H. (No. 2), P. (E.) (No. 8), S. and S.

v.

EPO

131st Session **Judgment No. 4394**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms W. T. H. against the European Patent Organisation (EPO) on 15 March 2018 and corrected on 25 April, the EPO's reply of 28 August 2018, the complainant's rejoinder of 7 January 2019 and the EPO's surrejoinder of 17 April 2019;

Considering the eighth complaint filed by Ms E. P. against the EPO on 15 March 2018 and corrected on 18 April, the EPO's reply of 28 August 2018, the complainant's rejoinder of 8 January 2019 and the EPO's surrejoinder of 17 April 2019;

Considering the complaint filed by Ms A. S. against the EPO on 15 March 2018 and corrected on 18 April, the EPO's reply of 28 August 2018, the complainant's rejoinder of 7 January 2019 and the EPO's surrejoinder of 17 April 2019;

Considering the complaint filed by Mr H. S. against the EPO on 15 March 2018 and corrected on 18 April, the EPO's reply of 28 August 2018, the complainant's rejoinder of 7 January 2019 and the EPO's surrejoinder of 17 April 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainants challenge the decision deriving from the Administrative Council's decision CA/D 2/15 to require the recipients of the new retirement pension for health reasons to cease performing gainful activities or employment or to refrain from performing such activities or employment.

The complainants started receiving an invalidity allowance between 1 July 2008 and 1 June 2011. At the material time Section VI of the Implementing Rules for Article 62a of the Service Regulations for permanent employees of the European Patent Office, the EPO's secretariat, provided that where a person in receipt of an invalidity allowance was nevertheless gainfully employed, this allowance was to be reduced by the amount by which the allowance together with the remuneration received for the said employment exceeded the salary for the highest step in the grade held at the time the person was recognised as unfit for service.

On 26 March 2015 the Administrative Council adopted decision CA/D 2/15 which amended with effect from 1 April 2015 the provisions relating to sick leave and invalidity. The provisions governing the invalidity allowance were then abrogated. Transitional measures provided however that, until 31 December 2015, the rights and obligations of a recipient of an invalidity allowance on 31 March 2015 would continue to be governed by the provisions in force on 31 March 2015 and that, as from 1 January 2016, the recipient would cease to receive the allowance and would instead be granted a retirement pension for health reasons. As from that date gainful activities or employment would no longer be allowed. On 17 July 2015 the Office informed the complainants that they would begin to receive a retirement pension for health reasons as of 1 January 2016 and that those who were performing gainful activities or employment should cease such activities or employment by 31 December 2015 and provide evidence of having done so.

In October 2015 each of the complainants filed a request for review of the decision of 17 July. They stated that they were personally affected by this decision since, as from 1 January 2016, some of them would be forced to give up existing gainful activities, or to refrain from taking up employment or engaging in gainful activities. Mr S. indicated that he had invested a lot of time, expense and effort learning new skills in the fields of finance and machine learning and that he would have to give up pursuing a career in these fields. The complainants requested that

the blanket ban on any gainful activity or employment be lifted. The requests were dismissed as irreceivable on 11 December 2015, on the ground that they were not directed against a decision adversely affecting the complainants' position. In March 2016 each complainant lodged an internal appeal, reiterating the request that the ban be lifted. By email of 1 April 2016 they were informed that their appeals, along with numerous similar appeals, had been referred to the Appeals Committee under the reference RI/32/16 and that the Chair of the Appeals Committee considered that they could be dealt with by a summary procedure. In its opinion dated 26 October 2017 the Appeals Committee recommended by a majority that the appeals be dismissed as manifestly irreceivable because, since the prohibition to engage in gainful employment had no individual, direct adverse effect on the complainants within the meaning of Article 108(1) of the Service Regulations, they had not established a cause of action. By letters of 19 December 2017 the complainants were informed that their appeals were dismissed as manifestly irreceivable. That is the decision impugned by each complainant.

The complainants ask the Tribunal to set aside the impugned decisions and to declare that the summary dismissal of their internal appeals was unlawful and improper and that they were entitled to engage in gainful activity from the date of the original decision and are still entitled to do so. They also seek the payment of moral damages, costs, 5 per cent per annum interest on all sums awarded and such other relief as the Tribunal may deem just, fair and equitable. In addition, Ms H. and Mr S. ask to be awarded material damages. The complainants also ask the Tribunal to disregard some of the EPO's submissions in its replies on the ground that they are completely irrelevant to the issues at hand.

The EPO asks the Tribunal to dismiss the complaints as irreceivable for lack of cause of action and, subsidiarily, as unfounded.

CONSIDERATIONS

1. This judgment concerns four complaints filed on 15 March 2018 by four former officials of the EPO. At the material time, the four complainants were on non-active status and drawing an invalidity allowance under Article 62a of the Service Regulations, as in force until

31 March 2015. This Article was amended by Administrative Council decision CA/D 2/15, dated 26 March 2015, with effect from 1 April 2015. As from that date, the complainants' status changed from non-active employees receiving an invalidity allowance to former employees receiving a retirement pension for health reasons. The complainants' arguments are embodied in four nearly identical briefs impugning four identical final decisions dated 19 December 2017. Those decisions endorsed the Appeals Committee's 26 October 2017 majority opinion recommending to reject the joined appeals dealt with by summary procedure as "manifestly irreceivable" for failure to establish a cause of action. In light of the above and considering that the four complaints arise from the same legal, and similar factual, circumstances, the Tribunal joins the complaints and will rule on them in a single judgment.

2. The grounds for the complaints are as follows:

(a) the internal appeals were heard by an unlawfully constituted Appeals Committee;

(b) the Appeals Committee erred in referring the internal appeals for summary procedure under Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations;

(c) the Appeals Committee erred in its application of the Implementing Rules for Articles 106 to 113 of the Service Regulations and committed an error of law by declaring the appeals manifestly irreceivable;

(d) the impugned decisions are tainted by an error of law as the EPO cannot amend the Service Regulations or Pension Scheme Regulations in violation of the acquired rights of staff members;

(e) the EPO's 11 December 2015 rejection of their requests for review contained errors of law and fact;

(f) the EPO's statement, that the receipt of a retirement pension for health reasons is subject to the condition that a staff member is incapacitated from exercising her or his duties, which means that the staff member cannot exercise external activities as well, is incorrect and unlawful; and

(g) the EPO's statements concerning gainful activities by staff members on invalidity and early retirement are unlawful and constitute unjust enrichment of the Organisation.

3. Two of the complainants have requested hearings. However, the requests are rejected as the parties have expressed their positions in sufficient detail in their written submissions and supporting documents to permit the Tribunal to make an informed decision.

4. The impugned decisions determined that the complainants' appeals against the decision to reject their requests, that the blanket ban on gainful activity or employment be lifted, were manifestly irreceivable for lack of cause of action as the complainants had failed to prove how the prohibition on gainful activity adversely affected them. The issue regarding the lawfulness of the decision of irreceivability for lack of cause of action is a threshold issue.

5. The Tribunal finds it convenient to cite the relevant provisions below.

Paragraphs 1 and 2 of Article 62a of the Service Regulations, as in force until 31 March 2015, provide as follows:

"**Invalidity**

(1) A permanent employee who is under the age limit laid down in Article 54, paragraph 1(a), first indent, and who is found to fulfil the conditions for invalidity set out in the present Article at any time during the period in which pension rights are accruing to him shall cease to perform his duties and receive an invalidity allowance.

(2) 'Invalidity' means physical and/or psychological incapacity making it definitively and permanently impossible for the permanent employee concerned to carry out, at least on a 50% part-time basis, his duties or similar other duties which might reasonably be assigned to him, i.e. which correspond to his situation, his knowledge and his capabilities."

Section VI of the Implementing Rules for Article 62a of the Service Regulations, as in force until 31 March 2015, provides as follows:

"**VI. Earnings rule**

Where a person in receipt of an invalidity allowance is nevertheless gainfully employed, this allowance shall be reduced by the amount by which his allowance together with the remuneration he receives for the said employment exceeds the salary for the highest step in the grade which he held at the time of his recognition as unfit for service."

Administrative Council decision CA/D 2/15, dated 26 March 2015, provides in relevant part as follows:

> "Article 35
>
> The following new Article 13 of the Pension Scheme Regulations shall be inserted:
>
> **'Article 13**
> **Conditions of entitlement**
>
> (1) A retirement pension for health reasons shall be payable to an employee who is under the age limit laid down in Article 54, paragraph 1(a) of the Service Regulations and who, at any time during the period in which pension rights are accruing to him, has reached 55 years of age and has been totally discharged from his duties for reasons of incapacity as defined in Article 62b of the Service Regulations for ten years.
>
> (2) The employee shall be retired on the first day of the month following that in which he fulfilled the conditions laid down in paragraph 1.'
>
> [...]
>
> Article 37
>
> The following new Article 15 of the Pension Scheme Regulations shall be inserted:
>
> **'Article 15**
> **Gainful activities or employment**
>
> (1) The former employee in receipt of a pension under this Chapter is not allowed to perform any gainful activities or employment.
>
> (2) The above shall apply only up to the age limit laid down in Article 54, paragraph 1(a), of the Service Regulations.'"

Article 72, paragraphs 1, 2 and 3, of Administrative Council decision CA/D 2/15, relevantly provide:

> "(1) Until 31 December 2015, the rights and obligations of a recipient of an invalidity allowance on 31 March 2015 shall continue to be governed by the provisions in force on 31 March 2015.
>
> (2) As from 1 January 2016, he shall cease to receive an invalidity allowance and shall instead be granted a retirement pension for health reasons, increased by a compensatory payment as follows:
>
> [...]
>
> (3) As from 1 January 2016, gainful activities or employment shall no longer be allowed."

6. The complainants received identical letters (English and French versions, as applicable) entitled "Implementation of Administrative Council decision CA/D 2/15 dated 26 March 2015: transitional measures for 2015", dated 17 July 2015. The letters informed them, inter alia, that:

> "The above-mentioned Council decision has abrogated the provisions governing the invalidity allowance with effect from 1 April 2015. Until 31 December 2015 you will, nonetheless (as laid down in Article 72(1) of CA/D 2/15), continue to draw an invalidity allowance in accordance with the provisions in force on 31 March 2015. The level of benefits will remain unchanged.
>
> With effect from 1 January 2016, you will be drawing a retirement pension for health reasons (Article 72(2) of CA/D 2/15). In other words, you will no longer be on non-active status, but will move to pensioner status. [...]
>
> As a consequence of this change of status, your retirement pension for health reasons may be subject to national income tax [...]
>
> [...]
>
> [A]s from 1 January 2016, you are not allowed to perform any gainful activities or employment (Article 72(3) of CA/D 2/15). If you are performing such activities, or are in employment, you are therefore requested to completely cease said activities or employment not later than 31 December 2015, and to provide evidence of having done so [...]
>
> External activities exercised by former employees in receipt of a retirement pension are governed *inter alia* by Articles 19 to 21 [of the] Serv[ice] Reg[ulation]s."

7. As acknowledged in the 17 July letters to the complainants, the amendments introduced by CA/D 2/15 were aimed at changing the complainants' status. Specifically, as from 1 January 2016 the complainants would be granted a retirement pension for health reasons and would not be allowed to carry out gainful activities or employment, which had been permitted under their previous status, and this change was contrary to their interests. As the Tribunal has said before, "there may be a cause of action even if there is no present injury: time may go by before the impugned decision causes actual injury. The necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant's position" (see Judgments 1712, consideration 10, 2632, consideration 10, and 3337, consideration 7). The Tribunal finds that the notification of the complainants' status change contained in the 17 July letters entitled "Implementation of Administrative Council decision CA/D 2/15 dated 26 March 2015: transitional measures for 2015" was reasonably construed by the complainants as the implementation of the general decision, triggering the count towards the deadlines for filing their requests for review.

8. In light of the above, the Tribunal finds that the Appeals Committee erred in recommending to summarily dismiss the complainants' internal appeals as "manifestly irreceivable" for failure to establish a cause of action and the President of the Office erred when he endorsed that recommendation. The cause of action existed, and, accordingly, the impugned decisions will be set aside. The cases will be remitted to the EPO for proper examination by the Appeals Committee of the merits without there being any need to rule on the complainants' argument that their internal appeals were heard by an unlawfully constituted Appeals Committee. The Tribunal need not address the further grounds for the complaints.

9. The complainants had a valid cause of action to bring their appeals before the Appeals Committee for a proper evaluation of the merits. The unlawful summary dismissal of their appeals by the 19 December 2017 final decisions, endorsing the Appeals Committee's recommendation, left the complainants in uncertain and stressful circumstances, thereby entitling them to an award of moral damages in the amount of 7,000 euros each. The complainants are entitled to costs in the amount of 800 euros each.

DECISION

For the above reasons,

1. The impugned decisions are set aside.
2. The cases are remitted to the EPO for proper examination by the Appeals Committee of the merits of the complainants' internal appeals, and for new final decisions.
3. The EPO shall pay each complainant 7,000 euros in moral damages.
4. It shall also pay each complainant 800 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 26 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ