119th Session **Judgment No. 3435**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr H. S. (his ninth), Mr A. C. K. (his second) and Mr P. O. A. T. (his third) against the European Patent Organisation (EPO) on 17 March 2010, corrected on 7 May, the EPO's reply dated 13 September 2010, the complainants' rejoinder of 2 May 2011, the EPO's surrejoinder dated 8 September, the complainants' additional submissions dated 26 September 2011 and the EPO's final comments dated 7 February 2012;

Considering the application to intervene filed by Mr I. T. on 7 September 2010 and the EPO's comments thereon of 20 September 2010;

Considering the application to intervene filed by Mr T. H. received on 2 November 2010 and the EPO's letter of 8 November 2011 indicating that it had no comment to make;

Considering the applications to intervene filed by Ms S. A.-M., Mr E. A., Mr F. A., Mr K. B., Mr M. B., Mr W. B., Mr C. B., Mr S. F. B., Ms R. B., Mr J. B., Mr J. C., Mr P. C., Mr M. C., Mr J.-M. C., Ms C. de La T., Mr F. D., Ms N. D., Mr L. F., Mr C. F., Ms J.-K. F., Mr R. G., Mr A. G., Mr D. G., Mr M. G., Ms H. G., Mr P. G., Ms Å. H., Mr J. H., Mr W. H., Mr I. M. H., Mr D. H., Mr A. I., Mr M. I., Mr J. J., Mr N. C. J., Mr A. J., Mr A. K., Mr E. K., Mr G. K., Ms L. K., Mr D. K., Mr L. L., Mr I. M., Mr A. M., Mr C. M., Ms J. M., Ms U. M.-

K., Mr T. M., Mr O. N., Mr M. Ö., Ms D. P., Ms G. P., Mr N. P., Mr W. P., Mr G. P., Mr R. P., Mr M. P., Mr X. R., Mr M. R., Ms S. R., Ms Y. R., Ms M. R., Mr B. R., Mr G. S., Mr W. S., Ms B. S., Mr M. S., Mr S. S., Mr P. T., Mr G. von der S., Mr S.-U. von W., Mr W. W., Mr R. W. between June and September 2011, and the EPO's letters of 24 February 2012 and 30 January 2014 indicating that it had no comments to make;

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. At the material time, the complainants were permanent employees of the European Patent Office, the EPO's secretariat.

On 14 December 2007 the Administrative Council adopted decision CA/D 28/07 revising with effect from 1 July 2006, 1 July 2007 and 1 January 2008 the salaries and other elements of the remuneration of permanent employees. On the same date, it adopted decision CA/D 31/07 which amended with effect from 1 July 2008 the Implementing Rule for Article 64 of the Service Regulations for Permanent Employees of the Office on the procedure for adjusting the remuneration of permanent employees from 1 July 2008, and in particular Article 5 of the Implementing Rule.

On 10 March 2008 each complainant wrote to the President of the Office challenging their pay slips for December 2007 and January 2008, alleging that the new salary adjustment applicable pursuant to the adoption of decisions CA/D 28/07 and CA/D 31/07 was unfair and unlawful. They contested the validity of these decisions and argued that the salary adjustment method laid down in Article 5 of the Implementing Rule for Article 64 of the Service Regulations applicable before the entry into force of decision CA/D 31/07 should remain valid. Therefore they asked that the old Article 5, which is according to them the "valid salary adjustment" method, be applied as of 1 January 2007, that the salary scales be retroactively adjusted as of that date

and that they be granted 8 per cent compound interest on the amounts due. They put forward the same claims with respect to 2008. They also requested the President to submit a document to the Administrative Council proposing to cancel the deletion of the old Article 5. Each of them further claimed 9,000 euros in moral damages and 2,000 euros in costs. They indicated that if their requests could not be granted, their letters should be considered as internal appeals. On the same day they wrote to the Chairman of the Administrative Council raising exactly the same arguments and claiming the same redress, except with respect to the submission of a document to the Administrative Council that would cancel the deletion of Article 5 of the Implementing Rule for Article 64 of the Service Regulations; instead they requested the Chairman of the Council to cancel the deletion of the said Article 5.

By a letter of 8 May 2008 the complainants were informed that the President considered that the salary adjustment method had been correctly applied and that she had decided to reject their requests for review. Consequently, the matter had been referred to the Internal Appeals Committee (IAC). On 19 May they were informed that the appeals filed with the President would be dealt with as soon as possible. On 30 June, they were informed that the Administrative Council had decided not to examine the appeals they filed with it but to refer them to the President. On 11 July they received confirmation that their appeals had indeed been referred to the President.

On 10 December 2008 the complainants wrote to the chairman of the IAC asking when the IAC's opinion would be issued. The chairman replied on 12 December that it would take at least a year after the date of filing of the appeal to have the EPO's position and that only then could the IAC start with the hearings. They wrote again to the chairman of the IAC in December 2009, enquiring about their pending internal appeals. They were informed on 21 January 2010 that the EPO would do its best to provide the IAC with its position paper on their appeal by mid-2010. However, on 17 March 2010, they filed their complaints directly with the Tribunal challenging the implied rejection of their internal appeals.

B. The complainants indicate that they initiated the internal appeal proceedings with both the President of the Office and the chairman of the Administrative Council on 10 March 2008 and have not yet received the EPO's position concerning these appeals. According to them, the EPO used delay tactics in the internal appeal proceedings and set up procedural traps. It thus did not act with due diligence in dealing with their appeals, whereas they did everything that was possible to expedite their appeals.

They contend that the Administrative Council mistakenly referred the appeal they had filed with it to the President of the EPO. The internal appeal procedure, which is still pending, is therefore procedurally flawed.

In their view, the new salary adjustment applied pursuant to administrative decisions CA/D 28/07 and CA/D 31/07 was not made in accordance with the valid salary methodology, namely that which was described in decision CA/D 8/02. They add that Article 5 of the Implementing Rule to Article 64 of the Service Regulations in force before 1 July 2008 should have been reflected in decision CA/D 31/07 which amended with effect from 1 July 2008 the Implementing Rule for Article 64 of the Service Regulations. The salary adjustment was too low and took effect one year too late.

They allege breach of an acquired right in so far as their salary, which is an essential element of their conditions of employment, has been modified. They consider that the method to calculate their salary is an essential element of their employment conditions which should not have been modified without their consent. Indeed it has an impact not only on their actual salary but also on the pension they will receive upon retirement.

According to the complainants, the contested administrative decisions violate the Noblemaire principle because they impair the EPO's ability to attract candidates from all member States, in particular from those States where the salaries are the highest. Indeed, under the "valid salary adjustment method" which was laid down in decision CA/D 8/02, the salary package would have increased by 15.5 per cent.

They ask the Tribunal to order the EPO to apply the salary method laid down in administrative decision CA/D 8/02, in particular its Article 5 and its Annex; to correct the application of Article 5 of decision CA/D 8/02 as of 1 January 2007; to apply the retroactive adjustment of the EPO's salary scales with effect from 1 January 2007 and to correct their salary slips as of December 2007 leading to an increase of basic salary of 15.5 per cent or at least 10.3 per cent. They also ask that the adjusted salary scales applicable as of 1 January 2008 be used as starting point for the subsequent adjustment of 1 July 2008 and the following years, and that the EPO be ordered to "cancel the deletion" of Article 5 in the amended Implementing Rule for Article 64 of the Service Regulations. They claim 8 per cent interest per annum on all amounts paid to them and request that their rights concerning "the comparison of the salary scales of EPO and EU and entitlement" be restored "to the *status quo ante*". They also claim 50,000 euros in moral damages for procedural delay, and "loss of life quality and loss of health for being forced to work on an increasing number of appeals", and 2,000 euros in costs.

C. In its reply the EPO submits that the complaints are irreceivable for failure to exhaust internal remedies given that the complainants' appeals are still pending before the IAC. It regrets the delay in dealing with them but indicates that it needed time to submit its position paper to the Appeals Committee, which it did, as announced, in mid-2010. It emphasises that the complainants filed, together with other staff members, appeals before both the President of the Office and the Administrative Council; the issues raised therein were complex and many arguments were advanced. In any event there was an exchange of correspondence between the Administration and the complainants concerning their pending appeals, which shows that their rights were not paralysed. It adds that they sought 9,000 euros in damages in their internal appeals and that their present claims for damages are irreceivable to the extent that they exceed that amount.

On the merits, it refers to its pleadings before the IAC without detailing them.

D. In their rejoinder the complainants indicate that they have increased their claims for damages because they have suffered additional damages due to the EPO's behaviour during the internal appeal proceedings; their "life quality" was impaired.

On the merits, they indicate that this case "is a test case, in which the rights of employees throughout the EPO are at stake".

Concerning the relief claimed, they indicate that if the Tribunal does not order the EPO to apply the salary method laid down in decision CA/D 8/02, they alternatively ask the Tribunal to order the EPO to send the contested decisions back to the President and to the Administrative Council for recalculation of the salary scales in light of "the methodology as defined in Art. 5 and its Annex", and to publish all the details of this new calculation. They also ask the Tribunal to order the EPO to send the contested decision back to the President and to the Administrative Council for "re-introduction of previous Art. 5 in the present salary adjustment methodology".

E. In its surrejoinder the EPO indicates that the comparison provided for in Article 5 of decision CA/D 8/02 between the EPO's salary scales and those of the European Communities could no longer be made because of the introduction of a new grade structure within the European Communities. The comparison lacked the relevance that justified its introduction in the first place. Consequently, it was abandoned in the new salary method introduced as of 1 July 2008 to calculate the salary adjustment. The EPO denies any breach of the Noblemaire principle.

F. In their additional submissions the complainants indicate that in the light of various statements made by the Administration during the negotiations with the staff, they could reasonably expect that the new Article 5 of the Implementing Rule for Article 64 of the Service Regulations would not merely relate to a discretionary method.

G. In its final comments the EPO reiterates that the comparison provided for in Article 5 of the Implementing Rule for Article 64 of

the Service Regulations had to be reviewed because of the introduction of new salary scales at the European Union.

CONSIDERATIONS

1. The complainants initiated internal appeal proceedings on 10 March 2008 (registered together under RI/44/08), against their pay slips for December 2007 and January 2008. They claimed that the EPO had applied the wrong salary adjustment method and that, following the adoption of decisions CA/D 28/07 and CA/D 31/07 on 14 December 2007, the new salary adjustment which came into effect on 1 January 2007 and 1 January 2008, was unfair and unlawful. The complainants wrote to the IAC Chairman in December 2009 to enquire about the pending appeal and they were informed on 21 January 2010 that the Organisation would submit its position paper to the IAC in mid-2010. The complainants filed their complaints directly with the Tribunal on 17 March 2010, asserting that they had done everything possible to expedite the appeal (RI/44/08) but that "[j]ustice delayed is justice denied". They submit that they have exhausted all internal means of redress as they had done their "utmost to obtain a decision but on the evidence a decision seems unlikely to be taken in reasonable time". The EPO filed its position paper with the IAC on 23 June 2010.

2. The complainants' claims for relief are set out above under B. As the cases are substantially identical, and the parties agree, the complaints are joined. 75 staff members have applied to intervene.

3. The complainants request oral hearings. It is consistent case law that the Tribunal shall not order oral proceedings for cases in which the written submissions are sufficient for rendering an informed decision. The complainants raise no issue that would justify the Tribunal departing from its consistent practice not to grant an oral hearing in cases which turn essentially on questions of law (see Judgment 1241, under 2, and Judgment 2264, under 4, recently confirmed in Judgment 3059, under 9).

4. The Tribunal is of the opinion that this case hinges on the question of receivability. Complainants shall have access to the Tribunal in accordance with Article VII, paragraph 1, of the Statute of the Tribunal which provides that a "complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". However, the Tribunal notes that it is important for the parties to attempt to find an internal solution to disputes, particularly as internal appeals bodies are competent to comment not only on the lawfulness of administrative decisions, but also to suggest alternative solutions. This alone can sometimes be enough to resolve a dispute, and in cases which are further pursued, the Tribunal should have at its disposal full records on the administrative handling of the dispute. In the present case, the complainants filed their complaints in March 2010 directly before the Tribunal, upon receiving notice that the Organisation's position paper on their internal appeal would not be filed until mid-2010. The position paper was filed as indicated.

5. The complainants assert that they did their utmost, to no avail, to accelerate the internal appeals procedure and that, according to the Tribunal's case law, they were allowed to file directly with the Tribunal as the requirement to exhaust all internal remedies cannot have the effect of paralyzing the exercise of their rights. The Tribunal is of the opinion that even though the submission of the Organisation's position paper was already delayed by the time the complainants wrote to the IAC Chairman in December 2009, and the additional six months for the expected date of submission could be considered excessive depending on the circumstances, the complainants were involved in a dialogue with the Organisation which they abruptly ended by applying directly to the Tribunal upon receiving notice of the Organisation's intent to submit its position paper in mid-2010. Having received confirmation of the Organisation's intent to continue the internal appeal, the complainants should have either waited for the Organisation's position paper of June to continue the internal appeal process, or should have requested a more immediate submission date.

The Tribunal notes that, though the appeal process was delayed, it was active, and the complainants could have a reasonable expectation of receiving a final decision which they could then contest before the Tribunal if they found it necessary. Therefore, the Tribunal cannot consider that the complainants had truly done their utmost to pursue their internal appeal and the complaints are considered premature and must be dismissed as irreceivable for failure to exhaust all means of internal redress. As they are irreceivable under Article VII, paragraph 1, of its Statute, the Tribunal shall examine neither other issues of receivability, nor the merits of the complaints.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ