Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

F. (No. 14)
v.
EPO

138th Session **Judgment No. 4898**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr T. F. against the European Patent Organisation (EPO) on 30 April 2021, the EPO's reply of 21 April 2022, the complainant's rejoinder of 31 October 2022 and the EPO's surrejoinder of 6 February 2023;

Considering the applications to intervene filed by Ms M. A., Ms A. C., Mr E. H., Mr M. K., Mr V. K., Mr J. R., Ms I. S., Mr A. T. and Mr I. W. on 9 February 2024 and the EPO's comments thereon of 29 February 2024;

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 contests the abolition of the permanent invalidity lump sum.

The complainant is a staff member in active service at the European Patent Office, the secretariat of the EPO, since 1 September 2006.

Following consultation of the General Consultative Committee (GCC), the Administrative Council adopted decision CA/D 2/15 on 26 March 2015, which amended several provisions of the Service Regulations for permanent employees of the Office relating to sick leave and invalidity. In particular, it amended, as of 1 April 2015, Article 84 of the Service Regulations, by abolishing the permanent invalidity lump sum that was payable in case of permanent invalidity of an employee.

In June 2015, the complainant filed a request for review of the decision to no longer pay the permanent invalidity lump sum. He contested Articles 15 and 16 of decision CA/D 2/15 amending, inter alia, Article 84 of the Service Regulations. He also contested his April 2015 payslip, which showed that the premiums for the invalidity insurance were no longer deducted from his salary.

Having been informed that his request for review was rejected as unfounded, the complainant lodged an internal appeal with the Appeals Committee on 10 November 2015. He alleged that the EPO had abolished a right, and an insurance scheme guaranteeing that right, although it had previously acknowledged that it was an acquired right. The complainant acknowledged that he had no "current entitlement to receiving a lump sum", but contended that all staff members recruited before 1 April 2015 had the right to receive a lump sum payment in the event of permanent invalidity and to participate in an insurance scheme giving effect to that right as laid down in Article 84 of the Service Regulations (in the version before it was amended). The abolition of the insurance had an immediate effect on him since, as of 1 April 2015, he was no longer insured. In addition, he alleged breach of his legitimate expectations, of the EPO's duty of care, of the principle of estoppel together with bad faith. He requested, inter alia, the quashing of decision CA/D 2/15 to the extent that it amended Article 84 of the Service Regulations, the restoration of the *status quo ante*, the granting of "real damages" relating to the costs of an alternative insurance, moral damages, exemplary damages and costs.

In its opinion of 23 April 2020, which concerned internal appeals filed by several staff members, the Appeals Committee unanimously found that the complainant's request to have his payslip quashed was receivable as it affected him directly and individually. However, the majority held that the request to have decision CA/D 2/15 annulled was irreceivable as it was a general decision. On the merits, the Appeals Committee unanimously found that the claims directed against the abolition of the permanent invalidity lump sum were unfounded. The Office did not breach the complainant's acquired right given that the right to the payment of a lump sum arose only when the condition of permanent invalidity occurred, which was a remote and rare occurrence. The Appeals Committee unanimously concluded that the right to a permanent invalidity lump sum was not a fundamental term of employment, that the complainant's legitimate expectations were not breached, and that there was no bad faith since an organisation could not be expected to abstain from modifying its rules in case of changed circumstances and for legitimate reasons. Again, it unanimously considered that the participation of nine members of the Central Staff Committee, instead of ten, in the GCC meeting in which the contested reform was discussed could not be attributed to the Office, and the presence of Vice-Presidents on the GCC was not a flaw. However, the Appeals Committee unanimously considered that the Office breached its duty of care by not providing sufficient transitional measures to allow for a smooth transition to the new system, in particular for employees who had a medical condition at the time the reform was adopted and whose permanent invalidity would have been established shortly after the reform. It therefore recommended that the President of the Office take appropriate transitional measures as foreseen by Article 75 of decision CA/D 2/15. It unanimously recommended that the complainant be awarded 300 euros in moral damages for the length of the procedure, and his claim for other relief be rejected as too vague.

The minority members of the Appeals Committee considered that the consultation required on the reform leading to the adoption of decision CA/D 2/15 was flawed because it was not carried out in good faith and the GCC was not properly composed. The minority therefore recommended, inter alia, to set aside the impugned decision, the

payslip, decision CA/D 2/15 to the extent it amended Article 84 of the Service Regulations and to restore the *status quo ante* or, in the alternative, to provide for transitional measures in accordance with the Appeals Committee's unanimous recommendation.

By a letter dated 8 February 2021, the Vice-President of Directorate-General 4 informed the complainant that the Office had decided to partially follow the majority and unanimous recommendations of the Appeals Committee and, accordingly, to dismiss his internal appeal as partly irreceivable and unfounded in its entirety. It had also exceptionally decided to partly depart from the Appeals Committee's findings regarding the duty of care and the implementation of transitional measures. The Vice-President explained that, in view of the extensive and significant coverage granted to incapacitated employees, additional financial support was not required. The Office nevertheless decided to follow the spirit of the Appeals Committee's unanimous recommendation and to introduce transitional measures for employees with medical conditions, which predated the contested reform, and which have not allowed them to return to work since then. They would receive payments equivalent to the former invalidity lump sum. Lastly, the complainant was granted a total of 500 euros compensation for the length of the appeal proceedings. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision of 8 February 2021, the "individual decision", and Article 84 of the Service Regulations as amended by decision CA/D 2/15. He also asks the Tribunal to order the EPO to restore for him the *status quo ante* by "maintaining staff recruited before 1 April 2015 under the old system" and to retroactively proceed with the payment of the contributions (including the share of his contribution) since 1 April 2015. In the alternative, he asks the Tribunal to order that he be reimbursed the monthly contributions he paid to the permanent invalidity scheme since recruitment and "the proceeds from the investment of this sum by the Defendant, if any", as well as interests at the rate of 5 per cent per annum. He further asks the Tribunal to order the EPO to find similar insurance coverage for him, at an affordable price, and to order the EPO to pay the difference between the contributions to be paid to the new

insurer and the contributions paid under the old system. In any event, he asks the Tribunal to award him financial and material damages for the loss of opportunity to contract an equivalent private insurance and of continuously contributing to a single scheme as well as for the loss of the past contributions. In addition, he seeks an award of moral damages, including for undue delay in the internal appeal proceedings, and of exemplary damages for the prejudice suffered due to the partiality of the Appeals Committee and the EPO's bad faith. Lastly, he claims costs.

The EPO asks the Tribunal to reject the complaint as irreceivable, and devoid of merit. According to the EPO, the claims for damages, as well as the claim to order it to find similar insurance coverage for him at an affordable price are irreceivable. Regarding undue delay in the internal appeal proceedings, the EPO observes that the complainant was already granted 500 euros.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts described above.

In brief, the complainant challenges Articles 15 and 16 of general decision CA/D 2/15 to the extent that they amend Article 84 of the Service Regulations for permanent employees of the Office by abolishing the permanent invalidity lump sum that was payable in case of permanent invalidity of an employee, together with his April 2015 payslip which showed that the premiums for the invalidity insurance were no longer deducted from his salary.

2. The EPO raises a number of threshold issues as follows:

(i) general decision CA/D 2/15 is not challengeable;

(ii) the claim for reimbursement of contributions is a new claim, and is, thus, irreceivable for failure to exhaust internal means of redress;

(iii) the request to find a similar insurance coverage is also irreceivable, as it is a new claim and as it amounts to a request for an injunction; and

(iv) as the complainant has significantly increased the amount he claims in moral damages, his claim is irreceivable.

The first receivability issue raised by the Organisation is unfounded.

According to the Tribunal's case law, complainants can impugn general decisions only if they directly affect 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. Moreover, a general decision can be immediately challenged where it does not require an implementing decision and immediately and adversely affects individual rights (see, for example, Judgment 4563, consideration 7). In the present case, the complainant has contested general decision CA/D 2/15 to the extent that it abolishes the permanent invalidity lump sum. The complainant has contested it together with an individual decision, that is the complainant's April 2015 payslip, showing that premiums for the invalidity insurance are no longer deducted from his salary and, as a result, that the complainant is no longer entitled to the lump sum in case of permanent invalidity. It is apparent that the individual decision, that is the April 2015 payslip, implements the general decision and, thus, the general decision has been contested when it was applied in a manner prejudicial to the complainant. Indeed, as of April 2015, the complainant is no longer requested to pay the premium for the invalidity lump sum, because he is no longer entitled to the lump sum after the general decision entered into force. Accordingly, as of April 2015, the Organisation was no longer paying its share of contributions aimed at covering the lump sum for permanent invalidity.

The Organisation's arguments concerning the second and third receivability issues are well founded, as the complainant advances before the Tribunal new claims not yet decided internally. These claims are, therefore, irreceivable. Moreover, the request to find a similar

insurance coverage aims at the Tribunal making an order that is beyond its competence.

There is no need to address the fourth receivability issue, for reasons that will become clear later.

3. The complainant advances a number of pleas that can be grouped as follows:

– procedural flaws affecting general decision CA/D 2/15; and
– substantive flaws affecting general decision CA/D 2/15 and the individual decision.

4. The pleas concerning procedural flaws affecting the general decision may be summed up as follows:

(a) the General Consultative Committee (GCC) was not properly constituted, as, in violation of Article 38(1) of the Service Regulations, it was composed of nine full members and nine alternate members of the Central Staff Committee (CSC), rather than of ten full members and ten alternate members;

(b) the GCC was not properly constituted, as it included Vice-Presidents, appointed by the President of the Office, allegedly in violation of Articles 1, 2, and 38 of the Service Regulations;

(c) the Vice-Presidents appointed to the GCC were also members of the Management Committee (MAC). Having regard to their role and responsibilities as members of the MAC, they lacked impartiality as members of the GCC. Indeed, the same persons participated in the elaboration of the contested reform at the highest level within the MAC and were consulted on the same reform as members of the GCC; in addition, their participation in the GCC curtailed the freedom of speech of the other members of the advisory body;

(d) the appointment of a Vice-President as Chairperson of the GCC was unlawful for the same reasons as those concerning the appointment of Vice-Presidents as members of the GCC.

5. The plea listed as (a) in consideration 4 above should be rejected. Irrespective of which is the correct interpretation of Article 38(1) of the Service Regulations and of Article 7(3) of Circular No. 355, and even if it were to be accepted that there should have been ten members of the CSC sitting in the GCC, this would not be, in the present case, a substantial flaw. Indeed, the number of members appointed by the President was equivalent to the number of members of the CSC so that the balance in the composition of the body was not altered. Therefore, that issue has no bearing on the outcome of the case.

6. The pleas listed as (b) and (c) in consideration 4 above are unfounded. The Tribunal has already addressed and rejected identical pleas raised by the complainant in another case. The Tribunal held in Judgment 4711, consideration 5:

> "The Tribunal has already ruled on complaints regarding the appointment to the General Advisory Committee (GAC) – the consultative body that was later replaced by the GCC – of members who were either employed on contract (mostly Vice-Presidents) or members of the MAC, or both. Such disputes had been brought before the Tribunal by other members of the same GAC. The Tribunal held that '[t]he composition of an advisory body does not, except in cases involving manifest perversity, affect the prerogatives of that body. [...] Moreover, the appointment of the Administration's representatives as members of the GAC does not show any manifest perversity' (see Judgment 4322, consideration 9). This case law is applicable also to cases, like the present one, where the composition of the advisory body is challenged by a staff member who is not a member of such body.
>
> In addition, the Tribunal does not accept the complainant's interpretation of Articles 1, 2, and 38 of the Service Regulations. Article 1(5) stated, at the relevant time, that:
>
> > '[t]hese Service Regulations shall apply to the President and vice-presidents employed on contract only in so far as there is express provision to that effect in their contract of employment'.
>
> Article 2, under the heading 'Bodies under the Service Regulations', included the GCC.
>
> These provisions do not imply that Vice-Presidents as members of the MAC cannot be appointed to the GCC. Such a conclusion is contradicted by the same Article 38, regarding the GCC, which includes in its composition, in addition to all full members of the CSC, the President of the Office and a

number of full members of her or his choice. As a result, the fact that the Service Regulations are not applicable to the President (Article 1) does not impede him from being the Chairman of the GCC (Article 38). This conclusion also applies to Vice-Presidents. Indeed, Article 38 provides that the President shall appoint to the GCC a number of full members of her or his choice, and does not expressly prohibit appointing Vice-Presidents.

As to the plea of lack of impartiality of the members of the MAC and of the Vice-Presidents, the Tribunal first recalls its case law stating it is a general rule of law that an official who is called upon to take a decision affecting the rights or duties of other persons subject to her or his jurisdiction must withdraw in cases in which her or his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, the official may consider herself or himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice (see Judgments 4240, consideration 10, and 3958, consideration 11). A conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest (see Judgment 3958, consideration 11). However, an allegation of conflict of interest or lack of impartiality has to be substantiated and based on specific facts, not on mere suspicions or hypotheses. The complainant bears the burden of proof of conflict of interest (see Judgments 4617, consideration 9, and 4616, consideration 6), and, in the present case, he fails to discharge it. Indeed, the mere circumstance that GCC members are also Vice-Presidents and/or members of the MAC does not sustain a conclusion that they lack impartiality as members of the GCC, as there is no evidence that they had received any instructions from the President (see Judgment 4243, consideration 9).

The complainant relies on the 'Terms of Reference of the MAC' which state that '[a]n agreement in the MAC, or a decision taken in the MAC by the President, has a binding effect on MAC members. MAC members are required to act in a way that is consistent with such agreements or decisions'. This provision is not relevant in the present case. Indeed, even if it were proven that it was prepared by the MAC (and it is not), a draft reform cannot be considered 'a decision' or 'an agreement' taken in the MAC and having binding effects on its members."

The Tribunal sees no reason to depart from this jurisprudence in the present case.

7. Based on the arguments detailed in consideration 6 above, the plea listed as (d) in consideration 4 above is also unfounded.

8. The pleas concerning substantive flaws affecting general decision CA/D 2/15 and the individual decision may be summed up as follows:

(a) breach of the principle *"tu patere legem quam ipse fecisti"*, as the EPO took no transitional measures to ensure the smooth transition to the new system, in violation of Article 75 of decision CA/D 2/15;

(b) breach of the principle of legal certainty and of an acquired right: the right to an invalidity lump sum enshrined in the former Article 84(1)(b) of the Service Regulations was a fundamental and essential term of employment within the meaning of Judgment 832, based on the three-part test established by the Tribunal's case law;

(c) breach of the principle of non-retroactivity; the EPO was barred from changing legal situations which predated the entry into force of decision CA/D 2/15. The pre-established legal situation resulted from the complainant's contributions to the permanent invalidity insurance scheme since recruitment; he suffered a financial loss since his contributions to the "fund" were paid for no reason;

(d) breach of the principles of legitimate expectations and of mutual trust; and

(e) breach of the duty of care, given the failure to properly inform staff members in a timely manner of the reform, the violation of the principle of good faith since the abolition of the invalidity lump sum was not justified, and the failure to mitigate adverse consequences for staff members.

9. The plea listed as (a) in consideration 8 above is unfounded. Article 75 of decision CA/D 2/15 reads:

> "The President of the Office shall take appropriate measures to ensure a smooth transition to the new system."

In light of this provision, the transitional measures fall within the discretion of the Organisation, not only with regard to their content, but also with regard to the decision whether they are needed or not (see Judgment 4711, consideration 10). The Tribunal notes that in the

present case, the impugned decision, following the opinion of the Appeals Committee, has already introduced transitional measures, albeit only for employees with medical conditions which predated the reform and which have not allowed them to return to work since then. The failure to provide further transitional measures of the kind requested by the complainant does not show legal flaws. The reasons given by the EPO for the non-provision of further transitional measures are not unreasonable. The EPO contends that transitional measures regarding the abolition of the permanent invalidity insurance were unnecessary, and, if adopted, would have raised serious practical difficulties while offering little advantages. The Office refers to the difficulty in identifying those who are concerned and the impossibility of obtaining insurance with the same coverage as the former at the same costs. The lump sum benefit was only an incidental element under the permanent invalidity cover and the Office still provides a social security package as its employees receive 70 per cent of their basic salary and salary-related allowances on invalidity, and 100 per cent of other allowances granted to active staff. As a result, the Tribunal considers that the lack of transitional measures was not a breach of the Organisation's duty of care and was not inconsistent with Article 75 of decision CA/D 2/15. In any event, it is not within the Tribunal's purview to impose transitional measures (see Judgment 4711, consideration 10).

10. The plea listed as (b) in consideration 8 above is unfounded. According to the Tribunal's case law, for example Judgment 4711, consideration 8, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must relate to a fundamental and essential term of employment. Judgment 832, consideration 14, details a three-part test for determining whether the altered term is fundamental and essential. The test is as follows:

(1) The nature of the altered term: “It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.”

(2) The reason for the change: “It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.”

(3) The consequence of allowing or disallowing an acquired right and the effect it will have on staff pay and benefits, and how those who plead an acquired right fare as against others.

In addition, as the Tribunal observed in Judgment 4028, consideration 13, international civil servants are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered though depending on the nature and importance of the provision in question, staff may have an acquired right to its continued application.

In light of its precedents, the Tribunal notes that the suppression of the invalidity lump sum did not infringe an acquired right, as such a lump sum cannot be considered an essential term of employment which induced the complainant to accept the appointment and to stay on. By its nature, the payment of a lump sum in case of the invalidity of a staff member is a remote and contingent right which arises only on the rare occurrence of the permanent invalidity of an official occurring while the official is still employed by the EPO (see Judgments 4398, considerations 11 and 12, and 3375, consideration 13). The triggering event underlying the payment of the lump sum is the permanent invalidity, not the fact that the complainant paid contributions. Hence, many staff members have contributed to the insurance throughout their whole career without receiving the lump sum. In addition, in the case

of such an invalidity, other benefits and emoluments are provided for in the “social security package”.

11. The plea listed as (c) in consideration 8 above is unfounded. The reform was not retroactive, as it applies only to permanent invalidity occurring after its entry into force. The alleged prejudice, consisting in the previous payment of the contribution to the fund that finances the lump sum, is non-existent, considering that the contribution was due by all staff, according to an insurance scheme, irrespective of the occurrence of the covered event, that is the permanent invalidity. The complainant benefited from the insurance coverage as long as he paid the related premiums.

12. The plea listed as (d) in consideration 8 above is unfounded. Legitimate expectations refer to specific assurances given at a particular time that certain changes would or would not occur at an uncertain time in the future. The circumstances raised by the complainant do not establish any legitimate expectations under the Tribunal’s case law, as the complainant’s expectations were grounded on a rule which has been lawfully abolished (see Judgment 4712, consideration 5).

13. The plea listed as (e) in consideration 8 above is unfounded. Staff members were informed of the reform by Communiqué No. 68 on 4 February 2015, which stated, inter alia, that the “lump sum for permanent invalidity [would be] suppressed”. This information was addressed to them two months before the reform entered into force. The Tribunal considers that two months’ notice was not unreasonably short. Moreover, bad faith is not proven. The abolition of the invalidity lump sum is part of a wider reform of the pension system aimed at ensuring its long-term viability. As to the failure to provide transitional measures, the plea overlaps with the one listed as (a) in consideration 8 above, which has already been addressed.

14. The complainant expresses criticism of the recommendation of the Appeals Committee, and of the impugned decision which is based on it; he contends that:

(i) by considering that it could not recommend the amendment of the unlawful general provisions, the majority of the Appeals Committee made a recommendation that is vitiated by an error of law, as reflected in the impugned decision;

(ii) the Appeals Committee, followed by the Vice-President in the impugned decision, erred in law by addressing the issue of Article 75 of the Service Regulations and the lack of transitional measures only as a breach of the Organisation's duty of care and not also as a breach of the principle that an organisation is bound by its own rules; and

(iii) the Appeals Committee did not act with complete impartiality insofar as it did not draw the necessary conclusions from its recommendation.

The alleged flaw summarized in (i) has, in any event, and even if proven, no bearing on the outcome of the present complaint, as the Tribunal has considered that the general provisions are not unlawful. The alleged flaw summarized in (ii), has, in any event, and even if proven, no bearing on the outcome of the present complaint, as the Tribunal has considered that there was no violation of Article 75 of the Service Regulations. As to the argument summarized in (iii), the alleged mistakes committed by the Appeals Committee do not establish by themselves any lack of impartiality.

15. Since the complaint is unfounded, the complainant is not entitled to "financial and material", moral or exemplary damages allegedly stemming from the impugned decision.

16. The complainant requests to be awarded moral damages for the alleged undue delay in the internal appeal proceedings. This claim is not supported by specific pleas and allegations. In the present case, the impugned decision has already awarded him 500 euros for the length of the internal appeal procedure, including the time that elapsed following the deliberations of the Appeals Committee. The complainant does not substantiate before the Tribunal that his injury warrants a higher amount. As a result, this claim is rejected.

17. As the complaint fails, the complainant is not entitled to costs.

18. In conclusion, the complainant's pleas are either irreceivable or unfounded, his claims are rejected, and his complaint will be dismissed.

19. As a result of the dismissal of the complaint, the applications to intervene must also be dismissed. Thus, there is no need to address the receivability issues raised by the EPO with regard to these applications.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 2 May 2024, Mr Patrick Frydman, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER