

**H. (No. 9), S. (No. 5), É. (No. 4),
F. (No. 24) and G. (No. 7)**

v.

EPO

134th Session

Judgment No. 4562

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 18 December 2019, the EPO's reply of 19 May 2020, the complainant's rejoinder of 22 June, the EPO's surrejoinder of 25 September 2020, the complainant's additional submissions of 23 August 2021, the EPO's comments thereon of 17 December 2021 and the EPO's additional submissions of 27 October 2021;

Considering the fifth complaint filed by Mr S. S. against the EPO on 4 January 2020, the EPO's reply of 19 May 2020 and the EPO's additional submissions of 27 October 2021;

Considering the fourth complaint filed by Mr S. P. É. against the EPO on 7 January 2020, the EPO's reply of 19 May, the complainant's rejoinder of 7 August, the EPO's surrejoinder of 11 November 2020, the EPO's additional submissions of 27 October 2021 and the complainant's final comments of 24 February 2022;

Considering the twenty-fourth complaint filed by Mr S. C. F. against the EPO on 7 January 2020, the EPO's reply of 19 May, the complainant's rejoinder of 21 June, the EPO's surrejoinder of 24 September 2020, the EPO's additional submissions of 27 October 2021 and the complainant's final comments of 24 February 2022;

Considering the seventh complaint filed by Ms M.-F. G. against the EPO on 16 January 2020, the EPO's reply of 19 May, the complainant's rejoinder of 20 October 2020, the EPO's surrejoinder of 15 March 2021 and the EPO's additional submissions of 27 October 2021;

Considering the application to intervene in the twenty-fourth complaint of Mr F. filed by Mr H. L. on 24 January 2020 and the EPO's comments thereon dated 19 May 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 cases may be summed up as follows:

The complainants challenge the deductions from their remuneration that were made in respect of their absences for strike participation as well as the lawfulness of the general normative decisions on which those deductions were based.

In June 2013 the EPO's Administrative Council adopted decision CA/D 5/13, creating a new Article 30a of the Service Regulations for permanent employees of the European Patent Office concerning the right to strike and amending the existing Articles 63 and 65 concerning unauthorised absences and the payment of remuneration. As a result of the amendment of Article 65, the salary deduction for absence due to participation in a strike was set at 1/20th of the monthly remuneration per day of absence, and the same deduction rate was applied to unauthorised absences. Until then, a deduction of 1/30th per day had been applied in both cases.

Paragraph 10 of the new Article 30a of the Service Regulations authorised the President of the Office to lay down further terms and conditions for the application of Article 30a, including with respect to the maximum strike duration and the voting process. Relying on that provision, the President issued Circular No. 347 containing "Guidelines applicable in the event of strike". CA/D 5/13 and Circular No. 347 entered into force on 1 July 2013, establishing a new legal framework for the exercise of the right to strike at the EPO.

The complainants participated in strikes at various dates between March 2014 and April 2016, after which they lodged requests for review challenging the salary deductions made in respect of their absences on those dates as well as the general decisions on which the deductions were based, namely CA/D 5/13 and Circular No. 347. Their requests for review were rejected as unfounded and the cases were referred to the Appeals Committee for an opinion. As numerous similar appeals had been filed, the Committee joined them and resorted to its “test appeal” procedure. In its opinion of 9 August 2019 the Appeals Committee considered that the appellants could only challenge the underlying general decisions to the extent that they had been applied to them. In other words, it considered that the provisions of CA/D 5/13 and Circular No. 347 which were directly related to the contested salary deductions could be challenged, but not the other provisions of those texts. So far as is relevant to the present complaints, the majority of the Committee (two of its three members) found that the 1/20th deduction rate could not be considered excessive, disproportionate or arbitrary, but represented an approach which, “overall”, was not unfair. The fact that the same rate was applied to unauthorised absences did not mean that absence for strike action was equated with unauthorised absence. Moreover, given that the loss to the employer, in terms of loss of labour, was the same in both cases, it was not arbitrary to apply the same deduction rate. They recommended that the appeals be rejected as unfounded and that no costs be awarded. The third member of the Committee, however, considered that the 1/20th rate was contrary to the principle of payment for services rendered, because in months comprising more than 20 working days an employee could potentially be deprived of up to three days’ remuneration for days actually worked. The Appeals Committee unanimously recommended awarding damages for delay in the proceedings.

By individual decisions dated 9 October 2019, the Vice-President of Directorate-General 4 (DG4), by delegation of authority from the President, rejected the complainants’ appeals as unfounded, in accordance with the majority opinion of the Appeals Committee, but awarded each of them 450 euros in moral damages for delay. That is the decision impugned in each of these cases.

On 7 July 2021 the Tribunal delivered in public Judgment 4435, which concerned a similar complaint filed by another EPO employee who likewise challenged the lawfulness of the deductions made from his remuneration on the basis of CA/D 5/13 and Circular No. 347 following his participation in strikes. The Tribunal held that the deductions made at the new rate of 1/20th of the basic salary were unlawful, and it ordered the EPO to reimburse the amounts deducted, less the amounts which could have been deducted under the Service Regulations as they existed before the amendments made by CA/D 5/13. It also awarded the complainant 800 euros in costs. In another judgment delivered on the same day, the Tribunal determined that Circular No. 347 was unlawful and set it aside (see Judgment 4430).

In September 2021, the EPO informed the five complainants in these proceedings that it had decided to apply the outcome of Judgment 4435 to them as well. The excess amounts deducted from their remuneration for strike participation were therefore reimbursed with 5 per cent interest, and each of them received 800 euros in costs. Notwithstanding these measures, the complainants did not withdraw their complaints.

Mr H. asks the Tribunal to set aside CA/D 5/13 and Circular No. 347 *ex tunc* and to order the EPO to refund him the amounts unduly deducted from his remuneration with interest. He also claims 5,000 euros in moral damages on the grounds that the excess salary deductions amounted to a disciplinary sanction, and 6,000 euros in moral damages for delays in the internal appeal proceedings.

Mr S. asks the Tribunal to set aside CA/D 5/13 and Circular No. 347 *ab initio* and to order the EPO to refund him the amounts unduly deducted from his remuneration with interest. He also claims moral damages of at least 9,800 euros and costs.

Mr É. asks the Tribunal to set aside CA/D 5/13 and Circular No. 347 *ab initio* and to order the EPO to refund him all amounts deducted from his remuneration on the basis of those texts, with interest. Failing that, he seeks the reimbursement, with interest, of all deductions made in excess of those provided for under the previous rules. He also claims 5,000 euros in moral damages, 800 euros in damages for delay (less the amount awarded to him in the impugned decision) and costs.

Mr F. asks the Tribunal to set aside the impugned decision as well as CA/D 5/13 and Circular No. 347, and to order the EPO to refund him the amounts unduly deducted from his remuneration with interest. He also claims moral damages of 200 euros per month from November 2013 to the date of the public delivery of the Tribunal's judgment, and compensation of 2,000 euros for delays in the internal appeal proceedings, less the amount already awarded in the impugned decision. He also claims interest on all sums awarded.

Ms G. asks the Tribunal to set aside Circular No. 347 and to order the EPO to refund her the amounts unduly deducted from her remuneration with interest. She claims 1,000 euros on the grounds that the relevant provisions of Circular No. 347 amount to a disciplinary sanction; 6,000 euros in moral damages, including 1,000 euros for the excessive duration of the proceedings; and such other relief as the Tribunal deems fit.

CONSIDERATIONS

1. In October 2013 and December 2014, a considerable number of members of staff of the EPO engaged in strike action. Aspects of the EPO's response to this strike action led ultimately to a multiplicity of complaints filed with the Tribunal. One issue raised in some of the complaints was the validity of an amendment made to the Service Regulations authorising the deduction of 1/20th of a striking staff member's monthly salary for each day the staff member was on strike and the consequential deduction made pursuant to this provision. One such complainant was successful and, on the basis of the arguments, the Tribunal held that the deduction should have been made at the rate existing prior to the amendment, namely at 1/30th of the monthly salary for each day the staff member was on strike, and the EPO was ordered to reimburse the difference (see Judgment 4435).

2. There remain for consideration by the Tribunal, complaints of five EPO staff members who were subjected to the unlawful deduction of 1/20th of their monthly salary in the circumstances just discussed.

These complaints each raise substantially the same legal issues in substantially the same circumstances in relation to each other. Accordingly, they are joined so that one judgment is rendered.

3. Mr F. has applied for an oral hearing. However, the Tribunal is satisfied the written submissions of the parties in this case are sufficient to enable it to reach an informed decision in these proceedings. The application is therefore rejected.

4. Each of the five complainants has been paid an amount by the EPO reflecting the difference between a deduction made at the rate of 1/20th of monthly salary and one made at the rate of 1/30th of monthly salary. In this respect their claims about the unlawful deduction at the rate of 1/20th of monthly salary are now moot, as are their claims that Circular No. 347 should be set aside, because such an order has already been made by the Tribunal in Judgment 4430. Insofar as they challenge CA/D 5/13, they do so as a means of collaterally challenging the deductions made. As noted earlier, they have been reimbursed the difference, so their challenge to CA/D 5/13 ceases to have any relevance. The five complainants were, amongst others, invited by the EPO to withdraw their complaints. However, they have indicated they wish to pursue their complaints for, it appears, a determination of their claim for moral damages.

5. It is unnecessary to refer, with precision and in detail, to the pleas of each of the five complainants as there are recurring themes which can be addressed globally. One is that the delay in their internal appeals should sound in moral damages and in an amount exceeding that paid by the EPO (450 euros), which was viewed by the Tribunal to be adequate (see Judgment 4435, consideration 18). No basis has been demonstrated for awarding an additional amount and, in relation to one of the complainants, the fact that he had three appeals rather than one which took an inordinate time to resolve would not justify some greater amount. There is no evidence to suggest, in the circumstances of this case, that the moral injury occasioned to that complainant was all the greater because there were three appeals rather than one. Importantly,

as recalled in Judgment 4435, consideration 18, a complainant must establish the foundation for the award of moral damages.

6. Moral damages are also sought on the basis that the salary deductions at the rate of 1/20th and the underpinning normative legal documents were, variously described, an attack on the right to strike, a disciplinary sanction for strike participation or a disguised sanction for exercising the right to strike. Even if these descriptions are apt, each complainant would need to show they suffered moral injury (see the concluding observation in the preceding consideration) and they have failed to do so.

7. In the result, the complaints should be dismissed. Consequently, the application to intervene in Mr F.'s complaint must also be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as is the application to intervene.

In witness of this judgment, adopted on 18 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, 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

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ