Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K. (No. 46)

v.

EPO

138th Session **Judgment No. 4899**

THE ADMINISTRATIVE TRIBUNAL,

Considering the forty-sixth complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 12 June 2019 and corrected on 30 July 2019, the EPO's reply of 15 November 2019, the complainant's rejoinder of 2 April 2020 and the EPO's surrejoinder of 26 June 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 contests modifications made to the healthcare insurance contribution.

In view of the shift in demographics within the European Patent Office, the EPO's secretariat, and the increasing cost of healthcare generally, a sustainable model was needed, and the President of the Office proposed to replace the pay-as-you-go model with a system funded on an actuarial basis. Several decisions were made in that respect, including those mentioned below that are contested by the complainant.

On 21 December 2011, the Acting Vice-President of Directorate-General 4 issued Circular No. 338, entitled "Contribution for gainfully employed spouses to the healthcare insurance scheme in 2012". The

Circular provided that, according to the Implementing Rules for Articles 83 and 84 of the Service Regulations for permanent employees of the Office, contributions were payable for spouses in gainful employment who did not have a healthcare insurance of their own and were fixed by the President. The Circular described the criteria used to set the premiums and laid down the level of contributions depending on the spouse's gross income.

On 18 January 2012, the Acting Vice-President of Directorate-General 4 issued Circular No. 336, which described the method for making payments into the Reserve Fund for Pensions and Social Security of the European Patent Organisation (RFPSS) for the healthcare insurance scheme, and the practical arrangements for its implementation. The Circular gave special treatment to the application of this method vis-à-vis contributions for working spouses. On the same day, staff members were informed, by way of Circular No. 337, that the staff contribution rate for the insurance year 2010 was set at 2.4 per cent of basic salary or basic pension as initially fixed by Circular No. 322 of 22 December 2009.

The complainant, who joined the Office in 1990, was placed on non-active status for reasons of invalidity on 1 July 2012. He retired for health reasons on 1 January 2016.

In the meantime, in April 2012, he initiated the internal appeal proceedings contesting Circulars Nos. 336, 337 and 338 and seeking inter alia their withdrawal *ex tunc*. The President rejected his appeal on 25 July 2016, but pursuant to the Tribunal's ruling in Judgment 3785 concerning the unlawful composition of the Appeals Committee, the President withdrew the decision of 25 July 2016 and referred the complainant's appeal back to the Appeals Committee for a fresh examination. The complainant was so informed on 1 March 2017. His appeal was registered under the reference R-RI/2017/031.

In its opinion of 29 January 2019, the Appeals Committee unanimously considered that the appeal was manifestly irreceivable and applied the summary procedure. It held that there was a legal justification for the President's decision to withdraw the final decision of 25 July 2016, because the Tribunal had found in Judgments 3694 and

3785 of July and November 2016 that the Appeals Committee which had rendered the opinion on which the President had based his decision was not regularly constituted. The Appeals Committee therefore rejected the complainant's objection regarding the remittal of his case to it. It found that the appeal was irreceivable insofar as the complainant contested Circulars Nos. 336, 337 and 338 because these were general decisions and he did not substantiate any individual adverse effect stemming from them. In addition, the appeal was irreceivable insofar as he challenged the contribution to the healthcare insurance scheme for gainfully employed spouses established for 2012 on the basis of Circular No. 338. Indeed, having not shown that he had to pay such contributions, he had no cause of action. In addition, he had already contested that measure in other internal appeals. The Appeals Committee found that his appeal was time-barred to challenge the contribution rate to the healthcare insurance scheme as foreseen by Circular No. 337. Indeed, he initiated the internal appeal proceedings in 2012 against his 2010 payslips, which reflected the contribution rate to the healthcare insurance system for 2010. It stressed that the complainant had already raised that issue in another internal appeal that was pending. Since the request against the healthcare contribution rate in 2010 was irreceivable, so was his request for resetting the staff contribution rate to 1.7 per cent. The Appeals Committee noted that the length of the internal appeal proceedings was excessive, but recommended rejecting the claim for compensation on the ground that the appeal was manifestly irreceivable and of a "repetitive nature".

By a letter of 15 March 2019, the Principal Director of Human Resources notified the complainant that she had decided, by delegation of authority from the President, to endorse the recommendation of the Appeals Committee to reject the appeal for the reasons stated in its opinion. That is the impugned decision.

The complainant asks the Tribunal to "quash the decision" of 25 July 2016 in its entirety, to order that his payslips since January 2010 be modified by applying the correct contribution rate to the EPO's family sickness insurance (1.7 per cent of basic salary or basic pension) and that the EPO be ordered to refund the excess staff contribution paid

since January 2010 (or at least since January 2012). He also asks the Tribunal to set aside all underlying general decisions, in particular decisions CA/D 3/14 and CA/D 8/14; subsidiarily, he requests that the EPO no longer applies these underlying general decisions and applies the "previous wording of the regulations". He further seeks moral damages, an award of costs for "out of pocket expenses, time and trouble" with respect to his internal appeal and the procedure before the Tribunal, compound interest at the rate of 6 per cent on all amounts due and to order the EPO to bear the "cost of procedure". In addition, he seeks the setting aside of the "RoP-IAC" of 1 July 2014 and the "underlying general decision(s), i.e. amendment of Articles 106-113 [of the Service Regulations] and its Implementing Rules"; or on an "[a]uxiliary" basis to no longer apply them and to apply the regulations that were valid on the day he filed his internal appeal.

In relation to the appeal leading to the impugned decision of 15 March 2019, he requests the Tribunal to quash that impugned decision in its entirety, to award him moral damages and costs for the internal appeal procedure and the proceedings before the Tribunal, and to order the EPO to bear its own costs.

He adds that, in order to avoid a "loss of rights", he maintains the "main requests" he made in his twenty-ninth complaint and asks the Tribunal in particular to quash decision RI/91/12 of 25 July 2016.

The EPO asks the Tribunal to reject the complaint as irreceivable in several respects: lack of a cause of action, time-barred or failure to exhaust internal means of redress. It submits that the complaint is otherwise unfounded. The complainant should bear his costs.

CONSIDERATIONS

1. As a precursor to considering this complaint, two procedural applications will be addressed. The complainant's request for oral proceedings is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of the issues, their arguments and the relevant evidence. The complainant's request to join this complaint

with his twenty-ninth complaint is moot. The Tribunal considered the latter complaint, among others, in Judgment 4256 delivered in public on 10 February 2020 and dismissed them as being without object (see Judgment 4256, consideration 8).

2. Underlying this complaint is the complainant's challenge against the initiatives the EPO had undertaken at the material time to reform the financing of its healthcare insurance scheme. On 22 December 2009, the Office had announced in Circular No. 322 that the initial staff contribution rate to the scheme for 2010 was 2.4 per cent of basic salary or basic pension, but that that proposal would be resubmitted to the General Advisory Committee (GAC) and staff members would be informed in a new Circular whether any changes would have arisen after further consultation. Notably, decision CA/D 7/10, which the Administrative Council adopted on 30 June 2010, introduced an actuarially funded system to finance the healthcare insurance scheme with effect from 1 January 2011. This decision also amended Article 83 of the Service Regulations for permanent employees of the Office by abolishing the 2.4 per cent cap for staff contributions to the scheme and required the President of the Office to set the actual contributions to be paid based on actuarial studies. On 18 January 2012, the Acting Vice-President of Directorate-General 4 announced in Circular No. 337 that the staff contribution rate for the insurance year 2010 would remain at 2.4 per cent. In Circular No. 336, which was adopted on the same day, the Acting Vice-President of Directorate-General 4 described the method for making payments to the Reserve Fund for Pensions and Social Security of the European Patent Organisation (RFPSS), also introduced that year, for healthcare insurance in accordance with Administrative Council decisions CA/D 7/10 and CA/D 13/10. Section 3 in Circular No. 336 described the transitional method for making such payments for the period 2011-2013 under which staff contributions were set at 2.4 per cent in accordance with a transitional measure to decision CA/D 7/10. Circular No. 338, which was adopted on 21 December 2011, was concerned with contributions that were to be made for gainfully employed spouses to the healthcare insurance scheme in 2012. It was noted therein that, according to the Implementing Rules for Articles 83

and 84 of the Service Regulations, contributions to be fixed by the President were to be paid into the scheme for spouses who did not have healthcare insurance of their own. The Circular also described the criteria used to set the premiums as well as the level of contributions depending on the spouse's gross income.

3. In his internal appeal, the complainant had centrally challenged Circulars Nos. 336, 337 and 338 requesting that they be set aside. He also challenged his 2010 payslips seemingly on the basis that the sums he received therein had been reduced or may be reduced in the future because of the foregoing general decisions, thereby adversely affecting him. The Appeals Committee, treating that appeal in a summary procedure pursuant to Article 9 of the Implementing Rules to Articles 106 to 113 of the Service Regulations, recommended the appeal be rejected as manifestly irreceivable. The President having, in the impugned decision, adopted the Committee's opinion and its recommendation, the complainant requests setting aside the impugned decision and repeats his requests to set aside the general decisions, as well as what he submits is their implementation in his 2010 payslips.

4. In its report to the President, the Appeals Committee concluded, correctly, that insofar as the complainant had challenged the general decisions and requested that Circulars Nos. 336, 337 and 338 be quashed, the appeal was irreceivable *ratione materiae*. Citing consideration 3 of Judgment 3620, the Appeals Committee relevantly noted the case law which essentially recalled that a complainant can impugn a general decision only if it directly affects her or him and that a general decision cannot be impugned by a staff member unless and until it is applied in a manner prejudicial to her or him. The Tribunal had also noted, in that consideration, that the complainant in that case did not point to any decision implementing the general decision (CA/D 15/12) directly affecting her either after the decision was made on 26 October 2012 or during the period of its retroactive operation; that that general decision concerned the transitional measure applicable to individuals already in receipt of an invalidity pension at the time when the new scheme came into effect on 1 January 2008 and that the

complainant was not in the class affected by the transitional measure. Accordingly, in that case, the Tribunal dismissed the complaint as irreceivable.

5. In the complainant's internal appeal underlying this complaint, the Appeals Committee also concluded, correctly, that since he was not paying insurance contributions for a spouse at the time when he filed his internal appeal, the complainant had no cause of action. As the complainant lacks a cause of action, this complaint is irreceivable in the Tribunal. The Tribunal has stated, for example, in consideration 5 of Judgment 4145, that Article II of the Tribunal's Statute has been interpreted to require that for a complaint to be receivable the staff member must have a cause of action and the impugned decision must be one that, by its nature, is subject to challenge. The Tribunal also therein recalled, citing Judgment 4048, consideration 5, that "to invoke the Tribunal's jurisdiction, it must be a decision adversely affecting the complainant concerning either rights, privileges, obligations or duties arising under the provisions of staff regulations or the complainant's terms of appointment" and that "[t]he complaint must allege non-observance of either or both".

6. The Appeals Committee further concluded, also correctly, that the complainant's challenge to his 2010 payslips, which was filed in 2012, seeking the correction of the contribution rates levied (or which may be levied in the future) which he seems to suggest were reflected in those payslips, was time-barred and was accordingly irreceivable, and further, that request was entirely unsubstantiated.

7. Regarding the claim made in respect of the decision of 25 July 2016, the Tribunal notes that this decision was withdrawn by the President pursuant to Judgments 3694 and 3785, and that the Tribunal has found in Judgment 4256 that such withdrawal was lawful. The claim is therefore without object.

8. There is nothing in the present complaint which obviates the foregoing conclusions of the Appeals Committee, which the President endorsed in the impugned decision. Accordingly, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, 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.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER