K. (No. 47)

v.

EPO

137th Session **Judgment No. 4803**

THE ADMINISTRATIVE TRIBUNAL,

Considering the forty-seventh complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 12 June 2019 and corrected on 30 July, the EPO's reply of 19 November 2019, the complainant's rejoinder of 2 April 2020, the EPO's surrejoinder of 28 September 2020, the complainant's additional submissions of 13 April 2021 and the EPO's final comments of 9 July 2021;

Considering the letter of 12 January 2023 by which the EPO informed the Registry of the Tribunal that it had paid 100 euros in moral damages to the complainant for the irregular composition of the Appeals Committee, as was done in Judgment 4550;

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 contests amendments made to the procedure for adjusting remuneration as reflected in his payslips.

The complainant, who was an employee of the European Patent Office, the EPO's secretariat, was placed on non-active status for reasons of invalidity as from 1 July 2012. As of 1 January 2016, he was placed on retirement for health reasons.

In the meantime, on 26 June 2014, the Administrative Council adopted decision CA/D 3/14 amending, as from 1 July 2014, the Implementing Rule for Article 64 of the Service Regulations for permanent employees of the European Patent Office concerning the procedure for adjusting the remuneration of permanent employees. On 11 December 2014, it adopted decision CA/D 8/14 on revised salaries and other elements of the remuneration of permanent employees as from 1 July 2014.

On 16 March 2015, the complainant filed a request for review with the President of the Office on the salary adjustment as reflected in his annual salary statement for 2014 and his payslips of December 2014, January 2015 *et seq*. He alleged that the amendments to the EPO's salary method were to his detriment. Indeed, the new salary method led to arbitrary and unpredictable results, slowed down any positive salary adjustments, did not respect his acquired rights and legitimate expectations and did not fulfil the minimum criteria established by the Tribunal that a salary method should be "stable, foreseeable, and clearly understood". He therefore asked inter alia that the salary scales that applied as of 1 January 2008 be used as the starting point for any subsequent adjustment according to the new salary method on 1 July 2008 and the following years, that the salary scales of 1 July 2014 be retroactively adjusted, that his "pay" be immediately increased by 10 per cent, and that the amendment to the Implementing Rule be quashed. He also asked that a document be submitted to the Administrative Council proposing to reintroduce, in the Implementing Rule, Article 5 of the salary method described in decision CA/D 8/02. He further requested that his "annual payslip 2014", his January 2015 payslip, and all his subsequent payslips be corrected. Subsidiarily, he requested not to apply the salary method introduced by decision CA/D 3/14. His request was denied and, in July 2015, he filed an appeal with the Appeals Committee. On 18 October 2016, he was informed that his appeal was rejected as manifestly irreceivable in accordance with the Appeals Committee's recommendation. In his thirty-fourth complaint before the Tribunal, he impugned that decision. That complaint was dismissed by the Tribunal in Judgment 4256 delivered in public on 10 February 2020.

In the meantime, in light of Judgment 3785, the President considered that the final decision of 18 October 2016 was flawed as it was based on the opinion of an Appeals Committee not properly constituted. He informed the complainant in May 2017 that he had withdrawn the final decision and would refer it to the Appeals Committee for a new examination. The secretariat of the Appeals Committee informed the complainant, in September 2018, that his appeal would be treated by the newly constituted Appeals Committee in accordance with Articles 106 to 113 of the Service Regulations and the corresponding Implementing Rules as amended by decision CA/D 7/17. The complainant objected to that way of doing, and raised objections concerning the impartiality of the Vice-Chair of the Appeals Committee and the presiding member of the panel examining his appeal.

The Appeals Committee examined the complainant's appeal anew and issued its opinion on 29 January 2019. It rejected the complainant's request for oral hearings on the ground that his appeal would be dealt with under the summary procedure. It held that the appeal was manifestly irreceivable as he had failed to demonstrate that the application of the contested salary adjustment method contained in decisions CA/D 3/14 and CA/D 8/14 had a possible adverse effect on him. It noted in particular that he did not argue that the contested moderation and exception clauses, introduced respectively by Articles 11 and 12 of decision CA/D 3/14, were applied to him and hence could have had any adverse effect on him. He merely referred to potential future effects, and the contested payslips did not show any adverse effect. The Appeals Committee stated that, in any event, it was not competent to recommend the quashing of general decisions adopted by the Administrative Council. However, it recommended awarding him moral damages for the length of the internal appeal procedure.

By a letter of 21 March 2019, the Principal Director of Human Resources, acting on delegation of authority from the President, informed the complainant that she had endorsed the recommendation of the Appeals Committee for the reasons it stated. She awarded him 200 euros in moral damages for the length of the internal appeal procedure. That is the impugned decision.

The complainant asks the Tribunal to quash the decision of 18 October 2016, and consequently to allow all the claims he made in his thirty-fourth complaint. He also seeks the quashing of the impugned decision of 21 March 2019 and the correction of his payslips since 1 July 2014, the setting aside of all general decisions (in particular decisions CA/D 3/14 and CA/D 8/14) underlying the contested individual decisions. He asks that the adjusted salary scales as of 1 January 2008 be used as the starting point for any subsequent new salary method introduced as of 1 July 2008, and that Article 5 of the salary method resulting from decision CA/D 8/02 be reintroduced in the Implementing Rule for Article 64 of the Service Regulations. He further claims moral damages, costs and compound interest at the rate of 6 per cent on all amounts due.

The EPO asks the Tribunal to dismiss the complaint as irreceivable insofar as he challenges decisions CA/D 3/14 and CA/D 8/14 on the ground that he has no cause of action. It considers that the complaint is otherwise unfounded. The EPO asks the Tribunal to order that he bear his costs.

CONSIDERATIONS

1. The complainant is a former staff member of the EPO. He left the Organisation's service on 1 January 2016. This, his forty-seventh complaint, was filed on 12 June 2019. The genesis of the complaint is events occurring in 2014 and early 2015. Generally, they are sufficiently set out earlier in this judgment. The focus of his grievance is a decision of the Administrative Council of 26 June 2014 adopting decision CA/D 3/14 which amended the Implementing Rule for Article 64 of the Service Regulations for permanent employees of the Office and the adoption of decision CA/D 8/14. He challenges, amongst other things, these general decisions and does so by reference to his payslips, namely his annual payslip for 2014 and his January 2015 payslip (adding "et seq."). His challenge commenced by way of a request for review submitted on 16 March 2015, then identifying the subject matter of his grievance and the scope of his grievance.

2. For procedural reasons already referred to, the Appeals Committee came to address the receivability of his internal appeal in its opinion of 29 January 2019. The Appeals Committee found, as a matter of fact, that the salary adjustment methods contained in decisions CA/D 3/14 and CA/D 8/14 had not been applied to the complainant in a way that adversely affected him. The Committee concluded that:

> "The lack of adverse effect of these decisions is even admitted by the [complainant] who does not claim that the amount of salary received was altered or wrongly calculated by the change of the salary adjustment method, but merely argues that 'it is too risky to wait' and that *'it is wholly unpredictable what the Tribunal will decide [in a later future [judgment]'* [...] In fact, the [complainant] uses the impugned payslips as a vehicle to challenge general decisions which do not yet adversely affect him but may lead to unpredictable results and a detrimental effect on staff in the future. However, according to the Tribunal's case law, *'A future and uncertain alleged injury cannot establish a cause of action'* (Judgement No. 3618, para. 6) and *'the complainant suffers no injury from having to wait for a later decision which he may impugn'* (Judgement No. 1674, para. 6a)."

3. The EPO effectively repeats the analysis of the Appeals Committee in arguing in its reply that this complaint is irreceivable. In his brief, the complainant argues, on the question of receivability, that there was "a reasonable presumption that the decision will bring injury" referring to Judgment 1712 to which can be added more recent judgments, namely, by way of example, Judgments 3739 and 2081. However, having regard to the Appeals Committee's findings, it is not inevitable, certain or even likely there will be future injury to the complainant. It remains the position generally that an abstract change of methodology of salary calculation or the calculation of other emoluments is challengeable when it is implemented or, exceptionally, when future injury is certain or likely. Thus, in Judgment 4075, recently reiterated in Judgments 4381, consideration 11, and 4380, consideration 8, for instance, the Tribunal concluded that the complaint was irreceivable as beyond the scope of the Tribunal's competence. In that matter, the defendant organisation changed, by decision of 1 May 2015, the methodology for determining tax equalization payments payable to staff. The complainant commenced the process of challenging this decision internally on 23 July 2015 by way of Request for Resolution,

ultimately leading to a complaint filed with the Tribunal on 2 August 2016. The Tribunal said in consideration 4 of Judgment 4075:

> "The Tribunal has consistently held that 'a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to [the complainant]' (see, for example, Judgments 3427, under 31, 4028, under 3, 3628, under 4, and 3291, under 8). It is clear that the decision to amend the calculation of the tax equalization payments is a decision of general application that would necessarily require implementation through an individual decision to have any effect on a staff member. It follows that the decision was not open to challenge by the complainant until the new methodology was applied to calculate the amount of the tax equalization payment due to her for a particular year. This was not the case at the time the complainant submitted her Request for Resolution. Article II, paragraph 5, of the Tribunal's Statute provides that the Tribunal is competent to hear complaints 'alleging non-observance, in substance or in form, of the terms of appointment [...] and of provisions of the Staff Regulations'. As the Administration's 1 May 2015 decision was a decision of general application and was not applied to the complainant through an individual decision, the complaint is beyond the scope of the Tribunal's competence and is irreceivable and will be dismissed."

4. In the present case, this reasoning is apt to apply to the circumstances of the complainant. While the vehicle for the complainant's challenge is his payslips, he has not established that the general decisions were implemented in a way that negatively affected him nor is there evidence, particularly having regard to the Appeals Committee's findings, that it was inevitable, certain or even likely the complainant would suffer future injury. This complaint is irreceivable and should be dismissed.

5. In his complaint form, the complainant requested oral proceedings, identifying himself and a staff member as witnesses to be called. As the parties have presented ample submissions and documents to permit the Tribunal to reach an informed decision on the case, there is no need for oral proceedings. The request for oral proceedings is, therefore, rejected.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER