H. (No. 8)

v.

EPO

133rd Session **Judgment No. 4482**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 31 July 2020, the EPO's reply of 23 October 2020 and the complainant's email of 26 January 2021 informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

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 contests the "social democracy" reform introduced by decision CA/D 2/14.

Before retiring on 1 January 2016, the complainant was an official of the European Patent Office, the EPO's secretariat. The Administrative Council adopted decision CA/D 2/14 on 28 March 2014. The reform, which amended the legal framework for social dialogue, entered into force on 1 April 2014 but transitional measures were established.

On 26 June 2014 the complainant filed a request for review with the Administrative Council against decision CA/D 2/14. The request was subsequently redirected to the President of the Office as the competent appointing authority. On 30 October 2014, the latter rejected the request as manifestly irreceivable on the ground that the complainant was

challenging a general decision which had no immediate adverse effect on him individually.

The complainant filed an appeal on 30 January 2015 alleging that decision CA/D 2/14 violated, inter alia, the doctrine of acquired rights, the EPO's established practice, as well as the right of freedom of association and the rule against retroactivity, and that it breached the staff's legitimate expectations and the fundamental right to equality of arms. He also contended that the proposal submitted to the Administrative Council leading to the contested decision was procedurally flawed and that it contained wilful misrepresentation and omissions of facts and law.

On 5 March 2020 the Enlarged Chamber of the Appeals Committee, having heard the complainant and other appellants, issued its opinion on several appeals filed against decision CA/D 2/14, including the one filed by the complainant. The Appeals Committee was divided on various issues, but a majority of its members concluded that no illegality was established. Moreover, it unanimously agreed that there was room for serious doubts as to the manner in which the reform was enacted and implemented, taking into consideration that the reform had a far-reaching impact on the prerogatives and functions of staff representatives and the electoral rights of every staff member. With respect to the complainant, who had lodged his appeal in his capacity as a permanent employee of the Office, it considered that he was directly and adversely affected by the entry into force of decision CA/D 2/14. Indeed, under the old provisions staff had the right to determine in a general meeting of permanent employees the regulations regarding the election of a local section of the Staff Committee and the election of the members of the Central Staff Committee. As a result of the amendments introduced by decision CA/D 2/14, these provisions were abrogated and not replaced by similar ones. Thus, as of 1 July 2014, only the President may determine the detailed conditions relating to the election of the Staff Committee, which comprises a Central Staff Committee and local Staff Committees. Hence, employees were deprived of the right to participate in the determination of the election rules for the Staff Committee. However, the Appeals Committee unanimously found that the complainant's appeal was irreceivable on the ground that it had been filed outside the statutory deadlines, and that there was no evidence that he had submitted a request for review in June 2014.

By a letter of 18 May 2020 the complainant was informed of the President's decision to reject the appeal as unfounded but to award him 600 euros for the length of the internal proceedings. This is the impugned decision.

The complainant asks the Tribunal to quash decision CA/D 2/14, declare the amendments to the Service Regulations for permanent employees of the European Patent Office (as well as the Implementing Rules to the Service Regulations) contained therein unlawful, and to restore the *status quo ante*. He also asks the Tribunal to order that any decision made or provision adopted under the Service Regulations as amended by decision CA/D 2/14, including the elections to the Central and Local Staff Committees, or following consultation of the Staff Representation or any statutory body established under the new regulations be declared void *ab initio*. He seeks an award of 10,000 euros in moral damages and punitive damages for the violation of his fundamental right of freedom of association, as well as moral damages in respect of the duration of the internal appeal procedure. He further claims 500 euros in costs, and asks the Tribunal to award him any other relief as it may deem appropriate.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable for lack of a cause of action, and otherwise unfounded.

CONSIDERATIONS

1. The complainant was, in 2014, a member of the staff of the EPO. He retired on 1 January 2016. In March 2014 the Administrative Council of the EPO adopted decision CA/D 2/14 amending the Service Regulations. In these proceedings the complainant seeks an order quashing that decision and consequential relief. The internal appeal proceedings relating to the complainant's grievances about decision CA/D 2/14 (and the grievances of other staff) took several years and his complaint was not filed in the Tribunal until July 2020.

2. The details of the Administrative Council's decision and its effect will be discussed shortly. However the complainant's case is, at base, that the decision impacted immediately and adversely on his right to associate freely, a right long recognised by the Tribunal.

3. The EPO raises, as a threshold issue, whether the relief sought is within the competence of the Tribunal and the related question of whether the complaint is receivable in all respects. Foundational to this argument is that a member of staff cannot impugn in proceedings in the Tribunal a general decision of the governing organ of an organisation which is regulatory in character unless and until an individual decision which affects the member of staff personally is made based on the general decision.

4. This issue was recently addressed in several judgments involving the EPO concerning the right to strike, which is an aspect of freedom of association. The following discussion is found in one of those judgments, namely Judgment 4430. There is 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). 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."

5. 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). This is equally true of the more general right to associate freely (see, for example, Judgments 496, consideration 6, and 3414, consideration 4). As the Tribunal observed in that latter case, all officials of international organisations have a right to associate and an implied contractual term in the appointment of each that the relevant organisation will not infringe that right. Accordingly, the complainant can invoke the Tribunal's jurisdiction to seek to argue that his rights have been directly affected by the amendments to the Service Regulations effected by the impugned decision.

6. The complainant also seeks to impugn decision CA/D 2/14 on the basis that a number of anterior procedural and allied irregularities attended the adoption of the decision and impact on its lawfulness. These arguments are not available to the complainant. The complainant cannot approbate and reprobate. The invocation of the right to freely associate upon which he wishes to engage the Tribunal's jurisdiction renders irrelevant the question whether the decision was legally flawed for the other reasons raised by the complainant in this case. Consequently, there is a legal boundary for arguments the complainant may maintain.

7. The question that then arises in these proceedings is whether, in relation to the complainant, decision CA/D 2/14 had an immediate and adverse effect on his right to associate freely. The primary focus of the complainant's argument that it had such an effect was the alterations made to Chapter 2 of Title II of the Service Regulations concerning the election of members to the Staff Committee, both the Central Staff Committee and the Local Staff Committees. Before its amendment, Article 35 provided that the regulations regarding the election of representatives to a local section (broadly the same as the new Local Staff Committee) were to be determined by a general meeting of the permanent employees of the place of employment for which the particular local section was constituted (Article 35(6)(a)). The Article created a similar mechanism for the adoption of regulations by the staff for the election of members of the Central Staff Committee: Article 35(6)(b). The amendments effected by decision CA/D 2/14 removed from the staff the role of determining regulations for conducting elections and provided the ballot be conducted by the Office (Article 35(5)(a)), and invested in the President a power "[to] determine the detailed conditions relating to the Staff Committee elections" (Article 35(5)(c)).

8. There is a consistent line of case law of the Tribunal which makes clear, in a variety of ways, that organisations should not interfere in the affairs of a staff association or union (however described) and the association or union must have the concomitant right to conduct its own affairs and regulate its own activities (see, for example, Judgment 4043, consideration 13). It also includes the right to freely elect their own representatives. This is so whether the association or union is established and operates under and by reference to staff regulations or came into existence and operates outside the confines of such regulations (see

Judgment 2672, considerations 9 and 10). There are obvious reasons for this approach. The role of staff associations or unions is to represent the interests of members primarily in dealing with their employing organisation on issues concerning the staff. Staff associations or unions should be able to do so unhindered or uninfluenced by the Administration of the employing organisation. Were it otherwise, the role would be compromised.

9. There are other less obvious reasons. A staff association or union is likely to be more robust and thus more effective if the members perceive it to be independent and have confidence in it allied to a sense of ownership of it. Any involvement by the employing organisation in its activities, including elections, would most likely affect that perception and diminish or dampen that confidence and sense of ownership. While this latter reason should not be overstated, it nonetheless should be recognised (see Judgment 403, consideration 3).

10. The regime in place before decision CA/D 2/14 for the conduct of elections respected the right of staff to freely associate and the new regime did not. The reason given in its pleas by the EPO for the material changes within that organisation in 2014 presently being discussed, does not withstand scrutiny. The EPO says:

> "[...] the defendant recalls that before the reform, there were no clear and uniform rules on the election of staff representatives among the different duty stations. This could have led to unfair situations where employees of the same organization, working in the same category, would be subject to different rules concerning staff representative elections. It was therefore a concern for the administration to adopt clear and uniform rules throughout the duty stations to ensure internal social democracy."

11. If uniformity was necessary or desirable from the perception of the staff in exercise of their right to freely associate, it was within their power under the old regime to create that uniformity in exercise of the rights conferred by Article 35(6), paragraphs (a) and (b), of the Service Regulations. No "unfair situations" existing at the time of the reform are identified and, in any event, the passage only adverts without explanation to the possibility of "unfair situations" by use of the expression "could have led". Similarly no lack of clarity is demonstrated. Lastly, it is not explained why clear and uniform rules, assuming they were absent at the time of the reform, ensure internal "social democracy".

12. This case presents a situation where a remedy, which may intrude into the exercise of power by the Administrative Council, is appropriate to protect a fundamental right of a member of staff and, indeed, all members of staff which was a term of their appointment as officials of the EPO. The adoption of those parts of the new rules concerning elections by decision CA/D 2/14 entailed non-observance of that term of appointment. There can be no doubt that freedom of association is a well-recognised and acknowledged universal right which all workers should enjoy. It is recognised as a right by the Tribunal (see Judgment 4194). It is a right recognised in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, Article 2(a), as an obligation for all ILO Member States arising from the very fact of their membership in the ILO. Freedom of association is a right recognised by the 1966 International Covenant on Civil and Political Rights, Article 22, and also by the 1966 International Covenant on Economic, Social and Cultural Rights, Article 8.

13. The Administrative Council of the EPO has itself recognised the importance of human rights when formulating the rights and obligations of staff. In a decision made at its 55th meeting in December 1994, which is reproduced before the text of the Service Regulations, it and the President noted that:

> "[...] when reviewing the law applied to EPO staff the ILO Tribunal considers not only the legal provisions in force at the European Patent Organisation but also general legal principles, including human rights. The Administrative Council also noted with approval the President's declaration that the Office adheres to the said legal provisions and principles."

14. Indeed, and importantly, the Service Regulations themselves contained a provision concerning freedom of association in force both before and after decision CA/D 2/14. Article 30 was entitled "Freedom of association" and provided and continues to provide: "Permanent employees shall enjoy freedom of association; they may in particular be members of trade unions or staff associations of European civil servants." There is an obvious and irreconcilable tension between this provision, which acknowledges and recognises the right of staff to freely associate, and the amendments made by decision CA/D 2/14 to the rules concerning elections discussed in this judgment which derogate from that right.

15. Having regard to the fact that those amendments violated the complainant's right to freedom of association as already discussed and created this tension, it is appropriate to quash those elements of decision CA/D 2/14 which had this effect, namely the introduction by Article 6 of decision CA/D 2/14 of a new clause (5) of Article 35 of the Service Regulations in substitution for clause 6 of Article 35 of the pre-existing Service Regulations. The central order the Tribunal will make is intended to operate prospectively. That is to say, is intended to operate in relation to future elections but not affect the tenure of staff representatives already elected under the election regime put in place by decision CA/D 2/14. Retrospective operation would create unacceptable legal uncertainty about the actions, including decisions, of staff representatives and committees in the lengthy period since decision CA/D 2/14 was adopted. It is also intended to apply the pre-existing provisions, *mutatis mutandis*, to the election of staff representatives for the Central Staff Committee and Local Staff Committees as established by decision CA/D 2/14. In this respect, the order revives the pre-existing rules (see Judgment 365, consideration 4). Necessarily the applicable Implementing Rules, Circular No. 355, will have no legal effect.

16. The Tribunal is satisfied that all other claims should be dismissed. Insofar as the complainant seeks moral damages for the length of the internal appeal, it is by no means obvious that he suffered a moral injury having left the Organisation in 2016, and, in any event, he has not demonstrated that he has.

Insofar as he challenges Article 7 of decision CA/D 2/14, which narrows the source of members of certain statutory bodies, in particular, the Appeals Committee, he can only do so if he can demonstrate this general decision amending the Service Regulations immediately and adversely affected his individual rights. He does so on the footing that it affected his right to freely associate. This has not been demonstrated in this case. The Tribunal leaves open the question whether Article 7 was unlawful for determination in a case where it arises.

17. The complainant is entitled to his costs which are assessed in the sum of 500 euros.

DECISION

For the above reasons,

1. That part of the decision of the Administrative Council introducing by Article 6 of decision CA/D 2/14 a new clause (5) of Article 35 of the Service Regulations in substitution for clause 6 of Article 35 of the pre-existing Service Regulations, is quashed but without retroactive effect.

2. Order 1 will operate prospectively for future elections but does not affect the tenure of staff representatives already elected under the election regime put in place by decision CA/D 2/14.

3. Clause 6 of Article 35 of the Service Regulations in force before decision CA/D 2/14, will apply, *mutatis mutandis*, to the future election of staff representatives for the Central Staff Committee and Local Staff Committees as established by decision CA/D 2/14.

4. Circular No. 355 is quashed.

5. The EPO shall pay the complainant 500 euros costs.

6. All other claims are dismissed.

In witness of this judgment, adopted on 11 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, Mr Jacques Jaumotte, Judge, Mr Clément Gascon, Judge, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

JACQUES JAUMOTTE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ