

**K. (No. 43)**

**v.**

**EPO**

**133rd Session**

**Judgment No. 4487**

THE ADMINISTRATIVE TRIBUNAL,

Considering the forty-third complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 25 May 2019, the EPO's reply of 16 September 2019, the complainant's rejoinder of 7 January 2020 and the EPO's surrejoinder of 15 April 2020;

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:

The complainant challenges the fact that the arrears owed to him in respect of his invalidity allowance, related benefits and unused leave following a retroactive modification of the monthly gross salary scales in December 2012 were not paid to him until January 2013.

As from 1 July 2012 the complainant was placed on non-active status and received an invalidity allowance. On 11 December 2012 the Administrative Council adopted decision CA/D 11/12 which provided that, with effect from 1 July 2012, the monthly gross salary scales would be modified. By an email of 19 December the complainant was informed that his "emoluments" and "the lump sum under Article 84" of the Service Regulations for permanent employees of the European Patent Office, the EPO's secretariat, would not be amended retroactively before January 2013. On 21 December 2012 he lodged an appeal submitting that he was not paid the arrears concerning his invalidity allowance following the adoption of the said decision, the arrears

relating to the lump sum payable pursuant to Article 84 in view of his permanent invalidity and the amount due for unused leave. On 31 August 2016 the complainant was informed that his appeal was dismissed as manifestly irreceivable, in accordance with the unanimous recommendation of the Appeals Committee. That was the decision the complainant impugned in his thirty-first complaint before the Tribunal.

On 30 November 2016 the Tribunal delivered in public Judgment 3785, concerning another EPO employee, in which it held that the internal appeal proceedings were flawed because the composition of the Appeals Committee was unlawful. On 24 March 2017 the complainant was notified that the President of the Office had decided to withdraw the decision of 31 August 2016 (since it was tainted with the same flaw as the one leading to Judgment 3785) and to refer his appeal back to a newly composed Appeals Committee.

In its opinion of 29 January 2019 the Appeals Committee, applying the summary procedure, unanimously recommended that the appeal be dismissed as manifestly irreceivable. On 15 March 2019 the complainant was informed that his appeal was dismissed. That is the impugned decision.

The complainant reiterates most of the claims he submitted in his thirty-first complaint and asks the Tribunal to quash the 15 March 2019 decision, to award him moral damages under several heads, including for the delay in the internal appeal proceedings, and to award him costs for the internal appeal examined by the newly composed Appeals Committee and his forty-third complaint. He also asks the Tribunal to join his thirty-first and forty-third complaints.

The EPO asks the Tribunal to dismiss the complaint as irreceivable on several grounds and, subsidiarily, entirely unfounded. It also asks the Tribunal to award costs against the complainant since his complaint is vexatious and amounts to an abuse of process.

In his rejoinder, the complainant claims punitive damages for the EPO's "lies before court". Subsidiarily, he requests the Tribunal to remit his case to the competent criminal prosecution authorities in Germany.

In its surrejoinder, the EPO submits that these claims are irreceivable since they were neither submitted in the internal appeal proceedings nor in the complaint and, furthermore, that the claim for remitting the case to German authorities falls outside of the scope of the Tribunal's competence.

## CONSIDERATIONS

1. Decision CA/D 11/12, adopted by the Administrative Council on 11 December 2012, modified, among other things, the monthly gross salary scales with effect from 1 July 2012. By an email of 19 December 2012, in response to the complainant's request, he was informed that his "emoluments" and "the lump sum under Article 84 [of the Service Regulations]" would "not be amended retroactively" before January 2013. On 21 December 2012, he lodged an appeal submitting that he was not paid arrears concerning his invalidity allowance, nor the arrears of the lump sum payable in view of his permanent invalidity, nor the amount due for unused leave (this latter amount is referred to as "arrears", as well as the other sums, by the complainant). This appeal was dismissed by the 31 August 2016 decision, which was impugned before this Tribunal in the complainant's thirty-first complaint. The EPO withdrew, on 24 March 2017, the 31 August 2016 decision (as it was flawed due to the unlawful composition of the Appeals Committee) and referred the case back to a newly composed Appeals Committee (decision of 24 March 2017). The Appeals Committee delivered its opinion on 29 January 2019, by which it recommended that the appeal be dismissed as manifestly irreceivable. The appeal was dismissed with the 15 March 2019 decision taken in accordance with that recommendation.

2. Nothing more needs to be said about the 31 August 2016 decision. It has already been addressed by the Tribunal and has been withdrawn by the EPO. Its legality is no longer justiciable.

3. In relation to the 15 March 2019 decision, the complainant seeks the quashing of that decision and also:

- (i) to award him moral damages under several heads, namely as follows:
  - (a) 5,000 euros "for the unlawful referral by the President of the EPO";
  - (b) 2,000 euros "for the [Appeals Committee] not diligently treating the partiality objections in the internal appeals procedure";

- (c) 2,000 euros “for the [Appeals Committee] not diligently treating the internal appeal by not considering the evidence offered”;
  - (d) 5,000 euros “because of the failure to decide on a request which is pending since many years [...]”;
  - (e) 8,000 euros “for undue delay of the internal procedure of 10 years until issuing a decision allowing access to [the Tribunal]”;
- (ii) to award him 5,000 euros as costs for the internal appeal and for the present complaint;

Further claims made in the rejoinder:

- (iii) to award him punitive damages in the amount of 10,000 euros for the EPO’s “lies before court”; and
- (iv) subsidiarily, to remit his case to the competent criminal prosecution authorities in Germany.

4. The complainant raises multiple arguments regarding various procedural issues, and matters of fact and law.

5. The complainant requests oral proceedings. Pursuant to Article V of the Statute of the Tribunal, “[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party”. In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision and thus the request is rejected.

6. The complainant applies for joinder of the present complaint with his thirty-first complaint, impugning the EPO’s 31 August 2016 decision. The Tribunal has already ruled on his thirty-first complaint, with Judgment 4256, which also addressed 134 other complaints. As the EPO had withdrawn the final decisions impugned in those proceedings, the Tribunal stated: “[a]s a result of the withdrawal of the impugned decisions, the Tribunal can only conclude that the complaints are now without object. The legal foundation for the complainants’ claims no longer exists, and their complaints must therefore be dismissed in their entirety.” As a consequence, the present request for joinder is moot (see Judgments 4396, consideration 1, and 4025, consideration 13).

7. The complainant challenges “the underlying general decisions” together with the individual implementation. This claim is irreceivable with regard to the 15 March 2019 decision. The internal appeal lodged by the complainant on 21 December 2012 did not explicitly challenge any general decisions, its only object being to obtain the payment of the “arrears”, together with the December pay slip. Moreover, in that appeal, not only are the disputed general decisions not clearly identified, but also neither are any arguments offered to challenge their lawfulness. Therefore, this claim is irreceivable for failure to exhaust internal remedies (Article VII of the Tribunal’s Statute).

8. It is convenient to address now the complainant’s central grievance, namely the payment of the arrears in January 2013 instead of in December 2012 as he contended should have occurred.

The Tribunal notes that a delay in payment can be contested if it is unlawful and/or it adversely affects the party. The party challenging the delay bears the burden of proof. In the present complaint, the complainant does not give evidence of the unlawfulness of the delay. Instead, he submits generic reasons based on:

- (i) alleged former practice (“[For] decades I received the arrears together with the December pay”);
- (ii) hearsay (“Colleagues in active service told me that they already received the arrears with the December pay”); and
- (iii) mere presumptions or doubts (“There seems to be no legal basis for postponement of the payment of my arrears”).

Neither unproven practice, nor hearsay, nor mere presumptions or doubts can be considered sources of law and rights.

9. In addition, as to the first plea (summarized in consideration 8 above), the Tribunal notes that the complainant was placed on invalidity with effect from 1 July 2012. The alleged former practice regards the payment of “arrears” (and other emoluments) for an employee in active employment (Article 40 of the Service Regulations), while the payment of “arrears” due for the year 2012 regards an employee assigned to non-active status for reasons of invalidity (Article 42 of the Service Regulations). The two situations differ in fact and cannot be compared. Similarly, as to the second plea, the Tribunal notes that the complainant, unlike his

colleagues, was assigned to non-active status, and therefore there is no breach of the principle of equality of treatment.

10. With regard to the pleas summed up in consideration 8 above, the Organisation objects that:

- the retroactive adjustment of basic salary announced in CA/D 11/12 was adopted only on 11 December 2012;
- CA/D 11/12 did not foresee that said adjustment would be paid along with the pay slip of December 2012;
- in view of an established practice, inactive staff members and pensioners receive payment of salary adjustment along with the pay of January of the following year; and
- the complainant was duly informed on 19 December 2012 that the “emoluments, and the lump sum under Article 84 [of the Service Regulations]”, would be paid along with the salary of January 2013.

11. The Tribunal notes that the Organisation has not identified a written rule regarding the postponement of the payment of the yearly “arrears” with the salary of January of the following year, relying only on an “established practice”. Furthermore, the Organisation has not precisely documented the existence of this practice. Nonetheless, as the complainant has not successfully contested the existence of this practice, the Tribunal is satisfied that it exists. Moreover, this practice is indeed beyond the law but not against the law, and, above all, it is consistent with the duty of good faith of a debtor. Indeed, the Service Regulations do not provide a specific rule on the time limit for the payment of “arrears” (as well as other amounts that do not accrue monthly). With regard to the time of payment, the sole express rule is enshrined in Article 65(1) of the Service Regulations, and refers only to “remuneration”. Pursuant to Article 64(2) of the Service Regulations, “remuneration” includes basic salary and “any allowances”. Employees assigned to non-active status for invalidity reasons received an “invalidity allowance”, which is included in the category of “any allowances”. The rule enshrined in Article 65(1) is that “[p]ayment of remuneration to employees shall be made at the end of each month for which it is due”, and it is clearly applicable to remuneration and allowances that must be paid monthly. This rule, which applied to monthly invalidity allowance, cannot be considered automatically applicable to arrears, because arrears are,

by definition, a remuneration due for a previous period and paid later, for various reasons, for example as a consequence of retroactive salary adjustments. Likewise, the payment for unused leave logically can only be paid after the fact (that the leave remained unused). It can be concluded that no written rules contradict the current practice asserted by the Organisation.

12. Above all, the aforementioned practice substantially aligns with the general principle of good faith in the implementation of a contract. It stems from this principle that:

- a debtor should within a reasonable time discharge its obligations; and
- the reasonable time span should be established according to the relevant material circumstances.

Pursuant to Article 1 of the Implementing Rule for Article 64 of the Service Regulations (in force at the material time), entitled “Adjustment timetable”: “[t]he levels of the basic salaries and allowances [...] are adjusted each year, with effect from 1 July [...] The annual adjustment proposal should be submitted to the Administrative Council for approval at its meeting in December of the year in question”. In the present case, the salary adjustment for the year 2012 was approved on 11 December 2012 and the complainant was paid by the end of January 2013. This cannot be considered an unreasonable delay and the complainant has not shown that this time span adversely affected him.

13. Save for the two matters discussed shortly concerning delay in the internal appeal and costs, the range of procedural and other pleas raised by the complainant concerning both the internal appeal and these proceedings, had no material effect on the outcome or are irrelevant. At base, the complainant’s grievance raised only a narrow legal question. That legal question has been resolved in the EPO’s favour. Accordingly, these other immaterial or irrelevant pleas need not be addressed.

14. The complainant challenges the excessive length of the internal appeal and seeks compensation by way of moral damages, stating that neither the complexity of the case, nor the ancillary partiality objection raised during the internal proceedings justified its length. It is well settled in the Tribunal’s case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an

international organisation owes to its staff members. The amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations: the length of the delay and the effect of the delay (see Judgment 4229, consideration 5). Delay in an internal appeal concerning a matter of limited seriousness in its impact on the appellant would be likely to be less injurious to the appellant than delay in an appeal concerning an issue of fundamental importance and seriousness in its impact on the appellant (see Judgment 4100, consideration 7). Recent case law holds that an unreasonable delay in an internal appeal is not sufficient to award moral damages. It is also required that the complainant articulate the adverse effects which the delay has caused (see Judgment 4396, consideration 12: “[n]otwithstanding that there was unreasonable delay in the internal appeal process, the moral damages which the complainant seeks under this head will not be awarded, as he has not articulated the effects which the delay has caused”; see also Judgments 4147, consideration 13, 4231, consideration 15, and 4392, consideration 12). In the present case, the internal appeal was lodged on 21 December 2012, and the first decision was issued on 31 August 2016; after the case was referred back to a newly composed Appeals Committee on 24 March 2017, the second decision was issued on 15 March 2019. The Tribunal finds that the length of the internal proceedings was excessive, but that the delay was due in part to the lawful withdrawal of the first decision, and the new review by the second Appeals Committee. Above all, the complainant has not proven that he was adversely affected by the delay. It is not unreasonable to hold that the delay in this case produced no damages, considering that the internal appeal was unsubstantiated and that the complainant refused an out-of-court settlement that could have sped up the conclusion of the procedure.

15. Two claims (punitive damages and remitting the case to the German criminal prosecution authorities) were raised in the rejoinder. This is impermissible (see Judgments 4092, consideration 10, 4221, consideration 7, and 4396, consideration 7).

16. The complainant’s claim for costs of the internal appeal shall be dismissed, as the Tribunal’s case law stipulates that “such costs may only be awarded under exceptional circumstances” (see Judgments 4156,



consideration 9, 4392, consideration 13, and 4399, consideration 13), which do not exist in the present case.

Likewise, there is no reason to award costs for the present proceedings.

17. The EPO submits a counterclaim for costs, alleging that the complainant committed abuse of process. The counterclaim is based on the following allegations:

- irreceivability of the complaint;
- no harm stemming from the January payment;
- refusal of an out-of-court settlement; and
- the present dispute allegedly is an unnecessary procedure causing a waste of time and resources.

The EPO quotes, as relevant precedent, Judgment 4025, considerations 11 and 12, in which the Tribunal allowed the counterclaim for costs in a case deemed to have “no possibility of success” and to be “clearly frivolous”. The Tribunal observes that its case law has established strict requirements for a complaint to be considered frivolous, vexatious, and repetitive. Firstly, abuse of process requires bad faith, and bad faith cannot be automatically inferred solely on the basis of the filing of a large number of complaints by a litigant (see Judgment 4025, consideration 9). Secondly, the Tribunal “may indeed award costs against the authors of frivolous, vexatious and repeated complaints which absorb its resources and those of the defendant organisations and hamper the Tribunal’s ability to deal expeditiously with other complaints. Any such award must, however, remain exceptional, since it is essential that international civil servants’ access to an independent and impartial judicial body is not impeded by the prospect of an adverse award of costs if their complaint were to prove unfounded” (see Judgments 1962, consideration 4, 3196, consideration 7, and 3568, consideration 5). The present case is not comparable to the one addressed by Judgment 4025, considerations 11 and 12. In that case, the complaint was dismissed in its entirety and was deemed clearly frivolous. In the present case, even though the complaint shall be dismissed in its entirety, the issues raised cannot be considered plainly frivolous. In addition, there is no repetition of the same complaint, because the present complaint and the thirty-first one have different objects, that is to say two different decisions issued

on the same internal appeal. Furthermore, consistent with the principle stipulated in Judgment 4025, consideration 9, referring to an egregious number of complaints, the fact that the present complaint contains a number of unfounded claims and submissions does not establish bad faith on the part of the complainant.

Consequently, the counterclaim is unfounded and will be dismissed.

#### DECISION

For the above reasons,

1. The complaint is dismissed.
2. The EPO's counterclaim for costs is dismissed.

In witness of this judgment, adopted on 25 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ