Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

d. l. F. d. A. (No. 5)

v.

EPO

134th Session **Judgment No. 4554**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr P. d. l. F. d. A. against the European Patent Organisation (EPO) on 22 June 2020 and the EPO's reply of 26 October 2020, the complainant having declined to file a rejoinder;

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 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 complainant stopped working on 1 August 2006 owing to invalidity. As a result of a change in the invalidity scheme, he ceased receiving an invalidity pension and was granted an invalidity allowance from 1 January 2008.

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 (hereinafter "the 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 thereby 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.

By a letter of 17 July 2015, the Office informed the complainant that he would begin to receive a retirement pension for health reasons as of 1 January 2016. If he was performing gainful activities or employment, he should cease doing so by 31 December 2015 and provide evidence to that effect.

In October 2015 the complainant requested a review of the decision of 17 July. He stated that he was adversely affected by that decision because he would be forced to refrain from performing gainful activities or employment from 1 January 2016. He added that he was "thinking of undertaking" steps and investments to generate income from his assets, but he would be prohibited from carrying out asset management activities from 1 January 2016. In particular, he requested that the blanket ban on performing gainful activities or employment be lifted and that he be provided with the details of the method used to calculate his pension. By a letter of 11 December 2015, the complainant received the administration's general response to the requests for review it had received following the letter of 17 July 2015. The complainant's claims were dismissed as irreceivable on the grounds that they were not directed against a decision adversely affecting him since he was not engaged in any

gainful activity. The administration emphasised that the reform aimed to strengthen the culture of reintegration to work where possible, and that the administrative status of a recipient of a retirement pension for health reasons was considered incompatible with the performance of gainful activities or employment. Concerning the request for details of the method used to calculate the pension which the complainant would receive, the letter stated that the request had already been addressed and was therefore moot.

On 10 March 2016 the complainant lodged an internal appeal in which he reiterated his claims and also claimed moral damages and costs. His appeal was forwarded to the Internal Appeals Committee (IAC). By a letter of 7 April 2016, the complainant was informed that the Chair of the IAC considered that his appeal could be dealt with under the summary procedure. The IAC issued its opinion on 7 December 2016. Following the public delivery of Judgments 3694 and 3785, in which the Tribunal found that the IAC was not composed in accordance with the applicable rules, the President of the Office decided to refer the case back to a newly constituted IAC for reconsideration, of which the complainant was informed by a letter of 24 March 2017.

On 23 October 2019 the complainant was notified that the Chairman of the new IAC had decided that his appeal would be submitted to the members of the IAC for consideration under the summary procedure. The IAC issued its opinion on 12 March 2020. It found unanimously that the complainant had not provided any evidence that he was challenging a decision adversely affecting him and so recommended that the appeal be rejected as manifestly irreceivable. Regarding the complainant's request for details of the method used to calculate his pension, the IAC considered that, as he had not specified in what respect the documents he received in 2015 required further explanation, this request was vague and thus irreceivable. However, it recommended that the complainant be awarded 300 euros for the undue length of the internal appeal proceedings. By a letter of 27 March 2020 the complainant was informed that his appeal had been rejected as manifestly irreceivable, but that it had nevertheless been decided to award him the abovementioned sum of 300 euros. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to provide "unambiguous" details of the method used to calculate his retirement pension for health reasons. In addition, he claims compensation in the amount of 50,000 euros for moral and financial injury and costs in the amount of 15,000 euros for the internal proceedings and the proceedings before the Tribunal.

The EPO asks the Tribunal to dismiss the complaint primarily as irreceivable owing to the lack of an individual decision adversely affecting the complainant and subsidiarily as unfounded. The Organisation submits that the complaint is an abuse of process and therefore asks that the Tribunal order the complainant to pay it the sum of 100 euros as a counterclaim.

CONSIDERATIONS

1. The present dispute arises from the implementation of decision CA/D 2/15 of 26 March 2015 by which the EPO Administrative Council abrogated the provisions governing the invalidity allowance paid under Article 62a of the Service Regulations and provided that non-active employees who had been receiving the allowance would, as from 1 January 2016, be entitled – now in the capacity of former employees – to a retirement pension for health reasons.

The complainant, who was in that position, was informed of the new provisions by a letter of 17 July 2015, in which his attention was drawn in particular to the fact that, under the new provisions, he would not be allowed to perform gainful activities or employment after 1 January 2016.

2. Like a number of other employees concerned, the complainant requested the lifting of this ban, which meant it was no longer possible to receive additional income from other sources, as had been allowed to a limited extent under the previous rules. He submitted a request for review of the decision of 17 July 2015 and then an internal appeal against the decision of 11 December 2015 confirming the initial decision.

He now impugns before the Tribunal the decision taken on behalf of the President of the Office on 27 March 2020, which rejected this appeal as "manifestly irreceivable", in accordance with the recommendation issued by the IAC at the end of the summary procedure, which the IAC may use, inter alia, when it considers that an appeal is manifestly irreceivable. That decision was based on the fact that, in the present case, the complainant was not actually performing gainful activities or employment at the material time and only argued that he wished to be able to do so in the future. The conclusion was drawn from this that the contested decision did not in fact adversely affect him, so he did not have a cause of action to challenge it.

3. Continuing this line of argument, the EPO argues that the complaint is irreceivable for lack of a cause of action, since it does not seek to challenge an individual decision adversely affecting the complainant. This objection to receivability is thus directly related to the question of the lawfulness of the impugned decision since, as has just been stated, that decision was based on the same ground.

4. However, in Judgment 4394, delivered in public on 14 April 2021 concerning four complaints filed by former EPO employees who were in a similar position to that of the complainant and raising the same question, the Tribunal held that this objection to receivability should be dismissed. It accepted that the complainants did have a cause of action in challenging the ban on gainful activities or employment, even though that ban would not have forced them to abandon activities or employment that they were actually performing.

In that judgment, the Tribunal held that insofar as the letter of 17 July 2015, which had been sent to all the employees concerned, notified them of a change of status resulting from decision CA/D 2/15, it could be regarded as an individual decision implementing a general decision in their regard and therefore could form the basis of a request for review.

Referring to its case law on determining whether a cause of action exists, the Tribunal recalled in that judgment that "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" (see Judgments 1712, consideration 10, 2632, consideration 10, and 3337, consideration 7). Thus, in that case, since the ban on the performance of gainful activities or employment by the former employees concerned changed their previous situation in a manner detrimental to their interests and had the effect of requiring them to refrain from undertaking such activities or employment in the future, the decision adversely affected them, even though the actual injury deriving from the implementation of the ban was, in their case, purely hypothetical.

5. The Tribunal sees no reason to depart from its recent determination in Judgment 4394 and will plainly take the same approach in the present case.

Since the complainant should therefore be recognised as having a cause of action, the complaint is not only receivable but must also be allowed. Accordingly, the IAC was wrong to recommend, in the summary procedure that it believed it could use, that the complainant's internal appeal should be rejected as manifestly irreceivable, and it was also wrong for the impugned decision to endorse that recommendation. That decision, which is hence unlawful, must therefore be set aside, without there being any need to examine the complainant's other pleas against it.

The case will be remitted to the EPO so that the merits of the complainant's internal appeal can be given proper consideration by the IAC and so that a new final decision can be issued thereon.

6. The complainant seeks an award of damages in compensation for the various injuries caused by the impugned decision.

In that regard, the Tribunal considers that, by unlawfully rejecting his appeal following a summary procedure for lack of a cause of action, the impugned decision placed the complainant in an uncertain and stressful situation. This resulted in moral injury, the amount of which can be assessed – as it was in the case of the complainants in Judgment 4394 – at 7,000 euros.

Furthermore, the complainant rightly takes issue with the slowness of the internal appeal procedure, which lasted almost four and a half years, owing in particular to the referral of the appeal to a new IAC on account of the improper composition of the IAC that initially heard it. That is plainly excessive and, although the complainant has already received compensation of 300 euros on that basis under the impugned decision, the Tribunal considers that sum insufficient in this case to redress the moral injury caused. Moreover, it is apparent from the wording of the IAC's recommendation proposing a payment of compensation that the amount was set taking into account the fact that the appeal was deemed suitable for a straightforward examination in summary proceedings, which led to it being reduced. However, as stated above, that assessment was based on an error as to whether there was a cause of action. In the circumstances, the Tribunal considers that the injury specifically caused to the complainant by the undue length of the internal appeal procedure will be fairly redressed by awarding him compensation in the amount of 2,000 euros in addition to the compensation that has already been paid to him.

By contrast, the Tribunal observes that the other material and moral injuries for which the complainant seeks compensation relate to his criticisms of the reform resulting from decision CA/D 2/15. The claims directed against that decision are thus linked to the consideration of the merits of his appeal and, in view of the referral of the case back to the Organisation, cannot be dealt with in these proceedings.

7. The complainant further requests the Tribunal to order the EPO to "[p]rovide unambiguous details of the method of calculating the 'new' pension for health reasons, in particular with regard to the guaranteed nominal value".

Thus framed, this claim can only be dismissed as irreceivable. Indeed, it is firmly established by the case law that it is not for the Tribunal to make orders of this kind against organisations (see, for example, Judgments 2370, consideration 19, 2541, consideration 13, 3506, consideration 18, or 4038, consideration 19).

On this point, the Tribunal merely notes that, although the file shows that on 20 October and 18 November 2015, the EPO sent the complainant tables showing the method used to calculate his pension, it cannot be considered, as the Organisation submits, that the complainant's request for information has thereby become moot, particularly since the tables were not accompanied by any explanations in words and, moreover, they were expressly presented as being only provisional. If the complainant were to continue to wish for additional information concerning the method used to calculate his pension, the Organisation should, under its duty to provide information and its duty of care, endeavour to meet his expectations, provided, at least, that they are formulated with sufficient clarity (see, on this point, Judgment 3963, consideration 2).

8. As he mainly succeeds, the complainant is entitled to costs for the proceedings before the Tribunal, which, in view of the fact that he did not engage a lawyer, are set at 800 euros.

However, the Tribunal considers that there are no grounds for awarding costs in respect of the internal appeal proceedings. Costs of this kind may be awarded only in exceptional circumstances (see, for example, Judgments 4157, consideration 14, or 4392, consideration 13). Such circumstances are not evident in this case.

9. The EPO has asked that the complainant be ordered to pay it the sum of 100 euros in partial compensation for its own legal costs on the grounds that the complaint is an abuse of process. However, the mere fact that the complaint has been allowed by the Tribunal obviously precludes it from being considered abusive. This counterclaim will therefore be dismissed.

DECISION

For the above reasons,

1. The impugned decision of 27 March 2020 is set aside.
2. The case is remitted to the EPO so that the merits of the complainant's internal appeal can be given proper consideration by the IAC and so that a new final decision issued can be thereon.
3. The EPO shall pay the complainant moral damages in the amount of 9,000 euros.
4. It shall also pay him 800 euros in costs.
5. All other claims are dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 28 April 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ