. In the present case each of the complainants is or was an examiner in the EPO. It is probable that each complainant has a high level of skill, knowledge and expertise in a field that enables them to perform their duties as examiners of patents. Patents often can, themselves, be redolent with scientific and other difficult or complex information and concepts requiring considerable skills and knowledge

to assess. However the existence of these skills and knowledge in each of the complainants does not render them an expert in other fields and, in particular, the field of actuarial study. Accordingly the complainants confront a difficulty at the threshold, of having undertaken their own analysis of the consideration by the expert actuaries of whether adjustments needed to be made to the pension contributions. A person, however intelligent and well read, cannot be considered an expert in a specialised field in the absence of training in that field. Views they might proffer carry, in substance, no evidentiary weight.

14. This has been recognised by the Tribunal in early judgments in which it has spoken of "evidence from authorities of equivalent weight" (see Judgment 1148, consideration 25, and Judgment 1248, consideration 4). Moreover the need for evidence of this character was adverted to by the Tribunal in the challenge to the 1992 contribution increases dealt with in Judgment 1392. The Tribunal referred in considerations 36 and 37 to the need for evidence to demonstrate flaws in the methodology actually used which provided the rationale for the decision of the EPO to increase the contributions. While the Tribunal did not say so in terms, there can be little doubt that it had in mind evidence from an expert in the relevant field, namely actuarial studies. It would be in the context of an expert opinion from an actuary challenging or contesting the expert opinion of the actuaries foundational to the decision of the EPO to increase contributions. Had there been such expert evidence then the Tribunal would have had to have evaluated that evidence and, as alluded to earlier in these reasons, might have appointed its own expert under Article 11 of the Tribunal's Rules.

15. In the present case the complainants do not provide expert evidence. While they eschew challenging the actuarial method (see, for example, paragraph 61 of their brief), the substance of their argument is, as they put it, "if wrong assumptions are made and wrong parameters are introduced in the actuarial calculation" they may deliver the wrong results. These are assessments appropriately made by experts in the relevant field, namely actuaries. In the absence of

expert evidence, there is no basis for the Tribunal to accept the complainants' arguments about the discount rate and other criticisms they make of the methodology used to justify the increase, and no basis for doubting the correctness of the opinion of the Actuarial Advisory Group on which the Administrative Council based its decision. In any event, even if the complainants had provided expert evidence, it would not follow that the decision of the Administrative Council or the implementation decisions deducting the higher rate from the complainants' payslips were unlawful. The power clearly vested in the Administrative Council to alter the pension scheme can be exercised lawfully if it represents a *bona fide* attempt to secure the pension scheme into the future and is based on what appears to be reasoned actuarial advice. The Administrative Council's decision had both attributes.

16. Two subsidiary issues remain to be dealt with. One concerns the length of the internal appeal, the other is whether the complainants are entitled to costs. As the IAC itself recognised, the proceedings took an unreasonable length of time. The internal appeals were commenced in July 2007. It was almost three and a half years later that the IAC published its opinion in December 2010. The President's rejection of the recommendation that the complainants be paid moral damages in the sum of 500 euros was based on the President's view that the case was complex and several appeals had been filed. Undoubtedly the case was complex and the proceedings somewhat complicated. However the issue raised in the internal appeal was an extremely important one for the complainants and also, it can be assumed, for many other officials of the EPO called upon to pay the higher contribution. In the circumstances the complainants' grievance should have been addressed with greater expedition. It does nothing to foster good relations between the staff and the administration for contentious issues like increases in pension contributions to remain unresolved for considerable periods of time. The complainants are entitled to moral damages for the delay in the internal appeal proceedings. Those damages are assessed in the sum of 2,000 euros each.

17. As the complainants have had some limited success in these proceedings, they are entitled to some costs, which are assessed in the sum of 500 euros each.

DECISION

For the above reasons,

1. The EPO shall pay each complainant 2,000 euros in moral damages for the delay in the internal appeal proceedings.
2. The EPO shall pay each complainant 500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2015, Mr Giuseppe Barbagallo, 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 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ