P. (E.) (No. 3)

v.

EPO

121st Session **Judgment No. 3614**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mrs E. P. against the European Patent Organisation (EPO) on 3 May 2012, the EPO's reply of 20 August, corrected on 27 August, the complainant's rejoinder of 4 October and the EPO's surrejoinder of 20 December 2012;

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 neither party has applied;

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

The complainant challenges the decision not to allow her to benefit from the transitional measure accompanying the replacement of the former invalidity pension with an invalidity allowance.

On 14 December 2007 the Administrative Council adopted decision CA/D 30/07, abolishing the invalidity pension system and replacing it with an invalidity allowance scheme with effect from 1 January 2008. Article 29 of CA/D 30/07 provided for a transitional measure aimed at ensuring that employees who were already in receipt of an invalidity pension on 1 January 2008 would continue to receive the same level of benefits when their invalidity pension was changed to an invalidity allowance.

In December 2007 the EPO's medical adviser met with the complainant to discuss the state of her health, as she had almost exhausted her entitlement to sick leave. Following that meeting, the medical adviser recommended that a procedure before the Medical Committee be launched. By a letter of 18 August 2008, the Administration informed the complainant that the Medical Committee had determined that she was permanently incapable of performing her duties. She would therefore be placed on non-active status due to invalidity with effect from 1 July 2008, and she would receive an invalidity allowance, pursuant to Article 62a of the Service Regulations for permanent employees of the European Patent Office, as from that date.

On 17 October 2009 the complainant sent a letter to the President of the Office in which she alleged that she had only recently become aware of the "promise" made by the EPO when the new invalidity scheme was introduced, namely to ensure that those already suffering from invalidity for whom the new scheme would be less advantageous would continue to benefit from the old rules. She argued that since she was already on long-term sickness and under examination by the Medical Committee at the time when the new scheme was introduced, she had a legitimate expectation that the old scheme would apply to her. On this basis she requested that her invalidity allowance be increased to a level corresponding to the amount she would have received as an invalidity pension under the old scheme with retroactive effect from 1 July 2008 or, failing that, from three months prior to the date of her request. She also asked to be paid interest on the resulting arrears. In the event that her request was rejected, she indicated that her letter was to be treated as an internal appeal. By a letter of 16 December 2009 she was informed that the President considered that the applicable provisions had been correctly applied and that the matter had therefore been referred to the Internal Appeals Committee (IAC) for an opinion.

In a report dated 14 December 2011, a majority of the IAC members concluded, in substance, that the appeal was irreceivable *ratione temporis* because the complainant had been notified of the

decision to grant her an invalidity allowance under the new scheme on 18 August 2008, but she had not challenged that decision within three months, as required by Article 108(2) of the Service Regulations. Moreover, inasmuch as the payslips she had received after the expiry of that three-month period merely confirmed the decision of 18 August, they did not open new time limits for challenging the original decision concerning her invalidity allowance. The majority also rejected the complainant's argument that the challenged decision was unlawful on account of the fact that the consultation of the General Advisory Committee with respect to the transitional measure had been flawed, as the measure in question was in any case inapplicable to her. The majority thus recommended that the appeal be dismissed as irreceivable.

In a letter dated 14 February 2012, the complainant was informed by the Director ad interim of Regulations and Change Management, on behalf of the President, that in accordance with the majority opinion of the IAC, her appeal had been rejected. That is the impugned decision.

The complainant requests that the decision be quashed and that her invalidity allowance be calculated in accordance with the rules applicable before 1 January 2008, retroactively to 1 July 2008 or, subsidiarily, to 17 July 2009, with interest on arrears at 8 per cent. In addition, she claims moral damages for delays in the procedure and costs.

The EPO requests that the complaint be dismissed as irreceivable on the grounds that the complainant did not challenge the decision of 18 August 2008 within the applicable time limit. In the event that the Tribunal considers the complaint receivable, either in part or in full, it submits that it is unfounded.

CONSIDERATIONS

1. The complainant is an employee of the EPO. She had been on sick leave from 13 April 2007. By December that year, she had reached a point in time when her sick leave would be exhausted. Thereafter steps were taken internally to review her position culminating

in a letter dated 18 August 2008 from the Administration informing her that effective 1 July 2008 she would receive, pursuant to the Service Regulations, an invalidity allowance. An allowance rather than an invalidity pension was payable because of a decision taken by the Administrative Council on 14 December 2007 (CA/D 30/07) which had the effect of abolishing the invalidity pension and replacing it with an invalidity allowance effective 1 January 2008. The Administrative Council also decided in December 2007 to implement transitional arrangements in relation to staff then in receipt of the invalidity pension which would operate when the new invalidity allowance scheme entered into force. In particular, a transitional measure was adopted in Article 29 of CA/D 30/07 designed to ensure that invalidity pensioners received the same level of protection under the new invalidity allowance scheme as under the previous arrangements. As a result of a successful challenge to the legality of the transitional measure, a further decision (CA/D 15/12) was made by the Administrative Council on 26 October 2012 endorsing the original transitional measure (also referred to as "guarantee clause") with retroactive operation.

2. On 17 October 2009 the complainant sent a letter to the President of the Office informing him of the effect on her of the decision to introduce the invalidity allowance and requesting that the allowance be increased to an amount which, on her calculations, was equivalent to the amount she would have been paid by way of invalidity pension. The letter concluded by saying that if the President was not in a position to grant her request, the letter should be treated as the initiation of an internal appeal pursuant to the Service Regulations. She said that in that appeal she was seeking that the decision to reject the request be quashed and her invalidity allowance be increased in accordance with her request.

3. On 16 December 2009 the Administration wrote to the complainant telling her that her request was denied and that the new scheme applied to her. The letter stated that the transitional measure had no application to her because, at the time it came into operation (1 January 2008), she was not "already [on] long term sick leave" and

she was "considered as under long-term sick leave as of 30 January 2008". By a separate letter dated that same day the complainant was informed that her foreshadowed appeal was now registered as an internal appeal with the IAC.

4. On 14 December 2011 the IAC issued its opinion. The majority recommended that the appeal be rejected as "not admissible". The minority recommended that the complainant be granted an invalidity pension under the arrangements in place before 1 January 2008, as well as arrears, with interest. It also recommended an award of 15,000 euros in moral damages and 2000 euros in costs. On 14 February 2012 the Director ad interim of Regulations and Change Management wrote to the complainant saying that she had decided, "by delegation of power from the President", to reject her appeal as inadmissible. This is the impugned decision.

5. The EPO argues in its pleas that the complaint is irreceivable. The essence of the argument is that the decision to pay the complainant the invalidity allowance and not the invalidity pension was communicated to the complainant on 18 August 2008. By virtue of Article 108(2) of the Service Regulations, the complainant had three months in which to lodge an internal appeal against that decision. Thus the complainant's communication of 17 October 2009 was not an appeal filed within the time prescribed by the Article.

6. The complainant answers this argument with two contentions. The first is that she is entitled to rely on salary slips that, from time to time, evidenced the payment of the invalidity allowance. The second is that the complainant's claim is based on facts of which she was not aware until well after the expiry of the three-month time limit. Additionally, in her rejoinder (though referred to obliquely in the initial complaint brief), the complainant raises the question of bad faith which, in some circumstances, will defeat a defence that a claim is time-barred and she also raises estoppel.

7. The substance of the first contention is that a recurring decision to provide an emolument in a given amount calculated through a method that is and remains unlawful, gives rise to a fresh cause of action at the time it is applied.

At the forefront of the argument of the EPO is Judgment 2823. In that judgment, the Tribunal addressed the operation of Article 108(2) in the following circumstances. A decision had been made on 28 July 2003 that the complainant's reckonable experience was seven years and nine months. That decision did not include a period of freelance work that the complainant had contended should be included. In November 2004 the complainant was promoted with effect from 1 May 2004. The promotion would have taken effect from an earlier date had the complainant's reckonable experience included the period of his freelance consultancy. In February 2005, the complainant lodged an internal appeal with respect to the effective date of his promotion. The complainant thereafter continued to challenge in internal discussions the calculation of his reckonable experience. At a meeting on 19 July 2006 he was informed, orally, that the calculation of 28 July 2003 had been final and that no new decision would be taken. In the result, the complainant filed, on 12 October 2006, a second internal appeal against a purported decision of 19 July 2006. One of his arguments (as summarised in B of the facts) was that "because the injustice resulting from that decision [of 19 July 2006] is repeated every month upon receipt of his salary, his claims should be receivable at least with respect to the period commencing with the filing of his complaint". The second appeal was rejected as irreceivable. The Tribunal addressed the question of whether this was correct in consideration 10:

> "Article 108(2) of the Service Regulations requires that an appeal be lodged within three months of an adverse decision. The oral communication of 19 July 2006 cannot be considered as the only final decision on the question of the complainant's reckonable experience. Nor is there any basis on which it can be said to be a fresh decision, as distinct from the confirmation of an earlier decision, no new basis having been advanced for maintaining the calculation of the complainant's reckonable experience at seven years and nine months as communicated by the letter of 28 July 2003. And save for the complainant's salary slips, there is nothing within the three months preceding 12 October

> 2006, the date on which his second internal appeal was lodged, that could conceivably be considered as a decision with respect to his reckonable experience. Although the complainant relies on his salary slips, that reliance is misplaced. It is correct, as pointed out in Judgment 1798, that 'pay slips are individual decisions that may be challenged before the Tribunal'. **However, they cannot be challenged as new decisions if they merely confirm a decision that was taken at some earlier time and outside the time limits in which an appeal may be brought.** More particularly, and as is clear from Judgment 847, an EPO staff member can only challenge the determination of seniority or reckonable experience within three months of its original determination." (Emphasis added.)

The EPO argues in this matter that, by parity of reasoning, the decision to pay the complainant the invalidity allowance was communicated to her on 18 August 2008 and the three months within which she could challenge that decision by internal appeal then commenced to run. Salary slips in the second half of 2009 based on that decision were not new decisions as they merely confirmed the decision originally made. Accordingly, the complainant cannot rely on her salary slips in that period to challenge the decision of 18 August 2008, applying the principle referred to in the passage just quoted from Judgment 2823.

8. To answer this argument, the complainant refers, at the forefront of her submissions, to Judgment 2951 and, additionally, refers to the fact that two of the judges who decided that case were on the panel that issued Judgment 2823. Judgment 2951 again concerned the EPO. In that matter the complainant commenced working for the EPO in October 2003. Her grading, at that time, was based on the EPO's view that she had no reckonable previous experience. It appears that the complainant first knew of the basis of the grading only on 18 February 2005 as the result of a request made by her in an email dated 2 February 2005. Later in 2005 representations were made on her behalf to establish that she had had reckonable experience before being appointed. The Director of Personnel responded to this representation on 18 November 2005 saying that the duties performed by the complainant prior to her recruitment were not considered to be at the same level as those of the post to which she was appointed. In an internal appeal filed on 16 December 2005, the complainant sought

a review of the decision of 18 November 2005 not to recognise her previous professional experience. While the IAC found in the complainant's favour in relation to some, but not all, of her experience before appointment, they said, in relation to the salary effects of the decision on reckonable experience, that salary arrears could only be claimed retrospectively for a three-month period prior to the date of the request (2 February 2005), that is, 1 November 2004.

In the proceedings before the Tribunal, an issue of receivability arose. On this issue the Tribunal said at consideration 4:

> "The complaint is receivable insofar as it concerns the complainant's reckonable experience and salary arrears to be paid from 1 November 2004. **An appeal against a decision which has recurring effects cannot be time-barred: each month in which the complainant receives her payslip, in accordance with her step-in-grade assignment, must be considered a source of a new cause of action** (see Judgment 978, under 8). However, in accordance with Article 108 of the Service Regulations she may not claim salary arrears for the period prior to the three months from the date she made her request. The Internal Appeals Committee was correct in its unanimous recognition of 2 February 2005 as the date when the complainant requested her step-in-grade calculation and thus the date from which the three-month period for claiming salary arrears begins. […]" (Emphasis added.)

9. It is difficult to reconcile Judgment 2823 with Judgment 2951. Before considering this question, it is convenient to refer to two comparatively early judgments of the Tribunal. The first is Judgment 753. In that matter, the complainant worked for the EPO and, at the time, the applicable Service Regulations provided that the normal working week was not to exceed 40 hours. However examiners who had once worked at the International Patent Institute that merged into the EPO in 1978 had a working week of only 35 hours. The complainant joined the EPO on 5 May 1980. On 8 January 1985 the complainant filed an internal appeal seeking reduction of his working week to 35 hours or a corresponding increase in annual leave or in salary. The Appeals Committee recommended to the President that the complainant's appeal (and 10 other similar appeals) be rejected as time-barred and, subsidiarily, as devoid of merit. The President followed this recommendation.

In subsequent proceedings before the Tribunal the EPO argued, successfully, that the complaint was irreceivable because the complainant had failed to file his internal appeal within the three-month period specified in Article 108(2) of the Service Regulations and thus had failed to exhaust internal means of redress. The Tribunal noted in consideration 2 that the complainant had joined the EPO on 5 May 1980. It also noted that, at that time, there were different working hours for new recruits (such as the complainant) and staff taken over from the old International Patent Institute. The Tribunal went on to say that if the complainant had believed that there had been a breach of his rights under the Service Regulations and of the principle of equal treatment, he should have lodged an internal appeal not later than three months after 5 May 1980 and that he had failed to do so. The Tribunal also noted that the complainant could have challenged the earliest decision on his pay, which covered payment for the 40-hour week, but again the complainant had failed to do so within the specified time limit. The Tribunal observed that the complainant's pay had altered since the earliest decision on his pay but that later monthly payments, like the first one, had been reckoned on the basis of the 40-hour week and therefore did not trigger a new time limit for internal appeal.

10. The second early judgment was Judgment 882. Again it concerned an employee of the EPO. The complainant had joined the EPO on 1 March 1985. Later that year new guidelines were introduced on the reckoning of experience and on 6 November 1985 the complainant was given a reckoning of experience in accordance with those guidelines. By a minute of 22 November 1985 the Head of the Personnel Department informed him that because of the new reckoning, he had been put on a particular grading as from 1 March 1985. On 18 April 1986 the complainant appealed against his grading arguing that it was not until 27 January 1986, when he got his payslip dated 1 January 1986, that he realised his grading was wrong. The President provisionally rejected his appeal and referred the matter to the Appeals Committee, culminating in a report of the Committee of 27 November 1986

recommending that the appeal be rejected because, amongst other things, it was irreceivable as time-barred.

In subsequent proceedings before the Tribunal, the EPO argued that the complaint was irreceivable because the internal appeal was time-barred. It argued that the complainant had been aware of the challengeable decision by 6 November 1985, when he got the new reckoning. He had not lodged an appeal until five months had passed and it should have been lodged within three months of the date of notification of the decision challenged. The complainant sought to answer this argument by saying that the time limit began when he got the first payslip showing his new grading, the one for January 1986, and in support of this argument the complainant cited Judgment 753. In its decision, the Tribunal held that the time limit for filing the internal appeal ran from the date of the earliest notification to him of his new grading. The Tribunal went on to say that the complainant misread Judgment 753. It said that what the Tribunal had earlier held was that "payment of salary might be treated as a challengeable decision only when there was no other" and dismissed the complaint as irreceivable because the complainant had failed to file his internal appeal within the specified time limit. The Tribunal concluded by saying "the certainty in law that is a condition of sound administration requires treating time limits as compulsory". Both Judgment 753 and Judgment 882 accord with the approach in Judgment 2823. However a number of other judgments of the Tribunal accord with the approach in Judgment 2951 (see, for example, Judgments 978, 1408 and 3405).

11. The Tribunal now turns to consider specifically Judgment 2823 in light of Judgment 2951. In both instances a decision was made about the reckonable experience of each of the complainants many months before each complainant lodged an internal appeal. Also, in both instances a subsequent decision was made effectively confirming the initial decision about reckonable experience. Both the initial decision and its subsequent confirmation adversely impacted on the amount each complainant was periodically paid. In each instance the internal appeal was against the subsequent decision. In Judgment 2823 the Tribunal decided, in substance, that the appeal was time-barred and

that this conclusion could not be avoided by relying on payslips. In Judgment 2951 the Tribunal decided, in substance, that the appeal was not time-barred as the complainant could rely on recent payslips as establishing a fresh cause of action. While the Tribunal does not say so expressly in Judgment 2951, it appears that a challenge could be made, by way of payslips, to the original decision when the complainant's reckonable experience was first determined.

12. The fundamental rationale for enabling an official to rely on payslips as establishing a cause of action is to provide a mechanism whereby a particular decision underpinning the payment or non-payment of a benefit can be challenged and often in circumstances where the official might have no standing to otherwise challenge that decision. A common example arises when an official challenges, by reference to a payslip, the lawfulness of a decision of the defendant organization's governing body which has, when implemented, an adverse effect on the official.

13. In contrast, the rationale for time limits is to ensure that, while an aggrieved official has an opportunity to challenge decisions that adversely impact on her or him, the time frame within which such a challenge can be made is not open ended. The reason for limiting the time frame is to ensure that legal certainty is created, in due course, between both an individual staff member and staff more generally and the organisation employing them. Certainty, in this context, can be of particular significance to an organisation in relation to, amongst other things, budgeting and staffing. The time limit is intended to create a fair balance between the interests of officials and the interests of international organisations employing them.

14. In the present case, the complainant was aware that she would be paid an invalidity allowance and not an invalidity pension on 18 August 2008. Putting aside an argument discussed shortly about "new facts", it would have been open to the complainant to challenge the decision to pay her an invalidity allowance by way of internal appeal within three months of being told of that decision.

15. The Tribunal has concluded that the approach in Judgment 2823 is to be preferred to the approach in Judgment 2951. The former, but not the latter, strikes an appropriate balance between the objectives discussed in considerations 12 and 13 above. Accordingly, and subject to subsidiary arguments advanced by the complainant, her internal appeal of 17 October 2009 was time-barred. The majority of the IAC was correct in concluding it was and the person acting on behalf of the President was correct in rejecting her appeal as inadmissible on that basis.

16. One of the complainant's subsidiary arguments turns on whether a new and unforeseeable fact of decisive importance has occurred since the decision was taken or whether the complainant can rely on facts or evidence of decisive importance of which she was not and could not have been aware before the decision was taken so as to engage the principle discussed by the Tribunal in Judgment 2203. This argument was alluded to by the complainant in the complaint brief though without identifying with any particularity what the relevant facts or evidence were and the surrounding facts which would engage the principle. In the complainant's rejoinder, she answers the EPO's arguments on this topic by saying, having noted what was said to be a concession of the EPO that the decision impugned was procedurally flawed, that:

> "The point is not whether the transitional measures did apply, but whether they should have in view of the defendant's own representations.
>
> But more importantly, the defendant has completely missed the complainant's point.
>
> If the decision to introduce the new scheme was procedurally flawed, as the defendant graciously admits, then it was, and is, null and void until such time as a new scheme is put into place through proper procedure."

The concession made by the EPO in its reply was that there had been a flaw in the consultation procedure preceding the decision of the Administrative Council in December 2007 introducing the invalidity allowance but only in relation to the transitional measure. However it is difficult to see how the existence of this procedural flaw in relation to the adoption of the transitional measure had any relevance to the

circumstances of the complainant. It is to be recalled that the new arrangements took effect on 1 January 2008. The transitional measure concerned the circumstances of staff members in receipt of an invalidity pension at the time the new arrangements took effect. The complainant was not in that situation. Thus "the fact" that there had been inadequate consultation in relation to the transitional arrangements was not decisive in relation to the complainant in the sense that had those facts been known it would have impacted on her rights and her capacity to challenge the decision to pay her an invalidity allowance in August 2008. Nothing is said by the complainant in her pleas which demonstrates that this procedural flaw raises an argument of substance that the adoption of the entire scheme (apart from the transitional measure) in December 2007 was unlawful. This argument is rejected.

17. A further subsidiary argument is apparently advanced by the complainant in reliance on the principle that if an organisation has acted in bad faith a decision may be set aside even if it has become final (see, for example, Judgment 3002, consideration 16). In her brief, the complainant simply challenges the conclusion of the majority of the IAC on this point and, effectively, adopts the reasoning of the minority. In their reasoning the dissenting IAC members focused on the conduct of the EPO (and specifically the conduct of a particular individual) which they concluded established that the EPO had taken steps to ensure that the new transitional measure was not considered by the General Advisory Committee before the proposal was submitted to the Administrative Council. However, as discussed in the preceding consideration, even assuming that there had been bad faith towards the complainant, it did not concern the new scheme as it applied to her. It is not suggested that the EPO did not act in good faith in relation to the adoption of all elements of the new scheme save for the transitional measure. This argument is rejected.

18. The final subsidiary argument concerns the principle of estoppel. This argument is apparently based on the fact that the EPO, in the internal appeal, initially accepted that the internal appeal was in part admissible but subsequently changed its position and argued that

it was inadmissible in its entirety. The complainant does not develop any argument in the complaint brief as to how this principle might render receivable her complaint. She simply "endorses the view of the minority of the IAC". However the recommendation of the dissenting members fails to explain how, in accordance with established principle, the EPO was estopped from arguing in the internal appeal that the appeal in its entirety was irreceivable. There is no obvious reason why this was so. As the EPO argues in its reply, an element of the principle is that a person has acted to their detriment by relying on some statement or representation of fact made by another. While the EPO did seemingly change its position, there is nothing to suggest that this led to the complainant acting to her detriment. She had an opportunity to respond to the final position of the EPO though she was unsuccessful in her arguments. Again this argument is rejected. In any event, it was open to the IAC to address the question of the receivability of the appeal in its entirety irrespective of the position adopted by the EPO.

19. In the result the EPO has demonstrated that the majority of the IAC was correct in concluding that the internal appeal was time-barred. Consequently, the complainant has not exhausted her internal means of redress and, on that basis, her complaint to the Tribunal is irreceivable and should be dismissed.

20. In addition, the complainant seeks compensation for delay in the internal appeal. The appeal was lodged in October 2009. The impugned decision rejecting the appeal was taken in February 2012. This delay was excessive. The Tribunal awards the complainant moral damages on that account in the amount of 200 euros and costs in the amount of 200 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 200 euros in moral damages.

2. The EPO shall also pay the complainant 200 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

CLAUDE ROUILLER

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

PATRICK FRYDMAN

MICHAEL F. MOORE

HUGH A. RAWLINS

FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ