119th Session **Judgment No. 3426**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr A. C. Ka. and Mr R. Ke. against the European Patent Organisation (EPO) on 30 September 2009, corrected on 9 November, the EPO's replies dated 11 May 2010, the complainants' joint rejoinder of 19 August, the EPO's surrejoinders dated 24 November 2010, the complainants' additional submissions dated 24 January 2011, supplemented on 16 February, and the EPO's final comments thereon dated 27 May 2011;

Considering the applications to intervene in both cases filed by Mr I. T. on 6 September 2010 and the EPO's comments of 16 September 2010;

Considering the application to intervene in Mr Ka.'s complaint filed by Mr T. H. on 8 November 2010 and the EPO's letter dated 8 November 2010 indicating that it had no comment to make;

Considering the *amicus curiae* brief submitted on 10 February 2011 on behalf of the Central Staff Committee and their nominees on the General Advisory Committee (GAC) of the EPO in both cases, and the EPO's comments thereon dated 27 May 2011;

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 and the pleadings may be summed up as follows:

A. Mr Ka. joined the European Patent Office, the secretariat of the EPO, in July 1990 and is still working for the EPO, whereas Mr Ke. is a former employee of the EPO who retired in August 1998.

On 29 June 2007 the Administrative Council adopted decision CA/D 25/07 which deleted, with effect from 1 January 2009, Implementing Rule 42/6 to the Pension Scheme Regulations and thus put an end to the Member States' obligation to reimburse the tax adjustment paid to EPO pensioners. Also on 29 June 2007 the Administrative Council adopted decision CA/D 18/07, according to which Article 42 of the Pension Scheme Regulations and its Implementing Rules would not apply to employees joining the EPO on or after 1 January 2009. The decision did not affect the rights of pensioners or employees who served within the EPO before 1 January 2009.

By a letter of 6 September 2007 each complainant wrote to the Chairman of the Administrative Council contesting its decision "to delete the reimbursement to the Office by the Member States of the tax adjustment paid". On the same date, the complainants initiated internal appeal proceedings with the President of the Office, indicating that they had been informed that the Administrative Council had adopted documents CA/105/07 and CA/76/07 proposed by the Office. They stated that, in their view, deleting the "reimbursement to the Office by the Member States of the tax adjustment paid [was] unjust, unfair and unlawful", and requested that she submit to the Administrative Council a document proposing "restoration of *the status quo ante*". On 5 November each complainant was informed that the Council had decided to forward to the President the appeals by which they sought to have the Administrative Council's decision abolishing Implementing Rule 42/6 quashed. The two appeals filed by each complainant were joined. By a letter of 8 November the complainants were informed that the Internal Appeals Committee (IAC) had received a copy of the appeal and that it would be dealt with it as soon as possible.

Having not yet received the position paper of the EPO with respect to their internal appeal, each complainant filed a complaint with the Tribunal on 6 September 2007.

B. The complainants indicate that they filed an internal appeal in September 2007 and, by the time they filed their complaints with the Tribunal in September 2009, they had not received any information about it, despite having acted with due diligence to obtain information on its status.

They allege a procedural flaw in the internal appeal proceedings insofar as the appeal that they had filed with the Administrative Council was forwarded to the IAC and not to the Appeals Committee of the Administrative Council as foreseen under Article 108(1) of the Service Regulations for Permanent Employees of the Office. However, they ask the Tribunal not to send back the matter to the Appeals Committee of the Administrative Council to avoid further delay, but instead to rule on the merits of the case. They also allege undue delay in the internal appeal proceedings warranting the award of additional moral damages.

On the merits, they contest, among other things, the validity of decisions CA/D 25/07 and CA/D 18/07 on the grounds that these decisions are illegal and that they breach their acquired rights with respect to tax adjustment. Indeed, the cost of reimbursing the tax adjustment is no longer borne by the Member States but by the EPO itself. They also allege violation of the Noblemaire principle insofar as the contested decisions introduce double taxation of part of the pension benefits. They argue that the EPO will no longer be able to attract candidates from all Member States by offering them employment with the same level of net pension. Indeed, pursuant to the contested decisions, pensions will be taxed at different levels depending on the date on which an employee was recruited.

The complainants ask the Tribunal to annul decisions CA/D 25/07 and CA/D 18/07. They add that if the Tribunal "limits itself to only one decision", the quashing of decision CA/D 25/07 should take precedence.

Each of them claims 9,000 euros in moral damages and 2,000 euros in costs.

C. In its replies the EPO indicates that, insofar as the complainants contest decision CA/D 25/07, it will refrain from challenging the receivability of their complaints for failure to exhaust internal means of redress because the internal appeal proceedings have been pending for quite some time and the Tribunal's case law on that issue is clear. It nevertheless submits that the complainants have no cause of action because the contested decision has no effect on their individual legal situation. Decision CA/D 25/07 concerns the financing of the tax adjustment and its purpose is merely to transfer a financial burden from the Member States to the EPO. It further contends that the complaints are irreceivable insofar as the complainants challenge decision CA/D 18/07, because in the internal appeal they contested only decision CA/D 25/07; they have consequently failed to exhaust the internal means of redress in that respect.

On the merits, the EPO submits that the complaints are unfounded. It denies any breach of acquired rights, stressing that decision CA/D 18/07 expressly provides that it applies only to employees who join the EPO after 1 January 2009; consequently, the decision does recognise the acquired rights of serving employees and pensioners to the tax adjustment. The EPO argues that Implementing Rule 42/6, which was modified by decision CA/D 25/07, cannot be seen to have constituted a guarantee of payment of the tax adjustment to pensioners; it was merely a financial mechanism. It adds that, according to the Tribunal's case law, a staff member has no right or expectation that the rules or policy applicable at the time of signing his or her contract will remain unchanged.

The EPO denies any violation of the Noblemaire principle. It stresses that there is no evidence that decision CA/D 25/07 will worsen the conditions of employment and thus render it difficult to recruit internationally the best qualified persons.

D. In their joint rejoinder the complainants assert that they have a cause of action because, pursuant to the contested decisions, they no longer have a direct right of recourse against the Member States with respect to part of their pension rights.

In their view, the abolition of the reimbursement of tax adjustment by Member States makes their present and future salary or pension less secure. The complainants submit that the EPO will have to bear the extra burden that was previously borne by the Members States with respect to the tax adjustment, which might jeopardise the payment of the tax adjustment Mr Ke. receives as a pensioner or adversely affect Mr Ka.'s working environment in the EPO. Mr Ka. submits that the withdrawal of Article 42 of the Pension Scheme Regulations gives the EPO an incentive to replace staff recruited prior to 1 January 2009 by new employees; his position is therefore prejudiced.

The complainants ask the Tribunal to award them 25,000 Swiss francs in costs in addition to the 2,000 euros they claimed in their complaints, explaining that they hired a lawyer to represent them at the rejoinder stage, and therefore incurred additional expenditure.

E. In its surrejoinders the EPO maintains that the complainants' acquired rights were not breached. It stresses that the EPO is the sole "debtor" of all obligations owed to its employees. Implementing Rule 42/6 of the Pension Scheme Regulations, which provided for the reimbursement by Member States of the tax adjustment, never created a direct relationship between pensioners and Member States. In any event, the EPO takes the necessary measures to ensure that it meets its obligations towards its employees and pensioners.

In its view, there is no evidence that the post-employment benefits the EPO offers to its staff are not sufficient to attract the best candidates from its Member States even if they are subject to taxation.

It contends that the lawyer the complainants hired at the rejoinder stage was paid by the Staff Union and that they consequently did not incur costs.

F. In their additional submissions the complainants note that, according to the EPO's surrejoinders, some 300 employees have challenged internally the same decisions as the complainants. They criticise the EPO for not having informed them of that fact earlier and consider that the EPO should suspend the 300 internal appeals pending a final decision of the Tribunal on their cases. They otherwise reiterate their arguments on the merits.

G. In the *amicus curiae* brief submitted on behalf of the Central Staff Committee and their nominees on the GAC, the legal representative indicates that the employees he is representing have filed internal appeals also challenging decisions CA/D 25/07 and CA/D 18/07. Amongst other things, he contends that decision CA/D 25/07 is procedurally flawed because the GAC was not consulted as required under Article 38(3) of the Service Regulations. With respect to decision CA/D 18/07 he submits that the GAC was consulted but not in the form of a face-to-face meeting. Video conference was used instead, despite the fact that it is not foreseen by the GAC's rules. He points to other flaws concluding that the GAC consultation did not meet the requirements for proper consultation.

H. In its final comments the EPO replies to both the complainants' additional submissions and the amicus curiae brief.

On the issues raised in the additional submissions, it indicates that it is not appropriate to suspend the internal appeal procedure initiated by other appellants. It adds that the legal service informs the IAC of pending appeals when they relate to each other and that it also informed the IAC that the complainants had a pending case before the Tribunal.

On the issues raised in the amicus curiae brief, it submits that the opinion of the GAC was not required concerning decision CA/D 25/07 because the issue at stake was not one that affected employees, it merely concerned the financial obligations of the Member States towards the EPO. Concerning decision CA/D 18/07, it indicates that the absence of specific provisions on the use of video conferences

does not mean that such means of communication cannot be used. Concerning the other alleged flaws it asserts that the members of the GAC had sufficient time to examine the document communicated to them.

CONSIDERATIONS

1. These reasons arise from two complaints filed against two 29 June 2007 Administrative Council decisions: CA/D 25/07 and CA/D 18/07. In decision CA/D 25/07, the Administrative Council deleted Implementing Rule 42/6 to the Pension Scheme Regulations with effect from 1 January 2009. This had the effect of transferring the obligation to fund the tax adjustment paid to EPO pensioners from the Member States to the EPO. In decision CA/D 18/07, the Administrative Council eliminated the tax adjustment provided under Article 42 of the Pension Scheme Regulations for employees taking up their duties with the EPO after 1 January 2009. The decision also specified that the rights of persons receiving EPO pensions or in the EPO's service before 1 January 2009 were not affected by the decision.

2. Mr Ka. is a serving staff member recruited before 1 January 2009. According to his complaint form, he asks the Tribunal to set aside decision CA/D 25/07 "and additionally related decision CA/D 18/07". He also asks that "[s]ince CA/D 18/07 and CA/D 25/07 must be seen together (draft decision CA/105/07 explicitly refers to draft decision CA/76/07), it is requested to quash both decisions, whereby in case the Tribunal limits itself to only one decision, quashing of CA/D 25/07 takes precedence".

3. In a separate complaint filed on the same day, Mr Ke. claims the same relief. He is a former EPO staff member and pension recipient since 1998.

4. The EPO applies and the complainants consent to the joinder of their complaints. As the two complaints rest on the same material

facts and raise the same issues of fact and law, they may be dealt with in one judgment, and are joined (see Judgment 1541, under 3).

5. The EPO states that it will not challenge "the receivability of the complaint[s] due to the length of the internal appeals procedure and bearing in mind the Tribunal's case law on such issue". As explained below, this position only relates to decision CA/D 25/07. The complainants take this to mean that "it is accepted by all parties that the Tribunal has jurisdiction". As an aside, even if there is agreement, the Tribunal must still determine whether it is competent to hear the complaint under Article II of the Statute. As the competence of the Tribunal is statutory, it cannot be conferred by agreement of the parties or on consent.

6. Returning to the EPO's statement, it is noted that it is simply a concession limited to decision CA/D 25/07. It is an acknowledgment that given the passage of time in the internal appeals process without a decision having been taken and having regard to the case law, the complaint is receivable pursuant to Article VII, paragraph 3, of the Statute. That the concession is limited to decision CA/D 25/07 is reflected in the EPO's challenge to the receivability of the complaint against decision CA/D 18/07 on the ground that the internal means of redress have not been exhausted.

7. The EPO also asserts that the complainants' respective internal appeals only challenged decision CA/D 25/07. The complainants dispute this assertion and maintain that their internal appeals challenged both of the contested decisions. The complainants argue that the contemporaneous documentation clearly undermines the EPO's claim that the internal appeal was limited to only one of the two contested decisions. They add that the two decisions are "connected, part of a package, and must stand or fall together".

8. The complainants' argument is rejected. On 6 September 2007, both complainants lodged materially identical internal appeals with the Administrative Council. The two appeals relevantly state:

> "I appeal against the decision of the Administrative Council to delete the reimbursement to the Office by the Member States of the Tax Adjustment paid (abolishing the refund to EPO pensioners of half the national income tax they pay) for the reasons set forth below, without prejudice to a more detailed argumentation.
>
> I claim:
>
> 1. Quashing of the decision […]."

9. It is not disputed that the "decision […] to delete the reimbursement to the Office by the Member States of the Tax Adjustment paid" is an appeal against decision CA/D 25/07. On the same date, both complainants also lodged materially identical internal appeals with the President. In their respective appeals, the complainants note that they were informed of the Administrative Council's adoption of documents CA/105/07 and CA/76/07 proposed by the Office and state:

> "I consider deleting the reimbursement to the Office by the Member States of the Tax Adjustment paid […] as unjust, unfair and unlawful for the reasons set forth below, without prejudice to a more detailed argumentation.
>
> Therefore, I request that you submit to the Administrative Council a CA-document proposing restoration of the status quo ante. In case this request cannot be followed, please consider this letter as an Internal Appeal […]."

10. Contrary to the complainants' assertion, there is nothing in their respective internal appeals that could reasonably be construed as being an appeal against decision CA/D 18/07. Further, the contemporaneous correspondence does not assist the complainants. On 5 November 2007, the Administration informed each complainant that since their respective appeals lodged with the President and the Administrative Council pertained to the same subject matter, namely, the abolition of Implementing Rule 42/6 to the Pension Scheme Regulations, they had been joined. In an 8 November 2007 letter from the Chairman of the IAC to each complainant, the reference is to "[y]our Internal Appeal No. 141/07 – deletion of the reimbursement of the tax adjustment". It would be expected that if there was misunderstanding regarding the decision(s) at issue, the complainants would have taken steps to rectify the problem as soon as it became known in November 2007.

11. Mr Ka.'s reliance on his 1 December 2008 letter to the Chairman of the IAC regarding the inordinate delay in the processing of his appeal is also misplaced. In the letter, he notes that the "President has not submitted a CA document proposing restoration of the *status quo ante* of the Tax Adjustment, which is equivalent to upholding decisions CA/D 25/07 and CA/D 18/07 which are directly based on the corresponding draft decisions of the President of the Office, i.e. proposals CA/105/07 and CA/76/07, which are requested to be quashed *ex tunc*". Given that up to this point in time there is no indication in the materials of an internal appeal against decision CA/D 18/07, this letter cannot be taken as making "it absolutely clear [as to] what is being challenged" as the complainant alleges.

12. As the complainants have not exhausted the internal means of redress as required by Article VII of the Tribunal's Statute, their complaints against decision CA/D 18/07 are irreceivable.

13. Turning to decision CA/D 25/07, the EPO submits that the complaints in relation to this decision are irreceivable as the complainants have not shown a cause of action. The EPO points out that the sole purpose of the decision is to transfer the financial burden of the payment of the tax adjustment to pensioners from the Member States to the EPO. As such, it has no bearing on the relationship between the complainants and the EPO and does not directly or indirectly affect the complainants' respective legal positions.

14. The complainants claim that an assertion of no cause of action is not a matter of receivability. They argue that under Article VII of the Statute, questions of receivability are limited to whether the internal means of redress have been exhausted, the impugned decision is a final decision and the complaint was filed within the statutory time limit.

15. They submit that they have dual interests in challenging the decisions: first, the decisions violate their private rights; and second, the decisions breach fundamental principles of international administrative law. They claim that they no longer have a direct right of

recourse against Member States in relation to the payment of the tax adjustment. As well, the payment of their pensions may be less secure given the additional financial burden on the EPO due to the abolition of the Member States' reimbursement of the tax adjustment. Mr Ka. also claims that his employment position is prejudiced by the fact that there is now a financial benefit for the EPO to dismiss him and replace him with a new employee in respect of whom the EPO is not obliged to pay the tax adjustment.

16. The complainants' position that cause of action is not a question of receivability is rejected. As the Tribunal stated in Judgment 1756, under 5, "[t]o be receivable a complaint must disclose a cause of action". There are two aspects to receivability – the procedural aspect found in Article VII of the Statute and the substantive aspect found in Article II. That is, whether the Tribunal is competent to hear the case *ratione personae* and *ratione materiae.* Framed another way, Article II requires that a complaint must reveal a cause of action and that the impugned decision is one which is subject to challenge. Under Article II, two thresholds must be met for there to be a cause of action. First, the complainant must be an official of the defendant organization or other person described in Article II, paragraph 6. Second, Article II, paragraph 5, requires that a complaint "must relate to [a] decision involving the terms of a staff member's appointment or the provisions of the Staff Regulations" (Judgment 3136, under 11).

17. In the present case, the complainants have not shown that decision CA/D 25/07 has caused them or is liable to cause them any injury. The effect of the decision was budgetary only. The shift of the financial responsibility for the tax adjustment did not in any way adversely affect either of the complainants and will not have any adverse effect in the future. The alleged negative impact due to loss of the right of recourse to the relevant Member State is without merit. The contractual responsibility for the payment of the tax adjustment has always rested with the EPO and not with the Member States. The complainants did not have a right of recourse to the Member States at any time. The allegation that the payment of their pensions may be

less secure given the additional financial burden on the EPO is without any evidentiary foundation and amounts to no more than conjecture. Finally, the alleged risk to continued employment is purely speculative and, more importantly, assumes bad faith on the part of the EPO that is unsubstantiated. Accordingly, the complaints will be dismissed. It follows that the applications to intervene will also be dismissed. As to the request for an oral hearing, given the extensive written submissions and evidence filed with the Tribunal, an oral hearing is unnecessary and the request is rejected.

DECISION

For the above reasons,

1. The complaints are dismissed.

2. The applications to intervene are dismissed.

In witness of this judgment, adopted on 6 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

PATRICK FRYDMAN

DRAŽEN PETROVIĆ