G. (Nos. 7 and 8) and V. (No. 8)

v.

EPO

132nd Session **Judgment No. 4430**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr W. A. G. against the European Patent Organisation (EPO) on 19 September 2019, the EPO's reply of 6 January 2020, the complainant's rejoinder of 27 January and the EPO's surrejoinder of 27 April 2020;

Considering the eighth complaint filed by Mr W. A. G. against the EPO on 1 October 2019, the EPO's reply of 10 February 2020, the complainant's rejoinder of 2 March and the EPO's surrejoinder of 3 June 2020;

Considering the eighth complaint filed by Ms V. B. A. V. against the EPO on 8 October 2019, the EPO's reply of 10 February 2020, the complainant's rejoinder of 2 March and the EPO's surrejoinder of 3 June 2020;

Considering the application to intervene in Mr G.'s eighth complaint, filed by Ms V. on 3 November 2019 and the EPO's comments thereon of 10 February 2020;

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 none of the parties has applied;

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

The complainants challenge the new rules governing the exercise of the right to strike at the European Patent Office (the EPO's secretariat).

In May 2013 the President of the Office 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. Article 30a sets out some basic rules concerning strikes, defining what is meant by a "strike" and indicating, amongst other things, that a call for a strike can be initiated by a staff committee, an association of employees, or a group of employees, and that the decision to start a strike must be the result of a vote by the employees. Paragraph 10 of Article 30a authorises 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 provides that the Office is responsible for organising a strike ballot and that, if the requisite number of votes is obtained, prior notice of a strike must be given to the President at least five working days before the event.

On 2 July 2013 the strike announced by SUEPO took place. The complainants did not participate, but employees who did participate received a letter shortly afterwards informing them that, as that strike did not comply with the new rules, they were considered to have been absent without authorisation and a deduction from their 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 the strike.

In September 2013 the complainants submitted identical requests for review to the President, challenging Circular No. 347, and to the Chairman of the Administrative Council, challenging CA/D 5/13. Their requests for review of CA/D 5/13 were rejected by a decision of the Chairman of the Administrative Council, which the complainants impugned in their respective second complaints before the Tribunal. In Judgment 3786, delivered in public on 8 February 2017, the Tribunal set aside that decision rejecting the requests for review on the grounds that it had not been taken by the competent authority and remitted the matter to the EPO for a new decision. In due course a new decision was taken by the President of the Office, who rejected the requests for review as manifestly irreceivable because they were directed against a general decision by which the complainants had not been directly and adversely affected. The complainants then challenged this new decision before the Appeals Committee.

The complainants' requests for review of Circular No. 347 were likewise rejected as manifestly irreceivable on the grounds that they were directed against a general decision by which they had not been directly and adversely affected. The matter was then referred to the Appeals Committee, which recommended rejecting the appeals as irreceivable for the same reason. The final decisions accepting that recommendation were impugned by the complainants in their respective third complaints. However, while those complaints were pending, the impugned decisions were withdrawn in light of Judgments 3694 and 3785, owing to a flaw in the composition of the Appeals Committee, and the appeals were remitted to a differently composed Appeals Committee. As a result, the complainants' third complaints were subsequently dismissed by the Tribunal as being without object in Judgment 4256, delivered in public on 10 February 2020.

When the Appeals Committee examined these appeals, it decided to join them with the complainants' appeals challenging CA/D 5/13. In its opinion of 3 May 2019, it recommended by a majority that they be rejected as partly irreceivable and wholly unfounded, though the Committee unanimously recommended an award of moral damages for the delay in the proceedings.

By decisions of 16 September 2019, the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President, rejected the appeals as irreceivable and, in any event, unfounded. She maintained that, as the complainants had not participated in the strike action on 2 July 2013, they had not been directly and adversely affected by the new strike regulations and they therefore had no cause of action. She did, however, agree to award them moral damages in the amount of 450 euros for the delay in the proceedings. That is the decision impugned by the complainants.

In his seventh complaint, Mr G. asks the Tribunal to quash Circular No. 347 and to award him moral damages in the amount of 5,000 euros for the fact that he was prevented from going on strike on 2 July 2013. He also claims moral damages under several other heads, namely: 2,000 euros for each month in which Circular No. 347 was in force; 10,000 euros for procedural violations in the first internal appeal procedure; 5,000 euros for procedural violations in the second internal appeal procedure; and 5,000 euros for procedural delays. He claims "moral damages and costs" of 5,000 euros "for having to submit two complaints to the Tribunal for one and the same case due to procedural violations for which the Office is responsible", as well as punitive damages.

In his eighth complaint, Mr G. asks the Tribunal to quash decision CA/D 5/13 *ex tunc* or to order that the EPO shall not apply it to his appointment. He claims moral damages under several heads, namely: 5,000 euros for the fact that he was prevented from going on strike on 2 July 2013, with interest at the rate of 8 per cent per annum; 2,000 euros for each month in which CA/D 5/13 was in force; 5,000 euros for procedural delays; and 1,000 euros for denying his right to be heard in the internal appeal proceedings. He also seeks an award of punitive damages, and he claims costs in the amount of 2,000 euros.

In her eighth complaint, Ms V. asks the Tribunal to quash Circular No. 347 and to award her moral damages in the amount of 5,000 euros for the fact that she was prevented from going on strike on 2 July 2013. She also claims moral damages under several other heads, namely: 2,000 euros for each month in which Circular No. 347 was in force; 10,000 euros for procedural violations in the first internal appeal procedure; 5,000 euros for procedural violations in the second internal appeal procedure; and 5,000 euros for procedural delays. She claims

"moral damages and costs" of 5,000 euros "for having to submit two complaints to the Tribunal for one and the same case due to procedural violations for which the Office is responsible", as well as punitive damages.

The EPO asks the Tribunal to dismiss the three complaints as irreceivable or, subsidiarily, as unfounded.

CONSIDERATIONS

1. In 2013 the Administrative Council of the EPO, by decision CA/D 5/13 of 27 June 2013, amended the Service Regulations to add Article 30a concerning the right to strike and related changes to Articles 63 and 65 concerning directly or indirectly the reduction of remuneration when a staff member was absent from work or on strike. These changes took effect on 1 July 2013. On 28 June 2013 the President promulgated a circular, Circular No. 347, entitled "Guidelines applicable in the event of strike", again effective 1 July 2013.

2. Mr G. was a member of the staff of the EPO at relevant times. On 11 September 2013 he submitted two requests for review, one challenging decision CA/D 5/13 and the other challenging Circular No. 347. The procedural paths those requests took was not straightforward but suffice it to note they resulted in two internal appeals, recommendations by the Appeals Committee and ultimately a decision of 16 September 2019 of the Vice-President of DG4, acting on delegation from the President, to reject both appeals as irreceivable and, in any event, unfounded.

3. Mr G. has filed two complaints, one on 19 September 2019 and the other on 1 October 2019, in the Tribunal impugning the decision to reject his appeals. The Tribunal notes the Vice-President awarded Mr G. a total of 450 euros in moral damages for the delay in the appeals proceedings and the delay in issuing the final decision.

4. Mr G.'s complaints should be joined so one judgment can be rendered. Also a complaint in virtually identical terms by Ms V., also an EPO staff member, challenging Circular No. 347, was filed with the Tribunal on 8 October 2019. It should also be joined with the other two complaints and a single judgment will be rendered.

5. Additionally, Ms V. applies to intervene in Mr G.'s eighth complaint challenging decision CA/D 5/13. This is opposed by the EPO on two grounds. First, Ms V. has not demonstrated she is in a situation in fact and in law similar to that of the complainant. The Tribunal is prepared, in the circumstances of this case, to assume (based on the extremely limited material she advances in support of the application) in her favour that she is. The second ground is that she had maintained an internal appeal challenging CA/D 5/13. Accordingly, the EPO contends she is not entitled to intervene, referring to Judgment 4160, consideration 15. This is correct and the application to intervene is refused.

6. Article 30a was added to the Service Regulations by CA/D 5/13 and provided:

"**Right to strike**

(1) All employees have the right to strike.

(2) A strike is defined as a collective and concerted work stoppage for a limited duration related to the conditions of employment.

(3) A Staff Committee, an association of employees or a group of employees may call for a strike.

(4) The decision to start a strike shall be the result of a vote by the employees.

(5) A strike shall be notified in advance to the President of the Office. The prior notice shall at least specify the grounds for having resort to the strike as well as the scope, beginning and duration of the strike.

(6) Employees shall inform the Office about their participation in a strike.

(7) The freedom to work of non-strikers shall be respected.

(8) Strike participation shall lead to a deduction of remuneration.

(9) The President of the Office may take any appropriate measures, including requisitioning of employees, to guarantee the minimum functioning of the Office as well as the security of the Office's employees and property.

(10) The President of the Office may lay down further terms and conditions for the application of this Article to all employees; these shall cover inter alia the maximum strike duration and the voting process."

7. It is also desirable to set out the terms of Articles 63 and 65 of the Service Regulations, as amended by CA/D 5/13.

Article 63 relevantly provided:

"**Unauthorised absence**

(1) Except in case of incapacity to work due to sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior. Any unauthorised absence which is duly established shall lead to a deduction of the remuneration of the permanent employee concerned pursuant to Article 65(1)(d).

[...]"

Article 65 relevantly provided:

"**Payment of remuneration**

(1) (a) Payment of remuneration to employees shall be made at the end of each month for which it is due.

(b) Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths and

- where the actual number of days for which pay is due is fifteen or less, the number of thirtieths payable shall equal the actual number of days for which pay is due;

- where the actual number of days for which pay is due is more than fifteen, the number of thirtieths payable shall equal the difference between the actual number of days for which pay is not due and thirty.

(c) Notwithstanding the provisions of (b), where remuneration is not payable in respect of a complete month owing to participation in a strike, the monthly amount shall be divided into twentieths to establish the due deduction for each day of strike on a working day.

(d) Notwithstanding the provisions of (b), where remuneration is not payable in respect of a complete month owing to unauthorised absence, the monthly amount shall be divided into twentieths to establish the due deduction for each day of unauthorised absence on a working day.

(e) Where entitlement to any of the allowances provided for in Article 67 commences at or after the date of entering the service, the employee shall receive such allowance as from the first day of the month in which such entitlement commences, provided that any request for the allowance is submitted within six months of the date on which entitlement commences, unless otherwise provided in these Regulations. If an allowance is requested after expiry of the above six-month period, it shall be granted retroactively but only for the six months preceding the month in which the request was submitted, except in a duly substantiated case of force majeure. On cessation of such entitlement the employee shall receive the sum due up to the last day of the month in which entitlement ceases.

(f) All permanent employees in receipt of an allowance shall inform the President of the Office immediately in writing of any change which may affect their entitlement to that allowance.

[...]"

8. Article 63 as amended prohibited a member of staff from being absent without prior permission (unless incapacitated by sickness or accident) and provided that unauthorised absence would result in a deduction of remuneration. Article 65 as amended created the mechanism for implementing the deductions spoken of in Article 30a and Article 63. Insofar as a strike is concerned, the deduction is for "each day of strike on a working day" as it is, in the same amount, for "each day of unauthorised absence on a working day".

9. Circular No. 347 provided:

"**A. Definition**

1. Strike

A strike is defined in Article 30a(2) of the Service Regulations.

Industrial actions which are not a collective and concerted work stoppage, such as go-slow or work-to-rule actions, shall not be considered as a strike.

The protection granted by the right to strike does not apply to employees participating in industrial actions other than a strike.

B. Exercising the right to strike

2. Call for a strike

A Staff Committee (Central Staff Committee or a local section), an association of employees, or a group of employees representing at least 10% of all EPO employees may decide to call for a strike.

3. Decision to start a strike

The start of a strike shall be the result of a vote by the employees entitled to vote.

Entitled to vote are the active employees either office-wide or at sites concerned by the strike which has been called for.

The voting process shall be organised and completed by the Office within a maximum of one month following the decision to call for strike. The voters' confidentiality shall be guaranteed. Employees not able to vote personally shall have the possibility to vote by proxy. An employee can be given only one proxy vote.

The voting process shall be supervised by a committee composed of two employees designated by the President and two employees designated by the Central Staff Committee on an ad hoc basis.

To be valid, at least 40% of the employees entitled to vote shall participate in the ballot. The decision to start the strike has to be approved by a majority of more than 50% of the voters.

4. Prior notice

Pursuant to Article 30a(5) of the Service Regulations, prior notice of a strike shall be given to the President at least five working days before the commencement of the strike action.

As regards the scope of the strike, the notice shall indicate which sites of the Office are concerned.

The duration of the strike shall not exceed one month starting from the date indicated in the prior notice as the beginning of the strike. Beyond this maximum duration, any new strike shall be organised in compliance with Article 30a of the Service Regulations.

5. Declaration of participation in a strike

Employees participating in a strike shall inform their immediate superior and shall register via an electronic self-registration tool made available by the Office. The immediate superior will have access to the self-registration tool.

The registration shall occur before or, at the latest, on the day of the strike.

Employees may be considered on unauthorised absence within the meaning of Article 63 of the Service Regulations if they were not at their workplace during a strike action, did not register and did not inform their immediate superior of their absence from work.

6. Deduction of remuneration

For each working day during which an employee participated in a strike, the Office will apply a deduction of the monthly remuneration, in accordance with Article 65(1)(c) of the Service Regulations.

For participation in a strike for more than four hours in a single working day, the Office will apply a deduction of 1/20th of the monthly remuneration.

For participation in a strike for four hours or less in a single working day, the Office will apply a deduction of 1/40th of the monthly remuneration.

For staff working part-time, the deduction will be adjusted proportionally.

The basis for calculating the deduction is the remuneration defined in Article 64(2) of the Service Regulations.

A strike participant remains covered by the social security scheme during strike and therefore continues to contribute in full to the scheme.

C. Entry into force

This decision shall enter into force on 1 July 2013."

The Circular was a normative legal document subordinate to the Service Regulations. As such, it could not modify or limit the Service Regulations in any respect (see Judgment 3534).

10. The EPO contends none of the complaints are receivable. The context in which decision CA/D 5/13 was made and Circular No. 347 promulgated should be mentioned. Between 17 and 24 June 2013 staff who were members of SUEPO voted to engage in industrial action. On 27 June 2013, SUEPO published what it described as an action plan identifying when particular industrial action would take place and the nature of the industrial action. The first was a picket strike to be held on 2 July 2013. The complainants did not participate in this industrial action and accordingly no steps were taken to deduct an amount from the pay of either as contemplated by one of the amendments to the Service Regulations made by decision CA/D 5/13. The action plan proposed industrial action through August, September, October and November 2013.

11. It is desirable to make one general observation at the outset and before considering the merits of the pleas. In these proceedings the complainants seek relief that, in substance, involves a declaration that CA/D 5/13 and Circular No. 347 are each unlawful and that each should be set aside. As to the Circular, the Tribunal is satisfied, having regard to its case law and its Statute, that it has jurisdiction to declare the Circular unlawful and set it aside (see, for example, Judgments 2857, 3522 and 3513). The position is not so clear in relation to CA/D 5/13 which, if it were set aside, would likely have the legal effect of setting aside current (at least as at the time the proceedings in the Tribunal were commenced) provisions of the Service Regulations. While the Tribunal can examine the lawfulness of provisions of a general decision (see, for example, Judgments 92, consideration 3, 2244, consideration 8, and 4274, consideration 4), whether it has jurisdiction to set aside a provision of the Service Regulations is a significant legal question on which the Tribunal's case law is unclear. It should be resolved in an appropriate case by a plenary panel of the Tribunal constituted by seven judges, which is not presently possible.

It is, in the Tribunal's view, of no material consequence to the complainants that the issue of whether CA/D 5/13 should be set aside remains unresolved. The normative legal document, Circular No. 347,

which had the most immediate, adverse and far reaching effect on the complainants' right to strike is, generally described, an implementing rule. If the Circular were found to be unlawful, any moral damages to which the complainants would be entitled by virtue of establishing the Circular was unlawful would be no different if, additionally, they had established that CA/D 5/13 should be set aside.

12. In advancing its argument that neither complaint is receivable, the EPO refers to a long line of Tribunal case law to the effect that a general decision cannot be challenged by a staff member unless and until an individual decision is taken adversely affecting the staff member (see, for example, Judgment 4274, consideration 4). The EPO points, in particular, to the fact that the complainants did not participate in the industrial action of 2 July 2013 and, accordingly, were not affected by any adverse implementing decision.

13. It has long been recognised that staff of international organisations have a right to strike and that generally it is lawful to exercise that right (see, for example, Judgment 2342, consideration 5).

Employees who strike by ceasing work are deploying a tool incidental to collective bargaining to place pressure on their employer, often in the context of a dispute about preserving or improving wages and working conditions, workplace safety, dismissals and freedom of association amongst other things. It is a tool employees have to redress the imbalance of power between them and their employer. Absent a right to strike, it is open to an employer to ignore entreaties by employees advanced collectively to consider, let alone respond to, their grievances about wages and working conditions or, additionally but not exhaustively, the other matters referred to at the beginning of this consideration. However, at least ordinarily, the price the employees pay for deploying the tool is that they forfeit the remuneration they would otherwise have received had they worked (see, for example, Judgment 615, consideration 4).

14. The promulgation of Circular No. 347 is a general decision of the President. As already mentioned, there is Tribunal case law to the effect that a general decision cannot be challenged by a staff member unless and until an individual decision is taken. But the Tribunal's case law contains an exception or limitation. As the Tribunal said in Judgment 3761 at consideration 14:

> "In general, [an administrative decision of general application] is not subject to challenge until an individual decision adversely affecting the individual involved has been taken. However there are exceptions where the general decision does not require an implementing decision and immediately and adversely affects individual rights."

15. In the absence of any implementing decision, the question that then arises is whether, in relation to the complainants, there has been an immediate and adverse effect on individual rights. The Tribunal is satisfied there has been. Circular No. 347 did have an immediate and adverse effect on the complainants' right to strike. It is immaterial that they did not go on strike in June 2013 or that circumstances had not arisen where one or a number of the provisions of the Circular operated on or applied to conduct of the complainants. The effect was immediate because, at the date of promulgation of the Circular, it legally constrained future exercise of the right to strike or imposed burdens to the same effect. The complaints are receivable.

16. The Tribunal now considers the lawfulness of the Circular. It is not necessary to analyse it exhaustively. That is because it is plainly a document intended to operate in its entirety and no particular element is severable from the others. A review of its provisions reveals the following:

(i) Circular No. 347, paragraph 1: there are two problems with this provision. Firstly, it travels beyond the definition in the amended Service Regulations. It cannot do so as a subordinate normative legal document (Judgment 3534). Secondly, "go slow" and "work to rule" are legitimate forms of industrial action protected by the ordinary conception of the right to strike. Accordingly, by declaring that employees engaging in these forms of industrial action did not have the "protection granted by the right to strike" as ordinarily understood, this provision violated the right to strike.

(ii) Circular No. 347, paragraph 2: by imposing a minimum of 10 per cent of employees who may call for a strike, the Circular violated the right to strike of any employee who, in combination with others, may wish to strike where the total number of employees is less than 10 per cent.

(iii) Circular No. 347, paragraph 3: if the class who have a right to vote on whether the strike should start extends beyond (and potentially well beyond) the employees who wish to strike, then that wider class has a capacity to veto the strike. This problem is compounded by the percentages (40 per cent of employees and 50 per cent of voters) at the conclusion of this provision. Additionally, the requirement that the vote be conducted by the Office violated the right to strike. Employees themselves should be able to make arrangements for the vote (see Judgment 403, consideration 3).

(iv) Circular No. 347, paragraph 4: the time limit placed on the duration of strike violated the right to strike. Striking staff should be able, themselves, to determine the length of the strike.

17. Having regard to the aforementioned violations of the right to strike, which infect Circular No. 347 in its entirety, the Circular is unlawful and should be set aside.

18. The complainants are entitled to moral damages for the injurious impact of the Circular on their right to strike, which resulted in the diminution of their fundamental right to freedom of association. These are assessed in the sum of 2,000 euros for each complainant. They are each entitled to costs in the sum of 800 euros.

DECISION

For the above reasons,

1. Circular No. 347 is set aside.
2. The EPO shall pay each complainant moral damages in the amount of 2,000 euros.
3. The EPO shall pay each complainant 800 euros costs.
4. All other claims and the application to intervene are dismissed.

In witness of this judgment, adopted on 15 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Michael F. Moore, Judge, 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

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ