Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K. (No. 40) and T. (No. 23)
v.
EPO

132nd Session **Judgment No. 4422**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fortieth complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 20 December 2018 and corrected on 1 February 2019, the EPO's reply of 19 June, the complainant's rejoinder of 1 October, the EPO's surrejoinder of 19 December 2019, the complainant's additional submissions of 6 February 2020 and the EPO's final comments thereon of 5 June 2020;

Considering the twenty-third complaint filed by Mr P. O. A. T. against the EPO on 10 January 2019 and corrected on 9 February, the EPO's reply of 22 May, the complainant's rejoinder of 30 September and the EPO's surrejoinder of 18 December 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainants are former permanent employees of the European Patent Office, the EPO's secretariat, who challenge their January 2014 and subsequent payslips showing an increase in their pension contributions.

There are two pension schemes at the Office: the Old Pension Scheme (OPS) applies to staff members recruited before 1 January 2009, whereas the New Pension Scheme (NPS) applies to staff members recruited on or after 1 January 2009. On 12 December 2013, following a report from the Actuarial Advisory Group recommending that the contribution rates to both the OPS and NPS be increased, and a proposal from the

President of the Office in line with that recommendation concerning specifically the OPS, the Administrative Council adopted decision CA/D 10/13, which amended Article 41(1) of the Pension Scheme Regulations and entered into force on 1 January 2014. The staff members' contribution rate to the OPS was increased from 9.3 to 9.7 per cent of their basic salary deducted monthly. On 20 December 2013 the President issued Circular No. 349 which increased the global contribution rate to the NPS and the Salary Savings Plan from 27.9 to 29.1 per cent of the basic salary as from 1 January 2014. The new contribution rates were reflected for the first time in the staff members' January 2014 payslips.

The complainants joined the Office on 1 July 1990 and were affiliated to the OPS. Since their retirement in January 2015 (Mr T.) and January 2016 (Mr K.), they no longer pay pension contributions to the OPS.

In March 2014, like many other staff members, the complainants each lodged a request for review against the implementation of decision CA/D 10/13 as reflected in their January 2014 and subsequent payslips. In May 2014 the President issued a decision on all those requests for review, rejecting them as without merit. On 17 July 2014 the complainants lodged internal appeals drafted in nearly identical terms, which were registered under the same reference. They requested the issuance of corrected payslips with a staff contribution rate of 8 per cent (the rate prevailing before 1 April 2007) and they claimed compound interest at 8 per cent on all amounts supposedly due. They further requested the quashing of decision CA/D 10/13 and of Circular No. 349, as well as moral damages and costs. They also requested that a possible shortfall of the Reserve Fund for Pensions and Social Security be covered by the Office, and Mr K. claimed 3,000 euros in damages for the delays in the procedure. On 28 September 2017 the EPO submitted its position papers on these appeals. Mr T. submitted no rejoinder, whereas Mr K. replied to the EPO's position paper on 25 January 2018. On 18 May 2018 they were informed that their appeals would be dealt with in a written procedure.

The Appeals Committee issued its single opinion on 13 August 2018. It unanimously recommended dismissing the appeals as partly irreceivable insofar as the complainants requested the issuing of new payslips with a contribution rate of 8 per cent and that any shortfall in the Reserve Fund for Pensions and Social Security be covered by the Office. It further recommended that the appeals be considered wholly

unfounded. By individual letters dated 2 October 2018, which constitute the impugned decisions, the complainants were informed of the President's decision to reject their appeals in accordance with the Committee's unanimous recommendation and for the reasons explained in its opinion.

The complainants first ask the Tribunal not to refer their cases back to the EPO. They also ask the Tribunal to quash the decisions to increase their pension contributions as implemented in their payslips *ab initio*, as well as general decision CA/D 10/13 and Circular No. 349, and to order the EPO to issue corrected payslips as from January 2014. Subsidiarily, they ask that decision CA/D 10/13 be no longer applied and that the EPO be ordered to apply the previous wording of the Pension Scheme Regulations. Under Article 11, paragraph 1, of the Tribunal's Rules, they seek an expert enquiry by an external independent actuary, if their claims are not granted in the written procedure. Moreover, they claim reimbursement of the additional amounts deducted for their pension contributions with 6 per cent compound interest, moral damages in the amount of 22,000 euros each (including compensation for undue delay in the internal appeal proceedings), plus 2,000 euros each for the costs incurred in the internal appeal procedure and the proceedings before the Tribunal. In his additional submissions, Mr K., who considers that the EPO lied before the Tribunal, claims punitive damages in the amount of 10,000 euros, to be donated to the United Nations Children's Fund and, subsidiarily, requests the Tribunal to remit his case to the competent criminal prosecution authorities.

The EPO asks the Tribunal to dismiss the complaints as partially irreceivable for lack of cause of action for the period after the complainants retired and to the extent that they challenge Circular No. 349 governing the contribution rate to the NPS. As the complainants did not reiterate some of the claims formulated in their internal appeals before the Tribunal, the EPO considers that such claims have become moot. Concerning some of the claims raised in these proceedings, it argues that they are irreceivable as the Tribunal has no jurisdiction to issue injunctions nor to order an amendment of statutory rules. Additionally, the EPO requests the Tribunal to dismiss the complaints as unfounded in their entirety.

CONSIDERATIONS

1. In March 2014, the complainants separately initiated the internal appeal procedures which culminated in these complaints, challenging inter alia the implementation of general decision CA/D 10/13 as reflected in their January 2014 and subsequent payslips. The Administrative Council adopted that general decision on 12 December 2013, following an actuarial study (required under the EPO's Pension Scheme Regulations) carried out by the Actuarial Advisory Group and a proposal from the President submitted after consulting the General Advisory Committee. Article 1 of decision CA/D 10/13 relevantly stated:

> "Article 41(1) of the Pension Scheme Regulations [...] shall read as follows:
>
> '**Article 41**
> **Employees' contributions - Costing the scheme**
>
> (1) The employees' contribution to this pension scheme shall be 9.7% of their salary and shall be deducted monthly.'"

Article 2 stated that "[t]his decision shall enter into force on 1 January 2014". Thereby, the rate of pension contributions for employees who were affiliated to the OPS, as the complainants were, was increased from 9.3 to 9.7 per cent of their basic salary deducted monthly. The complainants challenged that individual implementation as well as the underlying general decision CA/D 10/13.

2. At the President's request, pursuant to Article 35(1) and (3) of the New Pension Scheme Regulations, the Actuarial Advisory Group had also recommended increasing the global pension contribution rate and the contribution rate to the NPS. On 20 December 2013, based upon the Actuarial Advisory Group's recommendations and with specific application to employees who were affiliated to the NPS, the President issued Circular No. 349. It relevantly stated that, as from 1 January 2014, the global contribution rate to both the NPS and the Salary Savings Plan should be raised from 27.9 to 29.1 per cent of the basic salary and the NPS total contribution rate (Office and staff) should be raised from 21.0 to 22.5 per cent of the basic salary. The complainants challenged Circular No. 349, which is a general decision.

3. The complainants lodged their initial requests for review, like many other staff members, in March 2014. The President rejected them in the same decision of 21 May 2014. The complainants' internal appeals

to the Appeals Committee were drafted in similar terms and were registered under the same reference. In a single opinion, the Appeals Committee recommended their dismissal as partly irreceivable and wholly unfounded. The impugned decisions, taken by the President on 2 October 2018, adopted that recommendation. Although the impugned decisions were notified to the complainants in separate letters, the answer given to their internal appeals was common. Given the similar procedural and substantive backgrounds and nature of these complaints, they are joined to be the subject of a single judgment.

4. The complainants (and other staff members) had previously challenged the Administrative Council's prior general decisions CA/D 7/11 and CA/D 8/11, which had increased the rate of their pension contributions from 9.1 to 9.3 per cent of their basic salary with effect from 1 January 2012. They state that it would be efficient to treat their complaints concerning those previous challenges with the present complaints as they are closely related. This request has however become moot as the Tribunal has considered their complaints concerning general decisions CA/D 7/11 and CA/D 8/11 in Judgment 4255, delivered in public on 10 February 2020, and has dismissed them as being without object.

5. In challenging the impugned decisions, the complainants centrally seek orders setting aside the individual decisions reflected in the increased pension contributions in their January 2014 and subsequent payslips. They also seek orders setting aside the underlying general decision CA/D 10/13, as well as Circular No. 349. According to the Tribunal's case law, a complainant may impugn a decision only if it directly affects her or him, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to her or him, but she or he is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated her or his cause of action (see, for example, Judgments 3291, consideration 8, and 4119, consideration 4). Accordingly, the complainants are entitled to challenge the individual decisions resulting from the increased pension contributions reflected in their subject payslips, as well as the lawfulness of general decision CA/D 10/13.

6. The complainants may not however challenge the lawfulness of Circular No. 349, which specifically increased the global contribution rate paid by staff members who were affiliated to the NPS, to which they were not affiliated. The terms of Circular No. 349 were not individually implemented nor applied to them. It was not a decision adversely affecting them concerning either rights, privileges, obligations or duties arising under the provisions of staff regulations or their terms of appointment. It only provided the new NPS rate. The complainants therefore have no cause of action related to that Circular. Accordingly, their requests for orders to set it aside are irreceivable under Article II, paragraph 5, of the Statute of the Tribunal (see, for example, Judgments 4006, consideration 10, and 4145, consideration 5).

7. The complainants question aspects of the Tribunal's case law and previous judgments. Mr K., in particular, refers to attempts he made to reach an amicable settlement in various cases he had with the EPO. He also seems to suggest that the Tribunal should report an allegation which he makes in his additional submissions to the German authorities. The Tribunal will not advert to these and other statements which are outside the scope of the present complaints.

8. Regarding the complainants' subsidiary requests to order that decision CA/D 10/13 be no longer applied and that the EPO be ordered to apply the previous wording of the Pension Scheme Regulations, the effect of the Tribunal's case law is that, if it is found that general decision CA/D 10/13 and the individual implementing decisions deducting the new pension contribution rate from the complainants' relevant payslips are unlawful, the Tribunal can set aside the individual decisions and may grant consequential relief (see, for example, Judgment 2793, consideration 13, and the case law cited therein). However, if they are found to be lawful, it is not the Tribunal's role to order that decision CA/D 10/13 be no longer applied and that the EPO be ordered to apply the previous wording of the Pension Scheme Regulations that governed their pension contribution rate (see Judgment 3538, consideration 5).

9. The complainants each seek an order under Article 11, paragraph 1, of the Tribunal's Rules that an "[e]xpert [e]nquiry [by] an external, independent actuary not linked to the EPO or external companies running parts of the EPO's Pension Scheme concerning the raise of

pension contributions [be conducted]" if their claims are not granted in the written procedure. Their requests are rejected. The Tribunal recalls its statement in consideration 4 of Judgment 3538 when rejecting a similar request:

> "Plainly enough there is a power vested in the Tribunal to order measures of investigation that might include an expert enquiry. However this power fundamentally serves to assist the Tribunal in resolving issues raised by the parties and supported by the evidence adduced by the parties. For example, it is a power that might be used if expert evidence was adduced by both the complainant and the defendant organisation but there was some unresolved difference of opinion between the experts. In such a case either the Tribunal of its own motion might order an expert enquiry or might do so on the application of a party. However, Article 11 does not create a mechanism intended to enable one party to make good a case which is otherwise deficient. This appears, in substance, to be the basis of the complainants' request."

10. Mr T. signifies in his complaint form that he does not wish to have oral proceedings under Article 12, paragraph 1, of the Tribunal's Rules, but indicates in his complaint brief that he wishes a member of the Actuarial Advisory Group to be heard as a witness before the Tribunal. Article 41(3) of the Pension Scheme Regulations applicable to staff members affiliated to the OPS provides that changes to their pension contribution rate should be based on an actuarial study. A decision to change that rate must be made for sound actuarial reasons. The Actuarial Advisory Group was mandated to review the conditions for ensuring the equilibrium of the EPO's pension scheme, to examine the long-term care insurance scheme and to provide a joint report containing its recommendations by the end of July 2013, which eventually led to the increased pension contribution rate. Mr T. requests that the member of the Actuarial Advisory Group be called as a witness on the basis that the Organisation "abuses the Actuarial Advisory Group to rubber-stamp what the EPO desires with politically defined boundary conditions". Mr K. requests that the same Actuarial Advisory Group's member be called as a witness to confirm the correctness of his (Mr K.'s) mathematical calculation and states that "the political calculation of the EPO did not reflect reality".

11. The complainants' requests for oral proceedings are rejected. Contrary to what is argued, the right to an oral hearing is not absolute and a tribunal may dispense with it if the facts of the case are such that it is legitimate not to conduct such a hearing. The Tribunal finds it

unnecessary to call the member of the Actuarial Advisory Group to give evidence concerning what Mr T. refers to as “politically defined boundary conditions” and to confirm Mr K.’s mathematical calculation. The complainants’ submission that the Tribunal should conduct an oral hearing and hear the witness as there was no oral hearing in the internal appeal procedures is untenable. This is particularly because, under Article 8 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, a hearing in the internal appeal procedure is not mandatory and the Appeals Committee may decide to hold such a hearing where the written documentation is not sufficient or where a hearing might be decisive in forming an opinion. In any event, the written submissions and supporting documents provided by the parties to the Tribunal are sufficiently detailed to permit it to consider the complainants’ cases fully and to make an informed decision on the issues raised in these complaints.

12. Substantively, the complainants contend that the impugned decisions contain no reasoning and solely relied on the Appeals Committee’s opinion which is not acceptable and biased. The Tribunal’s case law has it that a final decision may accept the opinion or recommendations of an internal appeal body without further analysis (see, for example, Judgment 3994, consideration 12), but must be motivated if it rejects the opinion and recommendations (see Judgment 4062, consideration 3, and the case law cited therein). Accordingly, the fact that the impugned decisions merely accepted the Appeals Committee’s reasoning does not vitiate those decisions.

13. The contention that the Appeals Committee’s opinion is not acceptable requires the Tribunal to determine whether the Appeals Committee’s recommendation to dismiss the internal appeals on the basis that the increase in the rate of the complainants’ pension contributions with effect from 1 January 2014 (accepted in the impugned decisions) was incorrect. This contention is unfounded.

14. In considerations 14 and 15 of Judgment 3538, the Tribunal stated that a decision to increase the pension contribution rate may be challenged if a complainant provides evidence from an expert in the field of actuarial studies to demonstrate flaws in the methodology used in the actuarial study and that, in any event, even if a complainant

provides such expert evidence it would not necessarily follow that the decision of the Administrative Council or the implementation decision to deduct the higher pension contribution rate from a complainant's payslip would be unlawful. This, as the Tribunal stated in Judgment 3538, consideration 15, is because "[t]he power clearly vested in the Administrative Council to alter the pension scheme can be exercised lawfully if it represents a *bona fide* attempt to secure the pension scheme into the future [...] based on what appears to be reasoned actuarial advice".

15. Acknowledging the requirement that they had to provide evidence from an expert to demonstrate flaws in the methodology used in the actuarial study, the complainants state that they delivered "a full mathematical proof" in the internal appeal procedures, which is still valid, casting doubt upon the Actuarial Advisory Group's recommendations. However, they state that they did not file their calculations in the Tribunal proceedings because they would be ignored. Critically, they have not provided evidence from an expert to demonstrate flaws in the methodology used in the underlying actuarial study. Their arguments in the present proceedings that the actuaries fully relied upon the materials provided by one party to the proceedings (the EPO) and that the Actuarial Advisory Group had to accept all the boundary conditions imposed by the EPO, such as a politically pre-determined interest rate and politically pre-determined size of the Reserve Fund for Pensions and Social Security, which results in staff members paying pension contribution rates that are too high, do not obviate their need to provide expert evidence of the nature the Tribunal outlined in Judgment 3538. The complainants' additional argument that the increased pension contribution rate was caused because the EPO Member States had shifted the burden of tax adjustments from them to the EPO was dismissed by the Tribunal as conjecture in Judgment 3426. Moreover, the complainants provide no evidence that the decision of the Administrative Council CA/D 10/13 or the implementation decisions deducting the higher rate of pension contributions from their January 2014 and subsequent payslips was not "a *bona fide* attempt to secure the pension scheme into the future [...] based on what appears to be reasoned actuarial advice".

16. The following statements in consideration 5 of Judgment 2667 provide a fitting precursor to considering the complainants' challenge to the Appeals Committee's procedure and its composition:

> "Every official has the right to due process before the authority responsible for taking a decision concerning him or her. This right presupposes, on the one hand, that the said authority is properly constituted, that is to say that its members have been appointed in accordance with the rules governing its composition and, on the other hand, that those members are impartial. [...]"

17. To support their allegations that the Appeals Committee's opinion is biased, the complainants submit that the means of redress before the Appeals Committee do not meet the minimum judicial standards. Their allegations of bias are based in some respects on scandalous allegations concerning the Chair of the Appeals Committee. Moreover, the complainants' allegations of bias on the part of some members of the Appeals Committee are unfounded as they provide no evidence to prove them as the Tribunal's case law requires (see, for example, Judgment 4097, consideration 14). Additionally, the complainants' argument that the Appeals Committee's process does not meet the minimum judicial standards because the President of the EPO sits in the proceedings as a party and judge in his own cause is unsupported with any helpful analysis. Their statement that the Appeals Committee is an advisory body with no competency to make decisions misapprehends the quasi-judicial nature and functions of an internal appeal body (see, for example, Judgments 3785, consideration 6, and 3694, consideration 6). The complainants' argument that, in deciding to consider their internal appeals in a written procedure without conducting an oral hearing, the Appeals Committee conflates itself with the Tribunal leaving appellants without a fact-finding process does not take into consideration Article 8 of the Implementing Rules for Articles 106 to 113 of the Service Regulations mentioned in consideration 11 of this judgment. In the foregoing premises, the allegations of bias are unfounded.

18. In light of the Tribunal's statements in considerations 5 and 6 of Judgment 4049, the complainants' allegations that the Appeals Committee's procedure was flawed because the Committee "sat in secret composition (apart from the [C]hair [...] who signed the opinion)" and that, if they had prior knowledge that the Chair would have sat on their cases, they would have raised a partiality objection against him, as

well as their arguments that the Appeals Committee's composition was imbalanced, are unfounded. So also are their allegations which suggest that the Appeals Committee's procedure is vitiated because only the Chair of the Committee signed its opinion. Article 13(2) of the Implementing Rules for Articles 106 to 113 of the Service Regulations permits the Chair to sign the Appeals Committee's opinion alone. Moreover, there is no legal basis on which to hold that the registration fee which an internal appellant is required to pay upon filing an internal appeal is unlawful or provides a ground to vitiate the final decision.

19. The complainants' claims for what in effect amounts to punitive or exemplary damages are unfounded as they provide no evidence to prove their entitlement thereto (see, for example, Judgments 3092, consideration 16, and 3966, consideration 11).

Their claims for moral damages for delay in the internal appeal procedures are also unfounded. Although the period of about four and a half years from the lodging of the requests for review to the issuance of the impugned decisions is too long in the present circumstances, the complainants have not articulated the effect caused by the delay (see, for example, Judgment 3582, consideration 4).

20. Under Article 7(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, costs incurred in the internal appeal proceedings "shall be borne by [the appellant], unless the competent appointing authority decides otherwise". The Tribunal determined that such costs may only be awarded under exceptional circumstances (see Judgments 4157, consideration 14, and 4217, consideration 12), which do not exist in the present cases.

21. In the foregoing premises, the complaints will be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 2 June 2021, Mr Patrick Frydman, President of the Tribunal, Ms Dolores M. Hansen, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, 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

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ