J. (No. 2)

v.

EPO

132nd Session **Judgment No. 4421**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms F. J. against the European Patent Organisation (EPO) on 23 December 2017, the EPO's reply of 26 April 2018, the complainant's rejoinder of 8 June and the EPO's surrejoinder of 13 September 2018;

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:

The complainant challenges the deductions made from her remuneration in respect of her absences due to participation in strikes.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, who, at the material time, was working part-time. On 20 March 2013 she participated in a strike. When she received her payslip for April 2013, she noticed that the deduction from her remuneration that had been made in respect of her absence on that occasion, amounting to 159.15 euros, appeared to be greater than that which was provided for in the relevant provisions of the Service Regulations for permanent employees of the European Patent Office. She challenged this deduction by submitting a request for review to the President of the Office in which she contended that, in accordance with Article 65(1) of the Service Regulations, the deduction ought to have been equal to one-thirtieth of her monthly remuneration, which amounted to 118.91 euros.

The disputed deduction had in fact been calculated on a pro rata basis by reference to the complainant's part-time working hours.

The complainant also went on strike on 28 May 2013, which was a Tuesday. Prior to this, she had asked to take annual leave on the following Wednesday, Thursday and Friday, which had been accepted. Thus, she did not return to work after the strike until the following Monday. On 13 June 2013 she contacted an official from Human Resources by telephone to enquire about the salary deduction that would be made in respect of her participation in the strike on 28 May. She then sent an email to that same official saying:

> "[F]ollowing our telephone conversation this morning, I am sending you this email regarding my strike day on 28.05.13 followed by 3 days off (29.05.13 to 31.05.13). I did not return after my strike day at the EPO. I assume so that the EPO will deduct 6 days of my salary... is it legal to do something like this ?
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> If this really happens, I would like to get my annual leave back: 29.06.13 [sic] to 31.05.13 because I was supposed to be on strike.... right ? And I cannot be on strike and on holidays at the same time..."

The Head of the Salary, Pension and Administrative Services Department replied that, "in accordance with the information [the complainant] ha[d] provided"[*], her annual leave on 29, 30 and 31 May would be replaced by strike days. Moreover, as there had been no "physical return to work" after the strike, deductions would also be made for 1 and 2 June, that is to say, for the following Saturday and Sunday.

In the event, remuneration deductions were made for the period from Tuesday 28 May to Friday 31 May inclusive, but not for the weekend. In a second request for review, the complainant challenged the calculation of these deductions, as well as the fact that four days' remuneration had been deducted for a single day of absence. She referred, in particular, to a "Note to all staff" which the Vice-President of Directorate-General 4 (DG4) had issued on 18 March 2013 announcing, amongst other things, that "[p]hysical presence at the workplace before or after a strike" would determine the period of the corresponding salary deductions. The complainant stated that, if the deductions had been made on the basis of that Note, the President should take into account that the Note could not be implemented as it had been issued without prior consultation of the General Advisory Committee (GAC).

[*] Registry's translation.

The complainant's requests for review were rejected and she then filed two separate appeals. While these were pending, in July 2014, the Tribunal delivered Judgment 3369, in which it clarified the issue of how the EPO's 1/30th deduction rule should be applied to employees working part-time. In light of that judgment, the EPO reviewed the deductions it had made in the complainant's case. As the deduction for the strike on 20 March 2013 was excessive, in March 2016 it refunded her the sum of 21.22 euros. On the other hand, the deductions for the period 28 to 31 May proved to be less than those which would have resulted from the method prescribed in Judgment 3369, and the EPO decided not to recover the additional amount due.

The Appeals Committee joined the two appeals and issued its opinion in July 2017. It found that the complainant's claims relating to the calculation of the remuneration deductions were moot, following the adjustments made in light of Judgment 3369. It also found that only one day's remuneration should have been deducted for her participation in the strike on 28 May 2013, but it unanimously considered that, in accordance with the general principle that remuneration is due only for services rendered, no compensation was due in respect of the three additional days for which deductions had been made, because the complainant's three days of annual leave had been re-credited to her and she had not actually worked on the three days in question. Nevertheless, the Committee found that the way in which the matter had been dealt with was confusing and incorrect, and that the annual leave days should not have been converted into strike days. It unanimously recommended that the complainant be granted 2,000 euros for both appeals "for the injury suffered and for the undue length of both procedures", as well as costs upon submission of evidence.

On 26 September 2017 the Vice-President of DG4, by delegation of power from the President, decided to award the complainant 1,000 euros for delay, but no costs, as she had not produced evidence thereof. That is the impugned decision.

The complainant asks the Tribunal to order the EPO to reimburse the salary deductions in excess of 1/30th of her monthly net remuneration made in respect of her participation in the strike on 28 May 2013, with compound interest. She also claims moral damages of at least 4,000 euros in view of "the seriousness of the matter" and the delay in dealing with her two appeals, as well as punitive damages of at least 5,000 euros on

the grounds that the EPO applied instructions that were manifestly illegal and refused to apply the case law resulting from Judgment 3369 with respect to costs. Lastly, she seeks an award of costs of at least 1,000 euros.

The EPO asks the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The present case concerns the deductions made by the EPO from the complainant's remuneration in respect of her absences on 20 March and in May 2013 due to her participation in strikes. The complainant challenges the 26 September 2017 decision of the Vice-President of DG4 regarding her consolidated appeals concerning salary deductions for strike activity in March and May 2013.

2. Considering the content of her first appeal regarding the deduction made for the participation in the strike of 20 March, the complainant recognizes that on 26 March 2016 she was refunded the sum deducted in excess, namely 21.22 euros, in accordance with the case law established by Judgment 3369, delivered in public on 9 July 2014. According to that judgment, in the event of absence due to strike participation, remuneration of part-time employees is reduced by an amount equivalent to one-thirtieth of their monthly retribution for each day or fraction of day of strike. However, the complainant submits that the present complaint concerns her requests for relief regarding the fact that "an excessive amount was deducted in the first place". She argues that the refund came three years after the request for review of the deduction and almost two years after the delivery of Judgment 3369, and that the EPO "has not paid any damage for the injury caused (be it interests on the amount refunded or moral damages for the abuse)".

3. The complainant's second appeal regarded the deductions made for her participation in the strike of Tuesday 28 May 2013. As noted above, the complainant's request for annual leave on Wednesday, Thursday and Friday, 29 to 31 May, had been approved by the EPO prior to her participation in the strike. However, according to the complainant, due to the issuance on 18 March 2013 of a "Note to all staff" from the Vice-President of DG4, which in paragraph 3 stated:

"[p]hysical presence at the workplace before or after a strike will determine the period of the salary deductions", she was unsure about how her deductions would be calculated. She therefore phoned the Human Resources Department for clarification on 13 June 2013. Following the call, that same day she wrote a follow-up email again requesting clarification, as cited in the summary of facts above. Later that evening the complainant was informed by an email from the Head of the Salary, Pension and Administrative Services Department that, in accordance with the information she had provided, her annual leave would be replaced by strike days and that deductions would also be made for the weekend. Nevertheless, the EPO deducted only four days for strike participation for the period 28 to 31 May (excluding the weekend).

4. In the present complaint, the complainant contends that she did not express any wish to be considered on strike on 29, 30 and 31 May, but she had confirmed that she had been on strike on 28 May and on annual leave on 29, 30 and 31 May. She adds that her request to recover her three leave days was conditional upon the application of the "Note to all staff". She principally complains to the Tribunal that she had raised the issue of the unlawfulness of the Note before the Appeals Committee but that the Committee had failed to assess its legality. She argues that the Appeals Committee restricted itself to discussing the Administration's behaviour in deducting four strike days instead of one, without commenting at all on the "more fundamental point, i.e. the lack of legality of [the Note issued by the Vice-President of DG4]". She maintains that the Note played "a key role" in her case, and that the Committee's failure to assess the legality of the Note constituted "a dereliction of duty". The complainant asserts that the aim of the Note was "to make participation [in strikes] so costly that the salary deduction would have the effect of preventing, or at least reducing, the participation to the strikes".

5. The EPO objects that the Note was not applied to the complainant's deduction for her May strike and that, in any case, the Note was lawful, proportionate and based on sound justification.

6. The Appeals Committee's opinion (not to deal with the issue regarding the legality of the Note, as the Note was "not relevant for the challenged remuneration deductions") was correct. The Tribunal finds

that the impugned decision of 26 September 2017, which in this respect accepted the Appeals Committee's opinion, was not based on the Note. Examining the steps which led to the final decision, specifically the Committee's opinion endorsed by the final decision, it appears that the EPO's position changed during the administrative proceeding. Indeed, considering the complainant's phone call to an official of the Human Resources Department in the morning of 13 June 2013, her email to the same official later that day, and the responding email from the Head of the Salary, Pension and Administrative Services Department on the evening of the same day, it is clear that the EPO intended to apply to the complainant paragraph 3 of the Note. The statement of the Head of the Salary, Pension and Administrative Services Department, according to which, as there had been no physical return to work following the strike, deductions would also be made for the weekend (1 and 2 June 2013), cannot be explained otherwise than in light of the application of paragraph 3 of the Note. Without considering the lawfulness of the Note, which is debated, it should be noted that, even maintaining the three days (29 to 31 May) as annual leave, the proper application of the Note would have required the remuneration deduction for 1 and 2 June. However, contrary to what the complainant was told, no deduction was made for 1 and 2 June 2013.

7. It assumes decisive importance that, in the 26 September 2017 decision, the Vice-President of DG4 stated that the decision was taken "in accordance with the unanimous opinion of the [Appeals Committee] and for the reasons duly explained in paragraphs 13-25 thereof". The gist of the Committee's opinion is encapsulated in the summary of facts above, but the Tribunal finds it useful to cite paragraphs 15 and 16 in full and part of paragraph 21. Regarding the main claims for the appeal against the May deduction, the Committee stated as follows:

> "15. [...] The Appeals Committee unanimously holds that the number of days taken into account for the deduction, namely four, was incorrect and that the [complainant]'s request to deduct her salary for one day, only, is basically founded. This is because the Office erroneously registered three strike days for the original annual leave days. However, a compensation for the deductions of the three days would not be justified for the following reasons.
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> 16. First, it is recognized that the [complainant] received three days of annual leave booked back to her account. Second, it is uncontested that the [complainant] did not work on the three days in question. As a consequence, the Appeals Committee is of the opinion that no

> compensation for the deductions made for the three days is due, since it is a general principle of law that remuneration is due only for services rendered.
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> [...]
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> 21. Concerning the moral damages for the injury suffered re the number of days deducted in RI/135/13, the following shall be taken into account. The whole matter was overall treated in a confusing manner. [...]"

8. In his 26 September 2017 decision, partially departing from the Appeals Committee's recommendations, the Vice-President of DG4 decided to award the complainant 1,000 euros as moral damages only for the length of the procedure. He justified the lower amount on the basis that the Committee had consolidated the two appeals. The Tribunal notes that the Vice-President of DG4 did not take into account that the Appeals Committee, in its 26 July 2017 opinion, had also considered that the complainant suffered "moral damages from the injury suffered re the number of days deducted in RI/135/13 [re the May strike]" as "[t]he whole matter was overall treated in a confusing manner". The Committee unanimously recommended, on this basis, compensation in the amount of 2,000 euros, "for both appeals for the injury suffered and for the undue length of both procedures".

9. In the present complaint, the complainant requests "interest on the amount refunded or moral damages for the abuse" considering that the refund of 21.22 euros for the excessive deduction made for her participation in the strike of 20 March 2013 was greatly delayed; reimbursement of the salary deduction in excess of 1/30th of her monthly net remuneration made in respect of her participation in the strike of 28 May 2013; moral damages of at least 4,000 euros in view of the seriousness of the matter and the delay in dealing with her two appeals, as well as punitive damages and an award of costs of at least 1,000 euros. Regarding the deduction for the 20 March strike, the Tribunal finds that the complainant is entitled to 5 per cent interest per year on the sum of 21.22 euros from the day of the unlawful deduction to the day of reimbursement of this sum (26 March 2016). Regarding the reimbursement of the salary deduction for the May strike, the Tribunal finds that both the Appeals Committee and the Vice-President of DG4 were wrong in respectively recommending and deciding to maintain strike deductions for the period 29 to 31 May, as, although the

complainant's annual leave balance was re-credited with three days, she was not paid for those three days. Accordingly, the complainant shall be reimbursed for the deductions from her remuneration for those three days, with interest at the rate of 5 per cent per year from the date of the deduction until the date of reimbursement. The request for further damages for the delay in the internal appeal, for which the EPO paid an award of 1,000 euros, is rejected as the complainant has not indicated any specific injury stemming from the duration of the procedure. The Tribunal finds it appropriate to award the complainant additional moral damages in the amount of 3,000 euros for injury stemming from the Organisation's failure, in breach of its duty of care, to respond properly and accurately to the complainant's multiple requests regarding a sensitive matter. The Tribunal does not find that the present case qualifies for an award of punitive damages. As the complainant succeeds in part, she is entitled to costs in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant interest of 5 per cent per year on the sum of 21.22 euros from the date of the deduction to the date of reimbursement.

2. The EPO shall reimburse the complainant for three days of remuneration deductions for strike participation, with interest as indicated in consideration 9, above.

3. The EPO shall pay the complainant moral damages in the amount of 3,000 euros.

4. It shall pay her 1,000 euros in costs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 4 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ