G. (No. 2) and V. (No. 2)

v.

EPO

123rd Session **Judgment No. 3786**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr W. G. (his second) and Mrs V. V. (her second) against the European Patent Organisation (EPO) on 24 February 2014 and corrected 7 April 2014, the EPO's single reply of 19 September, the complainants' rejoinder of 15 October 2014 and the EPO's surrejoinder of 13 January 2015;

Considering the Tribunal's request of 24 May 2016 that the parties provide further submissions on the merits;

Considering the EPO's single reply on the merits of 22 July 2016, the complainants' rejoinder thereto of 8 September and the EPO's second surrejoinder of 3 October 2016;

Considering the applications to intervene in both complaints filed by Mr H. H. on 31 August 2015 and the EPO's comments thereon of 17 September 2015;

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 may be summed up as follows:

The complainants, staff members of the European Patent Office, the EPO's secretariat, challenge a decision of the Administrative Council

introducing provisions of the Service Regulations for permanent employees of the European Patent Office regulating the exercise of the right to strike.

In March 2013 the Staff Union of the European Patent Office (SUEPO) submitted a plan for industrial action to its members which was approved by a majority of those members in four European Patent Office Branches (The Hague, Munich, Berlin and Vienna). Later that month, by a Note to all staff of 18 March 2013, the Vice-President of Directorate-General 4 explained the conditions under which staff members could exercise their right to strike. At that time, the right to strike was not regulated in the Service Regulations.

Following a proposal by the President of the Office, on 27 June 2013 the Administrative Council adopted decision CA/D 5/13 (which entered into force on 1 July 2013). Decision CA/D 5/13 introduced Article 30a of the Service Regulations and amended Articles 63 and 65. Article 30a acknowledges EPO employees' right to strike and sets out the principles that apply in the event of a strike. Article 63 deals with unauthorised absences and Article 65 deals with remuneration.

By a Communiqué of 28 June 2013, the Vice-President of Directorate-General 4 informed the staff that a circular setting out guidelines applicable in the event of a strike (Circular No. 347) had been issued by the President of the Office. He explained that, as of 1 July 2013, any industrial action which did not fulfil the conditions laid down in the new provisions would not be considered as a strike and that participation in such actions might be considered by the EPO to be an unauthorised absence.

On 11 and 12 September 2013 Mr G. and Mrs V. respectively filed requests for review with the Administrative Council challenging the lawfulness of decision CA/D 5/13 and seeking various forms of relief. They asked that their letters be treated as internal appeals in the event that their requests were not granted.

By separate letters of 20 January 2014 the complainants were informed that the Administrative Council had unanimously decided to dismiss their requests for review as irreceivable and, subsidiarily, as unfounded. Those are the impugned decisions.

The complainants each went on strike during working hours on 17 October 2013 (after they had filed their requests for review with the Administrative Council).

The complainants seek oral proceedings. They ask the Tribunal to quash decision CA/D 5/13 *ex tunc*, or, at a minimum, to order that it shall not be applied to them. They each claim 3,000 euros in costs and 5,000 euros in moral damages. They each claim additional moral damages in the amount of 2,000 euros per month for the period that the contested decision is in force, and punitive damages in an amount to be determined by the Tribunal. Mr G. and Mrs V. seek payment of 137.49 euros and 206.33 euros respectively, representing the amounts deducted from their remuneration as a result of their participation in a strike on 17 October 2013, plus interest on those amounts at 8 per cent per annum.

The President of the Tribunal authorized the EPO to submit a single reply to both complaints and to confine that reply to the issue of receivability. The President of the Tribunal subsequently decided to remove the complaints from the list of the 122nd Session and to request the parties to provide submissions on the merits of the complaints.

The EPO asks the Tribunal to dismiss the complaints as irreceivable, or subsidiarily, as unfounded on the merits and to order the complainants to bear part of the EPO's costs.

CONSIDERATIONS

1. On 11 and 12 September 2013, the complainants, Mr G. and Mrs V. respectively, filed internal requests for review with the Administrative Council, challenging the lawfulness of the general decision CA/D 5/13. By separate letters of 20 January 2014 they were notified that the Administrative Council had unanimously decided to dismiss their requests for review as irreceivable and, subsidiarily, as unfounded. The complainants filed separate but nearly identical complaints against those final decisions on 24 February 2014.

2. As the two complaints are nearly identical, the Tribunal joins them as the subject of a single judgment. The EPO was initially allowed

by the President of the Tribunal to file a single reply and surrejoinder to the complaints and to limit its submissions to issues of receivability. The President subsequently removed these cases from the list for the 122nd Session and the parties were asked to provide submissions on the merits, which they did. The complainants request oral proceedings.

3. Mr H. has submitted an application to intervene in both complaints on the basis that the decisions of the Tribunal in these cases may affect him because he took a day of annual leave on 2 July 2013 to participate in a strike.

4. On 28 June 2013, the EPO issued a Communiqué informing all staff of the adoption of decision CA/D 5/13, drawing their attention to Circular No. 347 setting out the modalities of implementation applicable in the event of a strike, and pointing out that "as from 1 July 2013, any industrial action which does not fulfill the conditions laid down in the aforementioned new provisions will not be considered as a strike. As a consequence, staff participating in such actions may be considered on unauthorised absence."

5. Prior to the issuance of the above-mentioned Communiqué, SUEPO issued a notice stating that "[i]f the new regulations on strikes (CA/57/13) are adopted by the Administrative Council on 26-27 June, special measures will be introduced on top of the 'permanent actions': • picket strike on 2 July, [...]". As the Administrative Council adopted decision CA/D 5/13, the strike was scheduled. The complainants claim that they "intended to follow" that industrial action but did not do so as the action could not (due to the time limit set for advising the President of scheduled strike action) fulfil the terms and conditions for a strike and would therefore be considered an unauthorised absence for anyone who participated. Essentially, they seem to submit that this limitation violated their right to strike (specifically on 2 July) and should be considered as having had a direct negative effect on them. As noted above, they filed their separate requests for review of the general decision on 11 and 12 September 2013. The complainants went on strike during working hours on 17 October 2013 and their payslips of November 2013 reflect

the deductions taken with regard to that strike activity. The complainants also challenge those deductions in the present complaints.

6. The Tribunal should address at the outset the question of what is the authority competent to deal with the request for review of the decision in accordance with Articles 107, 108 and 109 of the Service Regulations under Title VIII concerning "Settlement of Disputes", as amended by the Administrative Council's decision CA/D 8/12. These articles provide:

"**Article 107**
Request to take an individual decision

(1) An employee, a former employee, or rightful claimant on his behalf may submit a written request that an individual decision relating to him be taken by the appointing authority which is competent to take such decision.

(2) The competent appointing authority shall take a decision within two months. Where the competent authority is the President of the Office, this period shall start to run on the date of receipt of the request. Where the competent authority is the Administrative Council, this period shall begin on the date on which the request was submitted to the first meeting of the Council after its receipt, taking due account of any specific provisions applicable for the submission of documents to the Council laid down in Article 9 of the Rules of Procedure of the Administrative Council.

(3) If at the end of this period the request has not been replied to, this shall be deemed to constitute an implied decision rejecting it.

Article 108
Procedures for the settlement of disputes

(1) Any person to whom Article 106 or 107 applies may challenge an act adversely affecting him, or an implied decision of rejection as defined in Article 107, paragraph 3:

(a) through the review procedure;

(b) through the internal appeal procedure;

(c) by filing a complaint with the Administrative Tribunal of the International Labour Organization.

(2) The challenging of the decision shall not suspend its execution.

(3) The detailed conditions relating to each of the three consecutive procedures referred to in paragraph 1 are laid down in Articles 109 to 113 of these Regulations and in implementing rules thereto.

Article 109
Review procedure

(1) A request for review shall be compulsory prior to lodging an internal appeal, unless excluded pursuant to paragraph 3.

(2) It shall be submitted within a period of three months to the appointing authority which took the decision challenged. This period shall start to run on the date of publication, display or notification of the decision challenged. Where the request for review is against an implied decision of rejection within the meaning of Article 107, paragraph 3, it shall start to run on the date of expiry of the period for reply.

(3) The following decisions shall be excluded from the review procedure:

(a) decisions taken after consultation of the Medical Committee or in accordance with the arbitration procedure laid down in Article 62, paragraph 13;

(b) staff reports referred to in Article 47.

(4) The competent appointing authority shall take a reasoned decision on the outcome of the review which shall be communicated to the person concerned in writing, indicating the means of redress available to challenge it.

(5) Where the competent authority is the President of the Office, the decision on the outcome of the review shall be taken within two months as from the date of receipt of the request. Such decision may then be challenged through an internal appeal under the conditions laid down in Article 110.

(6) Where the competent authority is the Administrative Council, the decision on the outcome of the review shall be taken within two months as from the date on which the request was submitted to the first meeting of the Council after its receipt, taking due account of any specific provisions applicable for the submission of documents to the Council laid down in Article 9 of the Rules of Procedure of the Administrative Council. Such decision shall be final within the meaning of Article 113, unless:

(a) it relates to a dispute concerning appointment by the Administrative Council, in which case it may be challenged through an internal appeal under the conditions laid down in Article 110;

(b) the Administrative Council exceptionally decides otherwise following a request by the person concerned.

(7) If at the end of the period of two months no decision has been taken on the request for review, this shall be deemed to constitute an implied decision rejecting it."

7. After the complaints were filed, the Tribunal decided Judgment 3700, delivered in public on 6 July 2016. That judgment has

a material bearing on how these complaints should be resolved and consideration of that judgment can be raised *ex officio*. The Tribunal found in Judgment 3700 that:

> "11. In the present case the Administrative Council was not the 'competent authority', within the meaning of Title VIII of the Service Regulations concerning settlement of disputes, as amended by the Administrative Council's decision CA/D 8/12, to examine the complainant's request for review.
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> In this respect, the Tribunal notes that unlike most international organisations the EPO has two appointing authorities pursuant to Articles 10 and 11 of the European Patent Convention: the President, who appoints the vast majority of the staff (approximately 6,700) and the Administrative Council, which appoints the President, the Vice-Presidents (currently 5) and approximately 170 other employees who are members of the boards of appeal and whose independence is guaranteed by the fact that they are appointed by the Administrative Council. In reality, most decisions affecting staff members appointed by the Administrative Council are taken by the President, because these staff members are also subject to most of the provisions of the Service Regulations and are referred to under the generic expression 'employees'. The only individual administrative decisions concerning these staff members that are taken by the Administrative Council are those relating to appointment and disciplinary matters. Decisions on all other matters are taken by the President, which is why the Service Regulations provide for the possibility that some staff may file appeals with different appointing authorities depending on which authority took the decision challenged.
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> It must also be borne in mind that the appeal system is essentially an individual one in nature and that, broadly speaking, a general decision may only be challenged in the context of an appeal against an individual decision implementing the general decision. In this context Article 107(1) of the Service Regulations, under Title VIII on settlement of disputes as amended by decision CA/D 8/12, identifies the appointing authority to whom a request for review of an individual decision may be submitted and the competent authority to deal with the review procedure by providing that '[a]n employee, a former employee, or rightful claimant on his behalf may submit a written request that an individual decision relating to him be taken by the appointing authority which is competent to take such decision'.
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> 12. In light of the above considerations, the meaning of the expressions 'competent appointing authority' (Articles 107(2) and 109(4) of the Service Regulations) and 'appointing authority which took the decision challenged' (Articles 109(2) and 110(1) of the Service Regulations), while not clear, should, having regard to the language and logic of Title VIII of the Service Regulations, be interpreted as meaning: (a) for employees appointed by the President, all requests for review must be lodged with the President and must

> be decided by the President; (b) for employees appointed by the Administrative Council, requests for review of individual decisions concerning them that were taken by the Administrative Council must be lodged with the Council and must be decided by the Council, whereas requests for review of individual decisions concerning them that were taken by the President must be lodged with the President and must be decided by the President. In the present case, as the complainant was appointed by the President, his request for review had to be lodged with the President." (See also Judgment 3796, under 2, also delivered this day.)

8. In the present complaints, the complainants were also appointed by the President and therefore their requests for review had to be lodged with and dealt with by the President. The President's reasoned decision on the outcome of the reviews should be challenged, if necessary, through the Appeals Committee in accordance with Articles 109 and 110 of the Service Regulations. While the Administrative Council dismissed the requests for review as irreceivable, it did so on the basis that the requests concerned a general decision. However, this in effect dealt with the merits of the requests. The Administrative Council should have recognised that it was not the competent authority at all and should have referred the requests to the President.

9. The flaw identified above, stemming from the Administrative Council's lack of competence to review the requests according to the system referred to in Title VIII of the Service Regulations, warrants setting aside the impugned decisions and remitting the matter to the EPO in order for the President, as the competent authority, to take a decision on the complainants' requests for review within two months from the date of the delivery in public of this Judgment. The President may consult with the Administrative Council if he considers it desirable to do so having regard to the nature of the appealed decision.

10. The claims regarding the salary deductions of 17 October 2013 are irreceivable for failure to exhaust all internal means of redress. The salary deductions as shown in the complainants' November payslips constitute individual decisions which must be challenged through the internal review process (i.e. the request for review and the internal appeal) prior to challenging them before the Tribunal in accordance with the

Service Regulations and Article VII, paragraph 1, of the Tribunal's Statute. These claims cannot be considered as part of the complainants' respective requests for review of 11 and 12 September 2013 as the deductions occurred two months later. Thus they are not receivable in the present complaints.

11. Considering the above, the Tribunal finds the complaints to be irreceivable in part and the remainder of the joined case, must be sent back to the EPO so that the President may take a decision. Considering the substance of the decision, and the fact that the Tribunal has decided to apply the recent case law, the Tribunal will make no award of costs. In these circumstances, the request for oral proceedings is rejected. Mr H.'s applications to intervene are irreceivable as they relate to his participation in the 2 July 2013 strike and his situation in fact and in law is not similar to that of the two complainants.

DECISION

For the above reasons,

1. The impugned decisions notified to the complainants by separate letters dated 20 January 2014 from the Chairman of the Administrative Council are set aside.

2. The joined case, insofar as it regards the challenges to decision CA/D 5/13, is remitted to the EPO for the President to proceed in accordance with consideration 9, above.

3. The claims regarding the salary deductions of 17 October 2013 are dismissed.

4. The applications to intervene are rejected.

5. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ