Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

118th Session **Judgment No. 3369**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms A. D. against the European Patent Organisation (EPO) on 30 December 2010 and corrected on 24 January 2011, the EPO's reply of 5 May, the complainant's rejoinder of 10 June and the EPO's surrejoinder of 15 September 2011;

Considering the applications to intervene filed by Mr A. K. and Mr P. T. on 29 July 2011, the application to intervene filed by Mr I. T. on 2 August, and the EPO's comments of 26 September 2011 arguing that those applications were irreceivable inasmuch as the persons concerned were not in a similar situation to the complainant;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. On Tuesday 19 June 2007 the Staff Union of the European Patent Office, the secretariat of the EPO, organised a collective action in which the complainant, who worked on an 80 per cent basis (eight hours per day from Monday to Thursday), participated. Having noticed that her payslip showed a deduction corresponding to 125 per cent of one-thirtieth – i.e. one-twenty-fourth – of the amounts due to her in respect of, inter alia, her basic salary and dependants' allowance, she sought an explanation. The Administration informed her that an eight-hour strike corresponded in her case to 125 per cent of a working day because she worked for, on average, 6.4 hours per day. Having unsuccessfully challenged this manner of proceeding, she filed an internal appeal on 24 October 2007. Following an initial rejection of her appeal by the President of the Office, it was referred to the Internal Appeals Committee on 12 December 2007. The Administration submitted its position on 9 November 2009. In its opinion of 6 September 2010 the Committee recommended, by a majority, that the appeal should be dismissed as unfounded. By a letter of 3 November 2010, which constitutes the impugned decision, the complainant was informed that her appeal had been dismissed, but that the deduction applied to her dependants' allowance would be reduced to one-thirtieth and that the amount unduly withheld would be reimbursed with interest.

B. The complainant asserts that she made up for two hours' work, but that she is not required to provide evidence of having done so. She claims to have drawn attention to that fact during her hearing before the Internal Appeals Committee, but that the Committee failed to mention it in its opinion. She therefore complains of a lack of impartiality and of an "affront to [her] dignity". On 10 September 2010 she wrote to the President of the Office to draw his attention, inter alia, to this omission, but she doubts whether he was informed of her letter.

Furthermore, the complainant argues that, as she was on strike for one day, the only possible deduction was a deduction of one-thirtieth. Judgment 1333 indicates that a part-time employee who chooses to go

on strike should be treated in the same way as his or her colleagues working full time. Citing the minority opinion expressed by a member of the Internal Appeals Committee, she submits that the deduction made from her dependants' allowance was unjustified inasmuch as this allowance constitutes a lump sum that is not calculated on the basis of monthly working hours.

The complainant requests the Tribunal to set aside the decision to deduct one-twenty-fourth of her basic salary in respect of the one-day strike of 19 June 2007, and the decision to apply a deduction to her dependants' allowance. In addition to reimbursement of the sums thus wrongfully deducted, she requests an award of 10,000 euros in moral damages and a further 2,000 euros in costs.

C. In its reply the EPO explains that, since the complainant was working on average 6.4 hours per day, her basic salary had to be reduced, pursuant to Article 65, paragraph 1(b), and Article 56, paragraph 4, of the Service Regulations, by one-twenty-fourth. Citing Article 64, paragraph 2, it submits that a deduction of one-thirtieth from allowances paid to employees is justified.

The Organisation further argues that the points raised in the letter of 10 September 2010 were rightly dismissed, emphasising that it is for the complainant to provide evidence to support her assertion that she made up for two hours' work during the days following the strike.

D. In her rejoinder the complainant enlarges on her pleas. While she states that she "fully concurs" with the view of the member of the Internal Appeals Committee who expressed a minority opinion, she complains about the composition of the Committee, deploring the fact that none of its members defended her during the hearing. She draws the Tribunal's attention to the duration of the procedure.

E. In its surrejoinder the EPO submits that the complainant's criticism of the appeal body's members is baseless and that, in particular, her contention that the members appointed by the Staff Committee are there to defend appellants is mistaken.

CONSIDERATIONS

1. The complainant, who has been in the service of the EPO since 1982 as an administrative employee, participated in a day of collective action organised in the Office on Tuesday, 19 June 2007.

At that time, she was employed on a part-time basis, working for 80 per cent of normal working hours on the basis of a specific timetable according to which the required 32 working hours were confined to four days, from Monday to Thursday, with eight working hours per day.

2. When she received her payslip for July 2007, the complainant discovered that the Office had reduced her monthly remuneration by an amount exceeding that normally deducted for participation in a strike, which was set, under the regulations in force, at one -thirtieth of remuneration.

According to the explanations she received at the time, the Administration had taken the view that, since she had been absent from work for the whole of Tuesday, hence for eight hours, the duration of her absence should be regarded as greater, given her status as a part-time employee, than a normal working day. Spread over five days, her average working day was in fact 6.4 hours, so that, according to the EPO, the complainant had actually been absent for a period equivalent to 1.25 of her own working days. The Administration had therefore considered it appropriate to reduce her remuneration by a proportionate amount, namely by one-twenty-fourth rather than one-thirtieth.

3. On 24 October 2007 the complainant challenged this decision in accordance with the procedure set out in Articles 107 and 108 of the Service Regulations. It should be noted that it took the Office until 9 November 2009 to submit its written observations to the Internal Appeals Committee and that, partly as a result of this, the latter body did not issue its opinion until 6 September 2010, i.e. almost three years after the appeal was lodged. The Committee

recommended, in the opinion adopted by a majority of its members, that the complainant's claims should be rejected.

By a decision of 3 November 2010, the Vice-President in charge of Directorate General 4 (DG4), acting with delegation of authority from the President of the Office, rejected the complainant's appeal, but reduced to one-thirtieth the deduction applied to the dependants' allowance paid to her and reimbursed with interest the amount unduly withheld in that regard.

4. That is the decision impugned before the Tribunal by the complainant, who challenges, on the one hand, the amount deducted from most elements of her remuneration and, on the other, the very principle of applying such deductions to dependants' allowances. The complainant requests, in addition to the setting aside of that decision and reimbursement of the sums in question, an award of moral damages and costs.

5. The Tribunal will not accept the complainant's argument contesting the lawfulness of the conditions in which her internal appeal was considered.

While the complainant seeks to cast doubt on the impartiality of the Chairperson and other members of the Internal Appeal Committee, it must be found that her allegations to that effect are not backed up by any reliable evidence. In particular, the complainant is manifestly misguided in her belief that she can accuse the members appointed by the Staff Committee of failing to defend her during her hearing before the Committee, since those members, who are required just like other Committee members to execute their duties in a fully independent manner, cannot be expected to perform such a role. Moreover, her criticism is particularly inappropriate in view of the fact that one such member expressed a minority opinion in her favour, and she states in her rejoinder that she "fully concurs" with that opinion. The mere fact that the complainant's arguments during her hearing were not entirely reproduced in the Committee's opinion cannot be regarded in this case as constituting a breach of its duty of impartiality.

Lastly, the complainant's assertion that a letter she decided to write to the President of the Office on 10 September 2010 was not taken into consideration cannot be accepted either, inasmuch as the grounds invoked in the impugned decision actually contain an explicit reference to the content of the letter.

6. The complainant's arguments become far more weighty, however, when she contends that the EPO could not legally set the amount of the deduction from most elements of her remuneration at one-twenty-fourth rather than – as in the case of full-time employees – at one-thirtieth.

7. As noted under 2 above, the decision taken by the EPO to apply a deduction of one-twenty-fourth was due to the calculation, based on arithmetically irreproachable principles, that the complainant had absented herself, while participating in an eight-hour strike, for a period equivalent to 1.25 of her average working day, having regard to the specific terms of her part-time employment regime. In so doing, the EPO sought to implement an approach based on proportionality which led it to conclude, as stated in its submissions, that the remuneration of an employee who is absent due to a strike must be reduced by an amount equivalent to the duration of such absence as a proportion of the employee's normal working hours.

Such an approach is certainly quite understandable in terms of equity and expediency. However, the Tribunal is bound to observe, in line with the minority opinion referred to above, that this approach is legally inconsistent with the applicable statutory provisions, which are based on a different perspective in this regard.

8. Article 65 of the Service Regulations, concerning the "[p]ayment of remuneration", which establishes inter alia the principle of monthly payment, stipulates in subparagraph 1(b) that "[w]here remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths".

This provision thus establishes the applicability to EPO employees of the "thirtieths" or "indivisible thirtieths" rule applied in many States and international organisations, according to which deductions made from an employee's remuneration in the event of absence – for instance in the event of a strike – are not calculated on a basis that is strictly proportionate to the duration of the employee's absence but on the basis of lump-sum fractions of one-thirtieth per day.

This rule precludes, by definition, the possibility of deducting an amount equivalent to a fraction other than a full number of thirtieths from the remuneration of an employee who has been absent on account of participation in a strike.

9. In the case of a part-time employee, the aforementioned provision of Article 65, subparagraph 1(b), must of course be applied in conjunction with the provisions of Article 56, paragraph 4, which stipulates that:

> "A permanent employee shall be entitled, during the period for which he is authorised to work part-time, to remuneration proportionate to the working time authorised. He shall, however, continue to receive in full any dependants' allowances and education allowances to which he is entitled."

The thirtieths to be withheld in the event of absence for participation in a strike of an employee working part time must therefore be calculated on the basis of the foregoing definition of remuneration – and not, for instance, on the basis of the remuneration payable to a full-time employee.

10. It follows from the foregoing that the Administration of the EPO committed an error of law when it decided in this case to apply a deduction of one-twenty-fourth instead of one-thirtieth to the remuneration payable to the complainant.

11. It is true that one of the basic consequences of the thirtieths rule is that an absence for just a fraction of a day is sufficient to entail

a deduction of one-thirtieth from remuneration, i.e. an identical deduction to that applicable in the event of a full-day absence. A strict application of that rule could therefore lead to the conclusion that the complainant, who participated in a strike for a period equivalent to 1.25 days in terms of her own specific working hours, was actually liable to a deduction from her remuneration equivalent to two-thirtieths rather than one-thirtieth thereof.

12. However, apart from the fact that, in any case, this was not the approach adopted by the EPO, the Tribunal considers that it could not lawfully have been adopted in the present case.

Indeed, it must be noted that the aforementioned provisions of the Service Regulations are somewhat ambiguous inasmuch as they fail to specify clearly how the thirtieths rule is to be applied in these specific circumstances. It is therefore questionable, to say the least, whether the part-time employees who opted to participate in the one-day strike organised on 19 June 2007 were aware of the fact that, in so doing, they were liable to incur a deduction of two-thirtieths in their remuneration. While the Vice-President in charge of DG4 circulated a note to the staff on 15 June 2007 reminding the staff, primarily in anticipation of the strike, of the main rules applicable to participants in such collective action, the document contained no reference to that eventuality. Moreover, this omission is in no way surprising because, as already noted, the EPO Administration itself did not interpret the relevant provisions in that way.

The Tribunal has consistently held that any ambiguity in the regulations or rules established by an international organisation should, in principle, be construed in favour of staff and not of the organisation (see, for example, Judgments 1755, under 12, 2276, under 4, or 2396, under 3(a)).

13. Under the rules in force, it was therefore incumbent on the EPO to limit the deduction from the complainant’s remuneration to one-thirtieth.

14. It follows that the aforementioned decision of 3 November 2010 must be set aside inasmuch as it maintained the deduction at a level exceeding that proportion, and that the EPO must therefore be ordered to reimburse the sum that was unduly withheld as a result from the complainant's remuneration.

15. In light of the foregoing considerations, it is unnecessary to resolve the dispute as to whether the complainant had, as she claimed, worked overtime during the days following the strike of 19 June 2007 in partial compensation for her absence.

16. The complainant also challenges the deduction by the EPO from the dependants' allowance she received pursuant to Article 69 of the Service Regulations.

As noted under 3 above, the Vice-President in charge of DG4 has already, pursuant to the decision of 3 November 2010, reduced the deduction applied to the allowance – which had also been set initially at one-twenty-fourth – to one-thirtieth. The Organisation itself actually concluded that this approach was more consistent with the reasoning underlying the aforementioned provisions of Article 56, paragraph 4, of the Service Regulations, according to which part-time employees continue to receive such allowances in full rather than at a reduced rate proportionate to their working time.

The complainant, however, is not content with this concession, and she contends that the allowance in question was not in fact liable to any deduction in respect of the strike because it consisted of a lump sum.

17. As may be gathered from consideration 9 above, the Tribunal cannot endorse the complainant's position in this regard.

On the contrary, it has already ruled that the various allowances paid by the EPO to its employees, including the dependants' allowance, are in fact subject to a deduction in the event of a strike

under the same conditions as the basic salary (see Judgments 1041, under 3 and 4, and 1333, under 3, also referred to on this issue in Judgments 1567, under 4, and 1658, under 6).

Noting that, according to paragraph 2 of Article 64 of the Service Regulations, "[r]emuneration shall comprise basic salary and, where appropriate, any allowances", the Tribunal held that the "remuneration" referred to in aforementioned subparagraph 1(b) of Article 65, from which deductions may be made, must perforce be understood as including such allowances.

Moreover, the fact that the dependants' allowance consists of a lump sum is not in itself sufficient to exclude it from any application of the principle, embodied in the Tribunal's case law, according to which remuneration is due only for services rendered (on this point see Judgments 566, under 3, 615, under 4, and 616, under 4).

In the absence of any new material that could undermine the case law based on above-mentioned Judgments 1041 and 1333, this claim will be dismissed.

18. While the complainant's arguments regarding the latter point must therefore be deemed unfounded, the fact that she was unlawfully penalised, in terms of her remuneration, due to an absence involving the exercise of the right to strike, undoubtedly caused her moral injury. As noted by the complainant in her above-mentioned letter of 10 September 2010, this injury was exacerbated by the slowness of the internal appeal procedure, which took more than three years, and mention should also be made of the fact that, overall, it will have taken no less than seven years to finally remedy, by the present judgment, the breach found to have been committed in July 2007. In view of all the circumstances of the case, the Tribunal considers that the complainant is entitled to an award of moral damages in the amount of 2,000 euros.

19. As the complainant succeeds in part, she is entitled to costs, which the Tribunal sets at 1,000 euros.

20. Applications to intervene were filed by three EPO employees. According to Article 13(1) of the Tribunal's Rules, persons to whom the Tribunal is open may intervene in a case provided that the ruling which the Tribunal is to make may affect them. It may be deduced from the defendant's comments that the three employees in question have never worked on a part-time basis. As their situation in fact and in law thus differs from that of the complainant, the present judgment cannot affect them. It follows that the applications to intervene must be dismissed as irreceivable (see, for example, Judgments 2190, under 10, 2237, under 10, or 3212, under 11).

DECISION

For the above reasons,

1. The decision of 3 November 2010 by the Vice-President in charge of Directorate General 4 is set aside to the extent that it maintained the amount of the strike-related deduction from the complainant's remuneration for the month of June 2007 at a level exceeding one-thirtieth thereof.
2. The EPO shall reimburse the complainant, owing to the setting aside of the decision under point 1, the sum unduly withheld from the said remuneration.
3. The EPO shall pay the complainant 2,000 euros in moral damages.
4. It shall also pay her 1,000 euros in costs.
5. All other claims are dismissed.
6. The applications to intervene are dismissed.

In witness of this judgment, adopted on 29 April 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ