Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K. (Nos. 8 and 38)

v.

EPO

134th Session **Judgment No. 4563**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 2 October 2012, the EPO's reply of 27 October 2014, the complainant's rejoinder of 14 January 2015 and the EPO's surrejoinder of 17 April 2015;

Considering the thirty-eighth complaint filed by Mr A. C. K. against the EPO on 22 October 2018 and corrected on 24 November 2018, the EPO's reply of 7 March 2019, the complainant's rejoinder of 13 April and the EPO's surrejoinder of 11 July 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 complainant challenges the decision to award him an invalidity allowance instead of an invalidity pension.

Before 1 January 2008, employees meeting the definition of invalidity received a monthly invalidity pension. To the extent that payments of the invalidity pension were subject to income tax in an EPO Member State, the European Patent Office, the EPO's secretariat, adjusted the pension by a certain percentage in order to compensate for the imposition of the national income tax.

On 14 December 2007 the Administrative Council adopted decision CA/D 30/07 which amended, with effect from 1 January 2008, several articles of the Service Regulations for permanent employees of the European Patent Office, including Article 42 concerning non-active status, Article 83 on sickness insurance, Article 84 (which provided for the payment of a lump sum in the event of permanent invalidity) and Article 107 on the possibility of making an internal appeal. The provisions on the invalidity pension were then repealed and Article 62a was inserted in the Service Regulations. It provided that employees who had not yet reached retirement age and who were found to fulfil the conditions for invalidity would cease to perform their duties and would receive an invalidity allowance. Article 42, as amended, provided that in such a case the employee would be assigned to non-active status. Pursuant to Article 62a(7) the invalidity allowance was subject to contributions to the Pension Scheme. The allowance was intended to be exempt from national income tax.

Decision CA/D 17/08 amended as of 1 January 2009 several articles of the Service Regulations, including Articles 62a(7), 83 and 84.

By letters of 5 July 2012 the complainant was informed that a medical committee had established that he was permanently incapacitated and therefore unable to perform his duties. Pursuant to Article 62a of the Service Regulations, the President of the Office had thus decided to place him, as of 1 July, on non-active status and to grant him an invalidity allowance. Under Article 84(1)(b) the complainant was entitled to the payment of a lump sum. On 6 July 2012 the President issued a certificate stating that the complainant had ceased to perform his duties on 1 July 2012 and that he was in receipt of an invalidity allowance. That is the decision the complainant impugns in his eighth complaint.

In a letter of 12 July 2012 the complainant asked for confirmation that, in the event that the German authorities levied tax on his invalidity allowance, the EPO would compensate in full the national tax. If the EPO could not confirm this, he asked that his letter be considered as an internal appeal. The Administration replied on 7 August that even though the allowance was exempt from national taxation, it appeared that the German authorities might refuse such an exemption. Should the

tax be due at some point, the EPO would reimburse the amount of tax to the complainant. As his request was deemed to be met, the complainant was asked to confirm that he did not wish to pursue the matter as an internal appeal.

On 2 October 2012 the complainant filed his eighth complaint with the Tribunal but also, on the same day, lodged an internal appeal with the President. His main requests were that he be awarded an invalidity pension and that CA/D 30/07 and CA/D 17/08 be quashed *ab initio*. By a letter of 30 November 2012 the complainant was informed that the President considered that the rules had been correctly applied. Consequently, his letter had been registered as an internal appeal and forwarded to the Appeals Committee for an opinion.

Having heard the parties, the Appeals Committee issued its opinion on 14 June 2018. It unanimously recommended that the appeal be dismissed as partly irreceivable (because the complainant sought the quashing of a general decision and had not suffered any adverse effect) and entirely unfounded. Due to the unreasonable length of the appeals proceedings, the Committee also recommended that the complainant be awarded 500 euros by way of moral damages. By letter of 25 July 2018 the complainant was informed that the Vice-President of Directorate-General 4, by delegation of power from the President, had decided to follow the Committee's recommendations. That is the decision the complainant impugns in his thirty-eighth complaint.

In his eighth complaint the complainant asks the Tribunal to order that he be awarded an invalidity pension instead of an invalidity allowance and to quash decisions CA/D 30/07 and CA/D 17/08 *ab initio*. Subsidiarily, he seeks the payment of 1.7 million euros for the abolition of the joint guarantee of the Contracting States to the European Patent Convention for his income as an invalid and an order that the EPO pay him 100 per cent tax adjustment on the national tax levied on his invalidity allowance plus 100 per cent compensation for the national tax levied on the tax adjustment. Moreover, the complainant asks that the pension contributions deducted from his invalidity allowance since 1 July 2012 be reimbursed to him, that no pension contribution be deducted from the invalidity pension/allowance and that his payslips be corrected accordingly.

He asks that the amendment of Article 83 of the Service Regulations be quashed or that he be awarded 400,000 euros compensation for the loss of a financial guarantee. He also asks that the amendment of Article 107 of the Service Regulations be quashed. He seeks the payment of 8 per cent compound interest on all amounts due, 50,000 euros in moral damages and costs. In his rejoinder the complainant asks the Tribunal to declare that the recommendations made by the Appeals Committee in an unlawful composition have no legal effect.

The EPO asks the Tribunal to dismiss the complaint as irreceivable since the complainant has not exhausted the internal means of redress and cannot directly request the setting aside of a general decision, and, subsidiarily, as unfounded.

In his thirty-eighth complaint the complainant asks that this complaint be joined with his eighth complaint. He also asks the Tribunal to award him an invalidity pension until his death, to quash CA/D 30/07 and CA/D 17/08 or to order that the EPO no longer apply them and that it apply to him "the previous wording of the regulations". Subsidiarily (if he continues to receive an invalidity allowance until the age of 65), he asks the Tribunal to award him 1.7 million euros for the abolition of the joint guarantee of the Contracting States for his income as an invalid until he reaches the statutory retirement age and to order that the EPO pay him 100 per cent tax adjustment on the national tax levied on his invalidity allowance plus 100 per cent compensation for the national tax levied on the tax adjustment. He also asks that the pension contributions deducted from the invalidity allowance since 1 July 2012 be reimbursed to him, that no pension contribution is deducted from the invalidity pension/allowance and that his payslips be corrected accordingly. He seeks the reimbursement of the pension contributions deducted from the pension for health reasons (which has replaced the invalidity allowance since 1 January 2016) and the correction of his payslips. He asks that the amendment of Article 84 of the Service Regulations be quashed or that the previous version of this article be applied. Alternatively he seeks the payment of 400,000 euros compensation for the loss of a financial guarantee. He also seeks the payment of 6 per cent compound interest on all amounts due, 50,000 euros by way of moral damages,

2,500 euros for the delay in the internal proceedings and costs for the internal procedure and the proceedings before the Tribunal. He asks the Tribunal to follow an "accelerated procedure".

The EPO asks the Tribunal to dismiss the complaint as irreceivable on several grounds and wholly unfounded. It does not oppose the request for joinder.

CONSIDERATIONS

1. As the two complaints are based on the same material facts and raise the same issues of fact and law, they may be dealt with in one judgment and are therefore joined.

2. The complainant requests oral proceedings and the hearing of witnesses. 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. The Tribunal therefore rejects the request.

3. By his eighth complaint, the complainant impugns the 6 July 2012 decision in which the President of the Office stated that the complainant "shall cease to perform his duties with effect from 1 July 2012, and receive an invalidity allowance". In brief, by this complaint the complainant requests to be awarded an invalidity pension instead of an invalidity allowance, and seeks, for this purpose, the quashing of the underlying general decisions CA/D 30/07 and CA/D 17/08. The 6 July 2012 decision was also challenged by means of an internal appeal, which was dismissed by a decision of 25 July 2018. The latter decision is impugned by the complainant in his thirty-eighth complaint, in which he submits, essentially, the same requests as those made in his eighth complaint.

4. With regard to his eighth complaint, a preliminary issue of receivability has to be dealt with. The eighth complaint was filed with the Tribunal directly against the 6 July 2012 decision without waiting for the outcome of the internal appeal that the complainant had lodged against that same decision.

Article 107 of the Service Regulations, in the version in force at the material time, stated:

> "(1) Any person to whom Article 106 applies may lodge an internal appeal either against an act adversely affecting him, or against an implied decision of rejection as defined in Article 106.
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> (2) The provisions of paragraph 1 shall not apply to:
>
> (a) decisions taken after consultation of the Medical Committee or in accordance with the arbitration procedure laid down in Article 62, paragraph 13 [...]"

Although the impugned decision was taken after consultation with the Medical Committee, it is not challenged on medical grounds, but only on the legal issue of the replacement of the invalidity pension by an invalidity allowance. The complainant himself expressly affirms in his eighth complaint that "[t]he recommendation of the Medical Committee is not impugned". For this reason, the 6 July 2012 decision is not challengeable directly before the Tribunal (see Judgment 3458, considerations 5 and 6). It is not a final decision within the meaning of Article VII of the Statute of the Tribunal.

The complainant also impugns Article 107(2)(a) of the Service Regulations, claiming that it precludes the internal appeal with regard to decisions taken after consultation of the Medical Committee. It is unnecessary to address this plea. Indeed, Article 107(2)(a) of the Service Regulations, as applied by the Organisation, and as interpreted by the Tribunal, did not immediately and directly affect the complainant, given that it did not impede the complainant, in the present case, from lodging an internal appeal. The complainant was entitled to lodge an internal appeal against the decision.

His eighth complaint is therefore irreceivable.

5. By his thirty-eighth complaint, the complainant impugns the 25 July 2018 decision as well as the underlying general decisions CA/D 30/07 and CA/D 17/08. The complainant asserts that the challenged general decisions immediately affected his rights for various reasons, which may be summed up as follows:

(a) the invalidity allowance is not subject to the joint guarantee of the Contracting States, and this would result in a loss of income in the event of a merger, reconstitution, other transformation or dissolution of the EPO;

(b) contrary to the intent of the EPO, which was to replace the invalidity pension with an invalidity allowance in order to exempt the income from national income tax, the German tax authority levies income tax also on the invalidity allowance;

(c) the amended Article 84 of the Service Regulations would only allow a one-time lump-sum payment, and no longer in a case where a staff member, who was placed on non-active status, returns to active status and again later to non-active status;

(d) Article 107 of the Service Regulations precludes internal appeals in cases of decisions taken after consultation of the Medical Committee; and

(e) the invalidity allowance is subject to a deduction of a pension contribution.

6. It is appropriate to recall that prior to 1 January 2008, EPO staff members fulfilling the conditions of invalidity were placed on pensioner status and received a monthly invalidity pension calculated by reference to the retirement pension that they would have received if they had remained in service until retirement age, with adjustments to compensate for the imposition of national income tax. By general decision CA/D 30/07 of 14 December 2007, the Administrative Council repealed the provisions regarding the invalidity pension and introduced new and amended provisions in the Service Regulations: as of 1 January 2008 staff members fulfilling the conditions of invalidity were placed on non-active status and were entitled to receive an invalidity allowance under Article 62a of the Service Regulations. The invalidity allowance

was supposed to be exempt from national income tax, as it was not a pension; however, in the event that a Member State were to refuse such exemption, the Organisation was willing to provide legal and financial support to staff members. By general decision CA/D 17/08 of 21 October 2008, the Administrative Council further amended the provisions relating to the invalidity allowance as of 1 January 2009. The complainant contends that he should have been granted an invalidity pension rather than the invalidity allowance which replaced it. Central to this complaint is the contention that the impugned decision is based on a general decision (CA/D 30/07) which, in turn, is unlawful because it breached the complainant's acquired rights.

7. The complainant challenges both an individual decision and two general decisions. The two general decisions are partially challenged directly, irrespective of the fact that they have not been applied to the complainant by means of an individual decision. According to the Tribunal's case law, complainants can impugn a decision only if it directly affects them, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to them, but they are not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action (see Judgments 3291, consideration 8, and 4119, consideration 4). However, a general decision can be immediately challenged where it does not require an implementing decision and immediately and adversely affects individual rights (see Judgment 3761, consideration 14).

In light of the above-mentioned case law, the claims and pleas of the complainant summed up in paragraphs (a), (c) and (d) of consideration 5 above are either irreceivable or moot.

8. In particular, the plea that the invalidity allowance is not subject to the joint guarantee of the Contracting States together with the EPO, and this would result in a loss of income in the event of a merger, reconstitution, other transformation or dissolution of the EPO (see consideration 5, paragraph (a), above) shall be dismissed, as the complainant has no cause of action. The complainant refers to potential future events, but there is no immediate negative effect on his rights.

Furthermore, the Tribunal has already held, in a case where the same issue had been raised, that "[w]ith regard to the alleged loss of the Member States' guarantee in the new system, the Tribunal is satisfied that the contested rules do not violate any acquired right and further notes that Article 37c of the European Patent Convention states with regard to budgetary funding, that the budget of the Organisation shall be financed 'where necessary, by special financial contributions made by the Contracting States'. In light of this, there has been no loss of guarantee" (see Judgment 3623, consideration 11).

9. The claim to quash Article 84 (see consideration 5, paragraph (c), above) is irreceivable inasmuch as this provision does not immediately and adversely affect the complainant. The reasons underlying this claim are merely speculative and hypothetical: the complainant had been placed on non-active status and had already received the lump-sum provided for by Article 84. His claim is based on the potential future harm that he would allegedly suffer in the event that he returned to active status and later again to non-active status.

10. With regard to Article 107 of the Service Regulations (see consideration 5, paragraph (d), above), the complainant does not specifically seek that it be quashed, but in his complaint he criticizes that provision. Suffice it to note that the interpretation and application of Article 107 by the Organisation allowed the complainant to lodge an internal appeal, and therefore the plea regarding the alleged absence of the internal appeal is moot.

11. The plea summed up in paragraph (b) of consideration 5 above, is moot. The complainant has been reimbursed in full for the amount of the national income tax levied by the national authority on his invalidity allowance.

12. The plea that the invalidity allowance is subject to the deduction of a pension contribution, which was not previously applied to the invalidity pension (see consideration 5, paragraph (e), above), raises the issue of whether the EPO infringed an acquired right of the complainant.

The Tribunal held that there was no such infringement where a staff member was already receiving an invalidity pension before decision CA/D 30/07 entered into force (the same decision challenged in the present case) and started receiving an invalidity allowance as of 1 January 2008 (see Judgment 3623, consideration 7). In the present case, where the complainant was placed on non-active status long after the new pension scheme had entered into force, there is even less chance of infringement. According to the Tribunal's case law, a rule which concerns a long-term issue (such as pensions which last the remainder of the employees' lifetimes) may be modified throughout the years. The changes in circumstances which may require the rule to be amended must be reasonable and the changes have to balance the interests of the employees and the Organisation. The interest of current and future employees who are not currently affected by the rule but shall be in the future is also to be taken into account by the Organisation. The question of the sustainability of pension schemes must be a primary concern to the Organisation and as such may naturally require adjustments to be made to the norm regulating pension schemes over time. This question has already been examined by the Tribunal in relation to the same Administrative Council's decision CA/D 30/07. The Tribunal found in Judgment 3540, and in the case law cited therein, that the reform did not violate the employees' acquired rights:

> "11. In Judgment 3375, the Tribunal considered whether a complainant, who was also required to pay pension contributions towards his EPO invalidity allowance which replaced the invalidity pension on 1 January 2008, under the same decision CA/D 30/07, had an acquired right to a non-deductible invalidity pension. The Tribunal found that the complainant did not have such an acquired right. In that case, the Tribunal stated as follows in considerations 8 and 9:
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> > '8. The following statement by the Tribunal in Judgment 1392, under 34, in which the EPO was the defendant, presents a helpful perspective from which to consider the question whether the complainant had an acquired right in the application of the pre-2008 invalidity provisions:
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> > "'whereas [the] right to a pension is no doubt inviolable, 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.'"
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> 9. This statement recognizes, in the first place, that it is within an organisation's discretion to amend its Service Regulations. Article 33(2)(b) and (c) of the European Patent Convention, the EPO's founding Treaty, specifically permits it to amend its Service Regulations and its Pension Scheme Regulations. In accepting this, however, the Tribunal stresses that the EPO should strike a balance between the mutual obligations of the Organisation and its employees and the main or fundamental conditions of its employees' appointment (see Judgment 832, under 15).'
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> [...]
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> 13. Considerations 14 to 18 of Judgment 3375 show that on the evidence that it accepted, the Tribunal expressed satisfaction that the change in the invalidity benefits to include the payment of the pension contribution was made on sound actuarial studies and management considerations, which ultimately provided the bases for the decisions of the [Administrative Council] of 14 December 2007, that are contained in decision CA/D 30/07, for the implementation of Article 62a of the Service Regulations. The Tribunal was satisfied, on the evidence, that the change was intended to ensure the long-term viability of the social security cover that is itself an essential and fundamental term or condition of employment of the complainant and other employees of the EPO, in the longer term interest of staff members. It was also in the interest of the EPO's obligation to continue to provide invalidity allowances to its employees. It was further found that the change to the invalidity allowance left the EPO's pension scheme, including the invalidity aspect, basically in the form in which it was known and administered. This seemed to have achieved the balance which the Tribunal's case law requires where such changes are made. On the one hand, the overall intention was to maintain certainty and continuity in the EPO's pension scheme, in the interests of the staff who subscribed to it on joining the Organisation. On the other hand, it was to support the EPO's interest to maintain the viability of its pension scheme as adjustments are made to changing needs. [...]"

13. The complainant also seeks the reimbursement of the pension contribution deducted from the pension for health reasons which is paid to him since 2016. This last claim is outside the scope of the present complaint and therefore the Tribunal shall not address it.

14. The complainant requests damages for the delay in the internal appeal in an amount higher than the 500 euros already awarded to him by the Organisation. 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). 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). In the present case, the Tribunal considers that the amount of 500 euros was sufficient in light of the complexity of the case, its outcome, and the circumstance that the complainant did not prove that he was adversely affected by the delay.

15. As the complaint fails on the main claims, the complainant's further ancillary claims for the payment of material and moral damages, interest and costs shall be dismissed.

16. The range of procedural issues and other pleas raised by the complainant had no material effect on the outcome or are irrelevant. Accordingly, these other immaterial or irrelevant pleas need not be addressed (see Judgment 4487, consideration 13).

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 16 May 2022, 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 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ