

**E. (No. 2)**

**v.**

**EPO**

**135th Session**

**Judgment No. 4630**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. E. against the European Patent Organisation (EPO) on 1 October 2019, the EPO's reply of 24 February 2020, the complainant's rejoinder of 7 May 2020, the EPO's surrejoinder of 9 September 2020, the EPO's further submission of 27 October 2021 and the complainant's final comments of 6 February 2022;

Considering the application to intervene filed by Ms M. E. on 19 January 2022 and the EPO's comments thereon dated 19 April 2022;

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 decision to treat his participation in a strike as an unauthorised absence.

Facts relevant to this case may be found in Judgment 4433, delivered in public on 7 July 2021. As explained in that judgment, in May 2013 the President of the European Patent Office, the EPO's secretariat, consulted the General Advisory Committee (GAC) on a proposal that he intended to submit to the Administrative Council for a new legal framework governing the right to strike. At this time, some

employees were participating in a campaign of industrial action organised by SUEPO (the Staff Union of the European Patent Office – a trade union which is not a statutory body of the EPO), which had been running for several months. Shortly after the GAC consultation, SUEPO invited its members to vote on a resolution to pursue the industrial action. On 27 June, after a favourable ballot, SUEPO published its “action plan for the summer 2013”. One of the actions planned by SUEPO was a picket strike which would take place on 2 July 2013 if the Administrative Council adopted the President’s proposal.

In the event, the proposal was adopted by the Administrative Council on 27 June 2013 in decision CA/D 5/13, which was to enter into force on 1 July 2013. CA/D 5/13 created a new Article 30a of the Service Regulations concerning the right to strike and amended the existing Articles 63 and 65, concerning unauthorised absences and the payment of remuneration, to reflect the new strike rules. As a result of the amendment of Article 65, the salary deduction for absence due to participation in a strike was set at 1/20th of the monthly remuneration per day of absence, and the same deduction rate was applied to unauthorised absences. Until then, a deduction of 1/30<sup>th</sup> per day had been applied in both cases. The new Article 30a set out some basic rules concerning strikes, defining what was meant by a “strike” and indicating, amongst other things, that a call for a strike could be initiated by a staff committee, an association of employees, or a group of employees. Paragraph 10 of Article 30a authorised the President of the Office to lay down further terms and conditions for the application of Article 30a. Relying on that provision, on 28 June 2013 the President issued Circular No. 347, containing “Guidelines applicable in the event of strike”, which was also to take effect on 1 July. Circular No. 347 relevantly provided that the Office was responsible for organising a strike ballot and that, if the requisite number of votes was obtained, prior notice of a strike had to be given to the President at least five working days before the event.

Also on 28 June 2013, the Vice-President of Directorate-General 4 (DG4) issued a Communiqué drawing attention to the new legal framework and informing staff that, as from 1 July 2013, any industrial action which did not comply with the new rules would not be considered as a strike, with the result that participation in such action was liable to be considered as unauthorised absence.

On 2 July 2013 the picket strike announced by SUEPO took place. On 9 July 2013 the complainant, who had participated in the strike, received a letter from the Principal Director of Human Resources informing him that, as the industrial action on 2 July did not comply with the new rules, his absence on that day was considered to have been unauthorised and a deduction from his pay would be made accordingly. No disciplinary action would be taken, however, in view of the fact that the new rules had entered into force only the day before.

On 7 August 2013 the complainant submitted a request for review to the President, challenging the decision contained in the letter of 9 July. He argued that the strike of 2 July had been properly called and organised by SUEPO before the new strike rules had entered into force and was therefore lawful, and he objected to the threat of disciplinary action in the event that he took part in further strikes. His request for review was rejected by the President and he then lodged an appeal with the Appeals Committee.

As similar appeals had been filed by many other employees, the Appeals Committee decided to consolidate them and it issued a single opinion on 3 May 2019. The Committee recommended by a majority that the appeals be rejected as unfounded, but it unanimously recommended that each appellant be awarded 450 euros in moral damages for the excessive duration of the proceedings.

By a letter of 3 July 2019 the Vice-President of DG4, acting by delegation of power from the President, informed the complainant that she had decided to reject his appeal as unfounded, insofar as it was receivable, in accordance with the majority opinion of the Appeals Committee, but to award him 450 euros in moral damages for the length of the internal appeal proceedings. That is the impugned decision.

In his complaint filed on 1 October 2019, the complainant asked the Tribunal to declare that CA/D 5/13 was not applicable to him, at least insofar as it infringed his right to strike and his right to freedom of association, and to order the withdrawal of Circular No. 347. He also requested that the EPO be ordered not to treat his participation in the strike on 2 July 2013 as unauthorised absence and to reimburse the salary deductions made on that basis, with 5 per cent interest. He claimed moral damages in the amount of 100 euros for each day on which he had been deprived of his right to strike, an additional 1,000 euros in moral damages for procedural flaws, and compensation for legal costs “if applicable”.

On 7 July 2021 the Tribunal delivered several judgments dealing with various other complaints challenging the strike rules introduced by CA/D 5/13 and Circular No. 347. In Judgment 4430, the Tribunal found that Circular No. 347 was unlawful and set it aside on the grounds that it violated the right to strike in several respects. In Judgment 4433, the Tribunal ruled on a complaint filed by a staff member who had likewise challenged the decision to treat his participation in the strike on 2 July 2013 as an unauthorised absence. In that case the Tribunal set aside the decision to make a salary deduction for unauthorised absence and ordered the EPO to reimburse the amount so deducted. It also awarded the complainant 4,000 euros in moral damages and 800 euros in costs.

By a letter of 24 September 2021, the complainant in the present case was informed that, in view of the similarity between his pending complaint and the complaint that was the subject of Judgment 4433, the EPO had decided to apply the outcome of that judgment to him as well. The EPO therefore reimbursed the amounts deducted from his remuneration in respect of his participation in the strike on 2 July 2013 and paid him 4,000 euros in moral damages and 800 euros in costs. It invited him to withdraw his complaint, but he chose not to do so.

## CONSIDERATIONS

1. The following discussion proceeds against the background emerging from the facts just described. Before dealing with the specifics of this case, one general observation (also made in other cases determined this session) should be made. In proceedings brought by a complainant in which one or several individuals apply to intervene, the complainant has no legal or other relevant interest in the applications to intervene. In contrast, the defendant organisation does have such an interest as successful applications to intervene can multiply both the legal and practical effect of a judgment in favour of the complainant.

2. In September 2021, the complainant was invited to withdraw his complaint having regard to steps the EPO had taken to implement, in relation to him, judgments concerning actual or proposed strike action of EPO staff. Specifically, the salary deductions for strike participation were reimbursed and he was paid 4,000 euros in moral damages and 800 euros in costs. It is tolerably clear from the complainant's final comments that he does not now seek, for himself, any relief arising from his complaint (and none is identified). Accordingly, the appropriate order to make is to dismiss the complaint. In accordance with the Tribunal's case law, it follows that the application to intervene must also be dismissed.

## DECISION

For the above reasons,

1. The complaint is dismissed.
2. The application to intervene is dismissed.

In witness of this judgment, adopted on 19 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ