Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

L. (Nos. 4 and 6)

v.

EPO

120th Session **Judgment No. 3525**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr C. L. against the European Patent Organisation (EPO) on 16 May 2011, the EPO's reply of 25 October 2011, the complainant's rejoinder of 30 January 2012, the EPO's surrejoinder of 14 May, the complainant's additional submissions of 10 July and the EPO's final comments of 16 October 2012;

Considering the sixth complaint filed by Mr L. against the EPO on 25 November 2011, the EPO's reply of 15 May 2012, the complainant's rejoinder of 12 July and the EPO's surrejoinder of 18 October 2012;

Considering Articles II, paragraph 5, and VII 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 may be summed up as follows:

Facts relevant to this case are to be found in Judgment 3146, delivered on 4 July 2012, concerning the complainant's second complaint. Suffice it to recall that on 9 December 2008 the EPO's Administrative Council adopted decisions CA/D 27/08 and CA/D 32/08. The former decision revised the salaries and other elements of the

remuneration of permanent employees of the EPO by, among other things, replacing as from 1 January 2009 the monthly basic salary scales in Tables 1 to 4 of Annex III to the Service Regulations for Permanent Employees of the EPO with monthly gross salary scales. The latter decision amended the Regulation on Internal Tax by, among other things, revising as from 1 January 2009 the tax rates and tax brackets.

In March 2009 the complainant, a permanent employee of the EPO, challenged decisions CA/D 27/08 and CA/D 32/08 by way of letters he sent to both the President of the Office and the Chairman of the Administrative Council. He asserted, inter alia, that his gross salary had been reduced by one third as a result of the implementation of decision CA/D 27/08 and that the combined effect of both decisions was an unacceptable reduction of his net salary.

Pursuant to a proposal submitted by the President on 3 June 2009, the Administrative Council determined that the complainant's appeals concerned the implementation of decisions CA/D 27/08 and CA/D 32/08. It therefore decided to forward them for further action to the President who concluded that they were unfounded and referred them to the Internal Appeals Committee (IAC) for an opinion.

On 5 October 2009, while the internal appeal proceedings were still pending, the complainant filed his second complaint with the Tribunal purporting to impugn, inter alia, the President's proposal of 3 June 2009 to have the Administrative Council decline jurisdiction with respect to his internal appeals, the Council's consequent decision in that respect and the "illegal" reduction of his gross salary. On 17 September 2010 the EPO filed its surrejoinder to that complaint. The Tribunal rendered its decision on the complainant's second complaint in Judgment 3146, delivered on 4 July 2012. In that judgment it found that the referral of the complainant's appeals to the President was lawful. It also found that, as these appeals were still pending before the IAC when the complainant had filed his second complaint, he had failed to exhaust internal remedies. It thus dismissed the complainant's second complaint as irreceivable.

On 23 December 2010, soon after the EPO filed its surrejoinder to the complainant's second complaint, the complainant submitted a request to the Administrative Council, in which he sought the withdrawal of what he considered as "false and humiliating" statements made by the EPO in its surrejoinder, as well as moral and punitive damages. The Chairman of the Administrative Council decided to refer this request to the President, who under Article 5(3) of the European Patent Convention is competent to represent the EPO in legal proceedings. He notified the complainant of this decision by a letter of 3 February 2011. Soon after, the Administration informed the complainant that a favourable reply could not be given to his request and asked him to indicate if he wished to pursue the matter internally. It also took the position that, insofar as his request concerned statements made in legal proceedings which were pending before the Tribunal, he had the right under Article 9(6) of the Tribunal's Rules to bring the matter to the Tribunal's attention through further written submissions in the context of his second complaint.

The complainant objected in writing to the referral of his request to the President, arguing that the Administrative Council and its Appeals Committee were competent to deal with it. He also enquired as to why the matter was not on the agenda of the upcoming Administrative Council meeting scheduled for 29 and 30 March 2011. The Administration replied that the matter had been referred to the President who was competent to represent the EPO in legal proceedings. The complainant made further enquiries as to whether the Administrative Council had taken a decision on his request. By a letter of 11 April 2011, the Administration informed him that it had concluded from the various communications that he wished to pursue his appeal and had therefore referred his request to the IAC as internal appeal RI/214/10. The complainant expressed disappointment at not having received a reply as to which was the competent authority to deal with his request and, in response, the Administration reiterated in an e-mail of 15 April 2011 its position regarding his request of 23 December 2010. In his reply of the same day, the complainant stated that he considered the Administration's latest e-mail to be a final decision allowing him to file a complaint directly with the

Tribunal and he sought guidance as to the deadline within which he ought to do so. The Administration replied that same day that its earlier e-mail did not constitute a final decision and that the time limit for filing a complaint with the Tribunal had started to run on the date when he had received the letter of 3 February 2011.

In two separate e-mails written on 3 and 13 May 2011 to the Chairman of the Administrative Council and the President respectively, the complainant reiterated his position regarding the Administrative Council's competence to deal with his request of 23 December 2010. He asked that the President present to the Administrative Council an opinion on his request, that the Council take a decision thereon and that he be awarded compensation. In the event of a negative reply, he asked that his e-mails be considered as internal appeals. On 16 May 2011 the complainant filed his fourth complaint with the Tribunal impugning the decision to refer to the President his request of 23 December 2010, which was communicated to him by letter of 3 February 2011. On 25 November 2011 he filed his sixth complaint with the Tribunal against the implied rejection of the claim he had notified to the Chairman of the Administrative Council on 3 May 2011.

In his fourth complaint, the complainant asks the Tribunal to decide that the Appeals Committee of the Administrative Council is the competent authority to deal with the appeal underlying his complaint or, subsidiarily, to decide whether it sees fit to judge on the underlying matter and its consequences. He claims compensation and costs in an amount to be decided by the Tribunal, as well as 40,000 euros in moral damages and an additional amount in punitive damages.

In his sixth complaint, he asks the Tribunal to quash the implied rejection of his request filed with the Chairman of the Administrative Council on 3 May 2011 and to send it back to the Council for "appropriate handing" in line with its Rules of Procedure. Subsidiarily, he asks the Tribunal to decide on the substance of said request and to order that the claims made under point C thereof be met. He also asks the Tribunal to render an opinion on whether there was conduct and action by the EPO, especially the Employment Law Directorate, beyond what could generally be considered admissible and to order

measures that will effectively discourage similar conduct by the EPO in the future. He claims damages and costs.

The EPO applies for the joinder of the two complaints and asks the Tribunal to dismiss them as irreceivable *ratione temporis* and *ratione materiae* and, on a subsidiary basis, to dismiss them as unfounded in their entirety. In its surrejoinder to the complainant's fourth complaint, it files a counterclaim for damages, because it considers that by filing two complaints dealing with the same issue, the complainant placed an unnecessary burden on its resources and committed an abuse of procedure.

CONSIDERATIONS

1. The complainant is challenging what he considers to have been "false and humiliating" statements made by the EPO in its surrejoinder to his second complaint which lead to Judgment 3146. The complainant contested these statements in a letter to the Administrative Council dated 23 December 2010, asking for their withdrawal and for an award of moral and punitive damages. The Chairman of the Administrative Council declined competence and referred the matter for further action to the President of the Office, who is competent to represent the EPO in legal proceedings. He notified the complainant of this decision in a letter dated 3 February 2011 with the following explanation: "You consider that this is a matter to be brought to the Administrative Council, as it involves the Organisation. However, pursuant to Article 5(3) of the European Patent Convention, it is the President of the Office who represents the Organisation in [...] proceedings [before the Tribunal]. Accordingly, your request is referred to him for appropriate action." The complainant was informed in a letter dated 10 February 2011 from the Director of the Employment Law Directorate that the President could not give a favourable reply to his request. It was also pointed out to the complainant that he could submit his request directly to the Tribunal under Article 9(6) of the Tribunal's Rules, which provides that any party to proceedings before the Tribunal may request permission to submit further written submissions

in a particular case. The complainant was asked to inform the EPO by 18 February 2011 whether or not he wished to pursue the matter internally. There were further exchanges between the parties and on 11 April 2011 the complainant was informed that, as the EPO had understood from his correspondence that he wished to pursue an appeal, his request had been forwarded to the IAC and registered as internal appeal RI/214/10. On 16 May 2011 the complainant filed his fourth complaint with the Tribunal, impugning the decision (communicated to him in the letter of 3 February 2011) to refer his 23 December 2010 request to the President.

2. The complainant sent an e-mail to the Administrative Council Chairman on 3 May 2011 arguing that the Council was competent to deal with his request of 23 December 2010 and asking that it take a decision thereon and that it award him compensation or, otherwise, that his e-mail be treated as an internal appeal before the Appeals Committee of the Administrative Council. On 25 November 2011 he filed his sixth complaint with the Tribunal, impugning the implied rejection of that request.

3. The EPO originally requested in its reply to the fourth complaint that that complaint be joined with the complainant's second complaint, which was then pending before the Tribunal. However, as that complaint was examined in Judgment 3146, it recognised that joinder was no longer possible. The EPO then asked, in its surrejoinder to the fourth complaint, as well as in its reply to the sixth complaint, that the complainant's fourth and sixth complaints be joined. The complainant states that he has no objection to the joinder of the two complaints.

4. The Tribunal finds that the two cases rest on the same set of facts, contain similar arguments and raise the same issues of law. For these reasons, the Tribunal finds it appropriate that they be joined so that they form the subject of a single judgment (see Judgments 3094, under 1, and 3103, under 5).

5. As noted above, the two complaints presently before the Tribunal stem from the complainant's second complaint which was adjudicated by the Tribunal in Judgment 3146. In that judgment the Tribunal found that it was lawful for the Administrative Council to refer the complainant's appeals to the President. As the complainant had pursued an appeal before the President and the IAC but had filed his complaint prior to receiving a final decision, his complaint was dismissed for failure to exhaust all internal means of redress, in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

6. The current two complaints are irreceivable and are also unfounded. The complainant was on several occasions informed that the proper forum for discussing the content of the statements made by the EPO in its surrejoinder to his second complaint was the Tribunal, but that that discussion should take place in the context of the proceedings relating to that second complaint. A complainant must apply for permission to submit additional comments in the proceedings dealing with her or his complaint, if she or he has reasonable grounds to object to the comments made by the organisation in its surrejoinder. Statements which are made in the context of complaint proceedings before the Tribunal are not decisions within the meaning of Article 106 of the Service Regulations and are thus not challengeable in separate complaint proceedings, nor do they fit strictly within the requirements of Article II of the Tribunal's Statute. In cases where the Tribunal does not allow further submissions, unless otherwise specified, it can be assumed that the Tribunal found those submissions to be either irrelevant to the complaint or unfounded, and not, as the complainant submits in this case, that the Tribunal considers that the matter must be raised in a separate complaint.

7. The complainant asserts that his sixth complaint was filed against the implied rejection of his request of 3 May 2011. The Tribunal notes that as of 14 February 2011, the date he received the letter of 3 February 2011, the complainant knew that the Administrative Council did not consider itself competent to deal with his request of 23 December 2010; as of 11 February 2011, the date he received the

letter of 10 February 2011, he knew that the President could not give a favourable reply to that request; and as of 15 April 2011 he knew that the time limit for filing a complaint before the Tribunal had started to run on 14 February 2011, the date he had received the 3 February 2011 letter. The EPO's non-response to the complainant's e-mail of 3 May 2011 cannot be considered an implied rejection of his 23 December 2010 request. It was not a new decision but a mere confirmation of the original decision contained in the letter of 3 February. Thus, his sixth complaint filed on 25 November 2011 is irreceivable.

8. The complainant's fourth and sixth complaints are irreceivable *ratione materiae*, because neither of them is directed against an administrative decision concerning him. Indeed, in both complaints the complainant essentially challenges what he considers to be "false and humiliating" statements made by the EPO in its surrejoinder to his second complaint. As regards the other matters raised by the complainant in his fourth and sixth complaints, it is sufficient to note that these are either irrelevant to the present case or have already been dealt with by the Tribunal in the proceedings leading to Judgment 3146.

9. Leaving aside for the moment the issue of the irreceivability of the two complaints, the Tribunal finds it useful to note that the complaints are also unfounded on the merits. The complainant's letter of 23 December 2010 was properly forwarded by the Administrative Council to the President, who is competent to represent the EPO in proceedings before the Tribunal. The complainant submits that the wording of the letter of 3 February 2011 from the Chairman of the Council was unclear. The Tribunal considers that the letter from the Chairman, stating that "pursuant to Article 5(3) of the European Patent Convention, it is the President of the Office who represents the Organisation in such proceedings. Accordingly, your request is referred to him for appropriate action", was clear and followed the usual format for such information. The complainant misinterpreted the meaning of the letter, focusing instead on his mistaken interpretation of the competences of the Administrative Council and those of the President. Similarly, he misinterpreted the letter of 10 February 2011 informing him of the

President's decision, in that he refused to accept that the response according to which the President "has come to the conclusion that a favourable reply cannot be given to your request" and the request that he indicate "by Friday, 18th of February [2011] whether or not [he] indeed wish[ed] to pursue the matter internally", meant that the President had clearly accepted that he and not the Administrative Council was competent to deal with the complainant's request, and that the complainant was expected to inform the Employment Law Directorate whether or not he wished to pursue the appeal.

10. Considering the above, the complaints must be dismissed in their entirety and the complainant shall bear his costs. This is not an appropriate case for awarding compensation of the type sought by the EPO.

DECISION

For the above reasons,

The complaints are dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 8 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN
MICHAEL F. MOORE

DRAŽEN PETROVIĆ