V. (No. 3)

v.

EPO

121st Session **Judgment No. 3623**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr D. V. against the European Patent Organisation (EPO) on 29 February 2012 and corrected on 5 April, the EPO's reply of 2 August, corrected on 27 August, the complainant's rejoinder of 19 November 2012 and the EPO's surrejoinder of 26 February 2013;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant contests the decision to assign him to non-active status and to replace his invalidity pension by an invalidity allowance on the basis of the unlawful transitional measure included in decision CA/D 30/07 of the Administrative Council.

Pursuant to decision CA/D 30/07 the rules governing invalidity pensions in the Service Regulations for Permanent Employees of the European Patent Office and the Pension Scheme Regulations were amended with effect from 1 January 2008. As from that date, employees who retired on grounds of invalidity before having reached the statutory retirement age of 65 would not become pensioners immediately but would be considered as employees with non-active status. As such, they would receive an invalidity allowance instead of an invalidity

pension and, except where their invalidity was due to an occupational disease, they would continue to contribute to the pension fund. When they reached the age of 65, their contributions to the pension fund would cease and they would begin to draw a retirement pension. Article 29(a) of the decision provided for a transitional measure to ensure that recipients of an invalidity pension who were under 65 years old on 1 January 2008 would continue to receive the same level of benefits when their invalidity pension was changed to an invalidity allowance.

On 14 January 2008 the EPO informed the complainant, who had been receiving an invalidity pension since 1 September 2003, of the legal changes introduced by decision CA/D 30/07. On 11 March 2008 he initiated an internal appeal, contesting the decision to replace his invalidity pension by an invalidity allowance with retroactive effect from 1 January 2008, which, according to him, had caused him a substantial loss of monthly income. In his additional submissions of 20 March to the President of the Office, he specified that he also challenged the decision to assign him to non-active status, the decision of the Administrative Council to revoke his invalidity pension and replace it by an invalidity allowance, and the competence of the Administrative Council to modify the Pension Scheme Regulations. He asked to be granted the invalidity pension, in the same amount and under the same conditions as before, until his death. He also requested that he be paid the difference between the benefits due to him under the invalidity pension and the invalidity allowance as from January 2008, together with interest and "cost payable (e.g. to the Dutch Tax authorities) due to the changes […] put in place". He asked that EPO compensate him for the actions he might have to take to avoid bankruptcy or as a result of bankruptcy pursuant to the financial burden he faced as a result of being placed on non-active status, and he claimed moral damages and legal costs. His requests were rejected and the matter was referred to the Internal Appeals Committee (IAC) for an opinion.

In its opinion of 9 August 2011 the IAC unanimously concluded that the transitional clause contained in Article 29(a) of decision CA/D 30/07 was unlawful on the grounds that the General Advisory Committee (GAC) had not been properly consulted with regard to its

content, and that it constituted a breach of acquired rights. It therefore recommended that the complainant should be treated in accordance with his former legal status, but only provisionally, until a new transitional measure was adopted. The IAC also unanimously considered that the EPO had acted in breach of its duty of care and that the complainant should be awarded 2,000 euros in moral damages. It unanimously considered that the EPO could not bear "unlimited" responsibility with respect to the alleged costs incurred by the complainant to avoid bankruptcy or those incurred as a result of bankruptcy; the complainant should demonstrate that the losses he had allegedly suffered were "unavoidable and reasonable". The majority of the IAC's members recommended that he be reimbursed the difference between the invalidity pension (including tax adjustment) and the invalidity allowance, plus 8 per cent interest, with retroactive effect from 1 January 2008. The majority also recommended that he be paid 500 euros for undue delay in dealing with his case and that he be reimbursed costs.

On 5 December 2011 the complainant was informed of the President's decision to resubmit the transitional measure to the GAC and then to the Administrative Council. She had also decided to award him 500 euros for the delay in the internal appeal proceedings and to reimburse his reasonable costs. His other claims, however, were rejected as unfounded. That is the decision he impugns before the Tribunal.

The complainant asks the Tribunal to order the EPO to withdraw the decision to assign him to "non-active status", to order that he be paid the difference between the benefits due to him under the invalidity pension and the invalidity allowance as from 1 January 2008 with accrued interest and "expenses", to order that he be paid "all costs incurred with a view to avoiding, or as a result of, bankruptcy", and to order the payment of punitive damages in an amount of 10,000 euros. He also seeks moral damages, alleging in particular that the amount received to compensate him for undue delay in the internal appeal proceedings was insufficient, and costs.

The EPO asks the Tribunal to reject the complaint as unfounded. It submits that the complainant's claim for damages is unsubstantiated,

stressing with respect to delay in the internal appeal proceedings that he was awarded 500 euros. It argues that his claim for costs should also be rejected as he has not shown that he incurred any, and that his complaint is unfounded.

CONSIDERATIONS

1. The complainant ceased working at the EPO as of 1 September 2003 on grounds of invalidity. Under the rules in force at that time, his invalidity entitled him to draw an invalidity pension at a rate of 70 per cent which he collected from the effective date of his retirement until 31 December 2007. He received a tax adjustment to compensate for the fact that, as a Dutch citizen residing in the Netherlands, he was liable to income tax on his invalidity pension. With effect from 1 January 2008, he was considered to be on non-active status following the implementation of the Administrative Council's decision CA/D 30/07 of 14 December 2007. Thus, instead of receiving an invalidity pension, he received an invalidity allowance under Article 62a of the Service Regulations as he had not yet reached the statutory retirement age. Following the legal changes introduced by decision CA/D 30/07 to the Organisation's pension scheme, monthly pension contributions were deducted from his invalidity allowance and he was no longer entitled to receive the tax adjustment as the invalidity allowance was exempted from national income tax.

2. In two emails dated 18 and 23 January 2008, the complainant requested a review of the decision contained in the letter of 14 January 2008 by which he was informed of the legal changes introduced by decision CA/D 30/07. As a precautionary measure, on 11 March 2008, he filed an appeal with the Internal Appeals Committee (IAC) against the replacement of his invalidity pension by an invalidity allowance, stating inter alia that the invalidity pension had been granted to him by the President in 2003 and was therefore an acquired right. His request for review was rejected on 12 March. The Administration submitted its position paper to the IAC on 16 July 2010, the complainant's rejoinder

was filed on 13 January 2011, and the IAC published its opinion on 9 August 2011.

3. In its opinion, the IAC unanimously found that the appeal was "admissible almost in its entirety and for the most part well founded" and noted that the Committee was "divided only on the issues of damages for the undue length of the proceedings and costs". The IAC unanimously concluded that "the guarantee for former invalidity pension recipients which was included among the transitional measures set out in Article 29(a) of Section VII of CA/D 30/07 (footnote No. 2 to Article 62a [of the Service Regulations]) ought to have been discussed afresh by the GAC prior to its adoption. It was not the subject of such a fresh discussion and must be considered formally unlawful for that reason alone. It also breaches the [complainant's] acquired rights and, therefore, could not properly be applied to him." The IAC added that, in another recent appeal, it had found that "the procedure leading to adoption of the transitional clause was defective because the clause as amended in [document] CA/159/07 Rev. 2 [which was submitted to the Administrative Council for approval] had not been the subject of a fresh GAC consultation prior to its adoption by the Council". The IAC had based that finding on the fact that the guarantee was worded differently in the first and second versions but the GAC had only been consulted for the first version and that in cases where significant differences could be identified, a new GAC consultation was required.

4. In a letter dated 5 December 2011, the complainant was informed of the President's decision to allow his appeal in part. Specifically, the President decided to endorse the unanimous opinion of the IAC (as set out in paragraphs 39 and 40 of its opinion) that the statutory consultation on the guarantee clause was procedurally flawed, and stated that the guarantee clause would be resubmitted to the GAC and then to the Administrative Council. The President also decided to follow the majority recommendation to reimburse the complainant for reasonable costs upon receipt of proof, and to award the complainant 500 euros for the delays in the procedure. The President

rejected as unfounded the complainant's claim for moral damages as he did not consider that the complainant had any acquired rights with respect to the "form of the invalidity provisions" or with regard to the loss of income allegedly suffered due to the personal tax position under national law and thus the EPO had not breached any acquired rights nor its duty of care. He asserted that the IAC's recommendation (paragraph 54) that the Office find a way to expressly extend the Member States' guarantee set out in Articles 37(c) and 40 of the European Patent Convention, to the new invalidity provisions could not be endorsed as that recommendation could only be implemented with the approval of the Member States. The President also stated that, with regard to paragraph 58, "it is not considered necessary to refer to the GAC the issue of whether former invalidity pensioners should be given the option of remaining in the old scheme" as "the important fact that the [European Union], unlike the EPO, has the benefit of tax-exempted pensions, making it feasible to offer two different schemes to staff", must be taken into account.

5. The complainant claims that the EPO acted in bad faith; violated its duty of care towards him; violated both the letter and the spirit of the principles of non-retroactivity and legal certainty; and showed a lack of respect for his dignity. He asks the Tribunal to order:

(a) withdrawal of the decision to assign him to non-active status;

(b) material damages in the form of reimbursement of the difference between invalidity pension (including tax adjustment) and invalidity allowance, plus accrued interest and expenses;

(c) "[c]osts for measures incurred to avoid bankruptcy";

(d) moral damages for the breach of his acquired rights, in an amount higher than the 2,000 euros recommended by the IAC;

(e) moral damages for the undue delay in the internal appeal procedure, in an amount higher than the 500 euros recommended by the IAC;

(f) punitive damages in the amount of 10,000 euros; and

(g) costs for the internal appeal and the present complaint.

6. Although it is not clear whether the complainant applied for oral hearings or not, the Tribunal sees no need to order oral hearings as the written submissions are sufficient to render an informed decision. It must be noted that according to the Rules of the Tribunal, specifically Article 6(1)(b), a complainant or her/his representative must append a brief stating the facts of the case and the pleas and any item of evidence adduced in support. In the present case the complainant limited his brief to a referral to his attached internal appeal, which the EPO contests. It is unnecessary to address the issue of receivability as the complaint fails on the merits. However, as the Tribunal has repeatedly stated, this is an entirely unacceptable way of presenting arguments to the Tribunal (see Judgment 3619 also delivered this day, and the cases cited therein).

7. The main issue raised in this complaint is whether or not the EPO violated an acquired right of the complainant. The Tribunal finds no such violation. A rule which concerns a long-term issue (such as pensions which last the remainder of the employees' lifetimes) may be modified throughout the years. The changes in circumstances which may require the rule to be amended must be reasonable and the changes have to balance the interests of the employees and the Organisation. The interest of current and future employees who are not currently affected by the rule but shall be in the future is also to be taken into account by the Organisation. The question of the sustainability of pension schemes must be a primary concern to the Organisation and as such may naturally require adjustments to be made to the norm regulating pension schemes over time. This question has already been examined by the Tribunal in relation to the same Administrative Council's decision CA/D 30/07.

8. The Tribunal found in Judgment 3540 and in the case law cited therein, that the reform did not violate the employees' acquired rights:

> "11. In Judgment 3375, the Tribunal considered whether a complainant, who was also required to pay pension contributions towards his EPO invalidity

allowance which replaced the invalidity pension on 1 January 2008, under the same decision CA/D 30/07, had an acquired right to a non-deductible invalidity pension. The Tribunal found that the complainant did not have such an acquired right. In that case, the Tribunal stated as follows in considerations 8 and 9:

> '8. The following statement by the Tribunal in Judgment 1392, under 34, in which the EPO was the defendant, presents a helpful perspective from which to consider the question whether the complainant had an acquired right in the application of the pre-2008 invalidity provisions:
>
> > 'whereas [the] right to a pension is no doubt inviolable, a pension contribution is by its very nature subject to variation [...]. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons [...] actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits.'
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> 9. This statement recognizes, in the first place, that it is within an organisation's discretion to amend its Service Regulations. Article 33(2)(b) and (c) of the European Patent Convention, the EPO's founding Treaty, specifically permits it to amend its Service Regulations and its Pension Scheme Regulations. In accepting this, however, the Tribunal stresses that the EPO should strike a balance between the mutual obligations of the Organisation and its employees and the main or fundamental conditions of its employees' appointment (see Judgment 832, under 15).'

12. […]

13. Considerations 14 to 18 of Judgment 3375 show that on the evidence that it accepted, the Tribunal expressed satisfaction that the change in the invalidity benefits to include the payment of the pension contribution was made on sound actuarial studies and management considerations, which ultimately provided the bases for the decisions of the [Administrative Council] of 14 December 2007, that are contained in decision CA/D 30/07, for the implementation of Article 62a of the Service Regulations. The Tribunal was satisfied, on the evidence, that the change was intended to ensure the long-term viability of the social security cover that is itself an essential and fundamental term or condition of employment of the complainant and other employees of the EPO, in the longer term interest of staff members. It was also in the interest of the EPO's obligation to continue to provide invalidity allowances to its employees. It was further found that the change to the invalidity allowance left the EPO's pension scheme, including the invalidity aspect, basically in the form in which it was known and administered. This seemed to have achieved the balance which the Tribunal's case law requires where

> such changes are made. On the one hand, the overall intention was to maintain certainty and continuity in the EPO's pension scheme, in the interests of the staff who subscribed to it on joining the Organisation. On the other hand, it was to support the EPO's interest to maintain the viability of its pension scheme as adjustments are made to changing needs. […]"

9. The Tribunal finds that it was open to the President to maintain the payments by reference to the initial transitional rule in the interim period while sending it back to the GAC for advice. This was done on the basis that the legal position in this period would be determined by a subsequent decision of the Administrative Council which, as it turns out, had retroactive effect covering this period.

10. The complainant bases his claim, that the new pension scheme is less advantageous for him, on the fact that under the new scheme he cannot deduct his interest payments on his mortgages from his taxable income. The complainant refers to document CA/159/07, part I, paragraph 15 which states "[t]his new measure will be applied to all current employees including those already on invalidity pension as from 1 January 2008. For those who have become invalids and for whom the new scheme would be less advantageous, the old regulations should continue to be applied." The Tribunal finds that this must be read in conjunction with document CA/159/07, part VII, paragraph 28(a) on transitional measures which provides:

> "Permanent employees under 65 years in receipt of an invalidity pension when this decision enters into force are subject to the new invalidity allowance scheme in accordance with Article 62a of the Service Regulations and the Implementing Rules therefor as from 1 January 2008.
>
> In cases where the application of the new regulations would lead to an employee receiving a lower benefit, the rate of the invalidity pension to which he would have been entitled under the Pension Scheme Regulations in force until 31 December 2007 shall be guaranteed until the recipient dies, except in cases where the employee ceases to satisfy the conditions for the entitlement of the allowance."

It should be noted that the new regulations have brought the invalidity pensions for employees who have not reached the pension age into a national tax exempt scheme. The Tribunal is satisfied that the transitional provision, properly construed, was not intended to require

the EPO to take into account the effect of the new regulations on each employee, having regard to their individual tax circumstances. The passages quoted above must be read to mean that the "benefit" refers to the amount that the EPO pays to its employees and not to the final net amount which the complainant receives after taking account of all the various tax options for his particular situation.

11. With regard to the alleged loss of the Member States' guarantee in the new system, the Tribunal is satisfied that the contested rules do not violate any acquired right and further notes that Article 37c of the European Patent Convention states with regard to budgetary funding, that the budget of the Organisation shall be financed "where necessary, by special financial contributions made by the Contracting States". In light of this, there has been no loss of guarantee.

12. The complainant requests an award of damages for the delays in the internal appeal in an amount higher than the 500 euros already awarded to him. The Tribunal finds that the 500 euros was sufficient considering the complexity of the case. In light of the above, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2015, Mr Giuseppe Barbagallo, Vice-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 3 February 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ