Registry's translation, the French text alone being authoritative.

100th Session **Judgment No. 2516**

The Administrative Tribunal,

Considering the complaints filed by Mr M.L.A.B., Mr J.-A.L.B., Mr J-J.C. (his fifth), Ms O.S. and Mr B.T. on 14 May 2004 against the European Patent Organisation (EPO) and corrected on 11 August (6 December for Mr B.), the Organisation's replies of 25 November 2004 (9 February 2005 in the case of Mr B.), the complainants' rejoinders of 28 February 2005 and the EPO's surrejoinders of 6, 8 and 21 June 2005;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants, of French or Italian nationality, are employed as examiners at the European Patent Office, the secretariat of the EPO.

Facts relevant to this case are given in Judgment 2440 delivered by the Tribunal on 6 July 2005. It may be recalled that at the initiative of the Office's Staff Union a collective action was voted on 27 March 2001, calling in particular for the blocking of B84/B85 notifications, which has the effect of slowing down the processing of patent applications. In communiqué No. 74 of 28 March, the President of the Office stated that blocking actions, which were designed deliberately to make it difficult to identify participants, would no longer be tolerated in future. He referred to a communiqué of the same day issued by the Vice-Presidents in charge of Directorates-General 1, 2 and 4, which stated that staff would be asked to indicate whether they were participating and that 1 per cent of basic monthly salary would be deducted for each working day of participation from the following month's salary.

The blocking actions having started at the end of March 2001, a form was sent to examiners in April asking them to state whether or not they were participating in the actions, on the understanding that their failure to respond would be interpreted as "confirmation" of their participation. On 21 May the Vice-President in charge of Directorate-General 1 (DG1) wrote to some examiners urging them again to give an answer by 29 May at the latest. None of the complainants returned the Administration's form. Mr B. and Mr B. wrote to the Vice-President in charge of DG1 that they refused to give a reply, since they considered the form unlawful. Ms S., on the other hand, sent a letter on 30 March 2001 stating that she was "performing [her] duties pursuant to the Service Regulations [for Permanent Employees of the European Patent Office] and the Guidelines".

On the basis of the replies received by 29 May, the line managers conveyed to the Administration the names of examiners participating in the blocking actions. On 26 June the complainants received an additional payslip showing the amounts withheld from their June 2001 salaries. Between 29 June and 12 July they wrote to the President of the Office or to the Director of Personnel claiming reimbursement, with interest, of the sums withheld and costs, some also claiming damages and/or requesting a copy of the documents on which the salary deduction had been based, failing which their letters were to be considered as initiating an internal appeal.

In communiqué No. 79 of 19 July 2001, the President informed all staff that the amounts withheld would be refunded, as indeed they were. The members of staff who had lodged an appeal were informed in a notice published in August in the EPO *Gazette* that since they had on the whole achieved a satisfactory outcome, unless they expressed objections, their appeals would thenceforth be deemed to be devoid of substance and the files would be closed.

The complainants, who had all written maintaining their appeals, were informed that the President had decided that their request could not be granted and that the matter had been referred to the Appeals Committee. Before the Committee, Mr B. stated, in order to justify his low productivity, that at the time of the collective action he had

spent a considerable amount of time preparing a mission to Japan, after which he had travelled to that country. Mr T., on the other hand, stated that he had not received a copy of the form and that his supervisor had merely talked the matter over with him.

In its opinions dated 1 December 2003 the Appeals Committee found that the complainants had not stated that they had not taken part in the action. By a majority it recommended rejecting the appeals. By letters of 13 February 2004 the Director of Conditions of Employment and Statutory Bodies informed the complainants that the President of the Office had decided, in accordance with the Committee's opinion, to reject their appeals. Those are the impugned decisions.

B. The complainants contend for their main plea that blocking actions do not constitute a strike and therefore cannot give rise to a pay deduction. According to them, the Office has not demonstrated, as it should, that in the course of the action they had not performed their work correctly, full time and in accordance with their contractual obligations and the rules in force. Given that the productivity of examiners is calculated in terms of annual output, that they are left considerable autonomy in allocating priorities and that the delivery of completed dossiers is not ranked as a higher priority than other functions, they object to the fact that, in order to determine whether or not staff members took part in the industrial action, the Office relied on the productivity assessments provided by the hierarchical superiors.

According to the complainants, the withholding of salary constituted a violation of the Service Regulations, in particular Articles 64 and 65, which make no provision for the non-payment of salary in the circumstances of the case. They argue that if the Office wishes to withhold salary on the basis of an alleged failure to meet contractual obligations it must initiate disciplinary proceedings. Firstly, such proceedings must be formally opened against each individual, which was not the case. Secondly, the Office must prove its allegations. Not only did it not do so, but it reversed the burden of proof by requiring staff members to state whether they were participating in the industrial action and by assuming that they were if they failed to reply, which is unacceptable. Thirdly, the disciplinary measures taken must correspond to those listed in the Service Regulations. The withholding of salary, which is not one of the sanctions listed in Article 93, is only applicable, according to Article 95, to staff members guilty of serious misconduct and who have therefore been suspended, which they were not. They conclude that the measure taken constituted covert disciplinary action.

They allege violations of the rights of the defence and of the general principles of law contained in the European Convention on Human Rights, and complain that they were not given the information on which the decision to withhold pay was based. According to them, electronic data was used to calculate the salary deductions, which is contrary to the data protection rules. They also consider that there was unequal treatment between staff members of the Office since, unlike in their case, no salary deductions were made when the previous B84/B85 blocking action occurred.

The complainants request the withdrawal of communiqué No. 74, moral damages for wrongful withholding of salary and costs. Mr B., Mr B. and Ms S. also claim damages for breach of the data protection rules and interest on the sums reimbursed. Mr T. also claims interest.

C. In its replies the Organisation contends that, insofar as the complainants seek the withdrawal of communiqué No. 74, their complaints are irreceivable, since according to the Statute of the Tribunal they may only seek the rescinding of the decisions impugned, namely those of 13 February 2004.

It further contends that the complaints are devoid of merit since the measures taken were legitimate and well founded in the circumstances. It considers that it had the right and indeed the duty, as the Tribunal found in Judgment 805, to take action to ensure its survival and the continuance of its work during the collective dispute. The directors, who oversee some 20 or more examiners, each of whom has between 30 and 100 files in stock, had no means of knowing with any certainty which of them were taking part in the blocking actions. This is why in order to identify participants while avoiding the laborious task of analysing the productivity figures of hundreds of examiners – which would inevitably have precipitated a flood of disputes – it was decided to apply the principle of self-declaration by the staff members themselves, appealing to the principle of good faith and relying on Article 14 of the Service Regulations, whereby "[a] permanent employee shall carry out his duties and conduct himself solely with the interests of the [...] Organisation [...] in mind".

The defendant points out that the examiners had been warned that their failure to respond would constitute a tacit

admission of participation in the actions. As this was merely an assumption, staff members were given until the end of May 2001 to inform their line managers that they had not in fact participated. It adds that the communiqué would have been pointless if the burden of proof of participation had still rested with the EPO.

The Organisation also argues that there was no breach of the Guidelines for the protection of personal data. Since directors normally have access to the production data of their examiners, they retained that right during the collective action and were thus able to draw conclusions as to whether or not staff members had participated. The processing required for the implementation of the salary deductions was considered to comply with the above-mentioned guidelines by the Data Protection Officer, who examined it at the request of the Appeals Committee. There can therefore be no financial compensation pursuant to Article 11(e) of the Guidelines.

According to the defendant, the application of a salary deduction pursuant to Article 65(1)(b) of the Service Regulations complied with the Tribunal's case law whereby salary is payable only for services rendered. It was fully justified, as confirmed by the Appeals Committee, since the participants in the dossier blockages were not performing at least part of their obligations. The Organisation recalls that the Committee concluded that the complainants had taken part in the blocking actions on the grounds that they had not denied taking part; in addition, Mr T.'s production figures had fallen drastically and neither Mr B., nor Mr B., nor Ms S. had handed in any dossier in the course of that period. It asserts that the President did not initiate disciplinary measures because he had decided to consider the collective action as lawful.

The defendant also contends that the measures taken were lawful. It submits that even if it were shown that a staff member who was assumed to have participated in the collective action had in fact not participated, it would still need to be determined whether the EPO could be held responsible for any such error, which seems unlikely given that the error would have been caused by the staff member's ambiguous reply in breach of Article 14 of the Service Regulations. Moreover, considering that the complainants were reimbursed within one month after the deduction, and considering their ambiguous conduct, the Organisation argues that they suffered no moral prejudice as defined in Tribunal case law.

D. In their rejoinders the complainants contend that the Office is misinterpreting Article 14 of the Service Regulations, which in their view is designed to establish the independence of staff and does not require them to abandon their rights. They consider moreover that Article 65 is not relevant.

E. In its surrejoinders the Organisation presses it pleas. It contends that when a collective action is announced the President of the Office, in accordance with Article 10 of the European Patent Convention, has a discretion to decide which measures are appropriate, and that discretion is subject to only limited review by the Tribunal. It notes that other public services have been confronted in the past with similar situations and that the Commission of the European Communities, for instance, applied the same solution in 1991 when it distributed a form stipulating that the absence of a reply would be considered as "signifying participation in all work stoppages concerning the duty station". It submits that the Tribunal will have to clarify the legal issues raised by dossier blockage, which enables participants to benefit from the advantages of a strike without suffering the drawbacks.

CONSIDERATIONS

1. In March 2001 – as recalled in Judgment 2440 – the Staff Union of the European Patent Office launched a series of collective actions which included strikes and the blocking of dossiers and B84/B85 notifications. In communiqué No. 74 dated 28 March 2001 the President of the Office referred to the communiqué of the same date issued by the Vice-Presidents in charge of Directorates-General 1, 2 and 4, which notified staff members likely to join the movement that their line manager would be asking them "[i]n the days ahead" whether or not they were participating in the blocking actions, that failure to respond would be treated as confirmation of participation and that, in that case, 1 per cent of basic monthly salary would be withheld for each working day of participation in either the dossier blockage or the "B84/B85 action". The Administration subsequently circulated a form to the staff members concerned asking them to state whether and since when they were participating in the blocking actions, on the understanding that their failure to respond would be considered as implying their participation.

2. The five complainants are examiners who were regarded by the Office as having participated in the collective action, either because they had not replied, or because they had replied ambiguously to the questions asked by their line manager. Part of their salaries for June 2001 was therefore withheld, which prompted them to

file appeals against the decisions thus taken. Following negotiations with staff representatives, the President of the Office informed staff that the salary withholdings would be refunded, and the complainants were in fact reimbursed at the end of July 2001. They nevertheless maintained their internal appeals, which were rejected by decisions of 13 February 2004, taken in accordance with the majority opinion of the Appeals Committee.

3. The staff members concerned filed five complaints with the Tribunal, which despite minor differences are similarly drafted and seek the same redress. They are therefore joined to form the subject of a single judgment.

4. The five complainants ask for the withdrawal of communiqué No. 74 issued by the President of the Office, and for the Organisation to be ordered to pay them moral damages for wrongful withholding of salary and costs. Four of them also ask for interest on the sums withheld. Three of them claim moral damages for alleged breach of personal data protection rules.

5. The claims directly concerning the President's communiqué No. 74, which is of general application, are clearly irreceivable, as the defendant contends. Nevertheless, in their complaints impugning the individual decisions applying that communiqué and that of the Vice-Presidents of 28 March 2001, the complainants may challenge the lawfulness of the measures which concerned them in particular, even though the effect of those measures was considerably attenuated by the quick reimbursement of the sums withheld.

6. The complainants maintain that the blocking actions did not constitute a strike and that the Organisation could not therefore withhold part of their salary without breaching Articles 64 and 65 of the Service Regulations, which guarantee their entitlement to a salary. They also assert that there is no provision in the Service Regulations that authorises the withholding of 1 per cent of staff members' remuneration for each day of participation in industrial action. The defendant, on the other hand, recalls that according to the Tribunal's case law, and particularly Judgment 805 concerning the order to work issued by the EPO on the occasion of a strike, an international organisation "has the right and indeed the duty, when its staff goes on strike, to take action to ensure its survival and the continuance of its work", provided that it respects the principle of proportionality.

It must be recognised, however, that in the cases currently before the Tribunal the so-called "blocking" actions did not constitute a conventional form of strike action, which generally involves a collective work stoppage justifying the withholding by the Organisation of one-thirtieth of the monthly remuneration for each strike day, but rather consisted in slowing down the processing of patent applications. The Tribunal considers that, while the Office was right not to apply deductions of one-thirtieth of monthly remuneration for each day not worked, since it was not possible to ascertain whether staff members were working or not during the collective action, it was on the other hand entitled, for the sake of the smooth running of its activities, which were seriously jeopardised by the collective action, to react to the withdrawal of service by staff members who were "blocking" their output. According to Judgment 314, delivered on 21 November 1977, the rule whereby salary is payable only for services rendered is a "principle of international public service" (see also Judgments 391 and 463). Thus, even the partial lack of services rendered by staff members who joined in the collective action could legally justify the defendant's decision to withhold part of their salaries without going as far as to apply the so-called "one-thirtieth" rule. The deduction of 1 per cent of monthly salary for each working day of participation appears to be neither unreasonable nor disproportionate in the circumstances of the case, nor could the decisions taken with respect to the staff members concerned be considered as disciplinary measures, as the complainants allege; they merely give effect to a general rule, lawfully applied in the Organisation, which does not allow remuneration to be paid for services not rendered.

7. However, the staff members whose salaries were partially withheld, albeit temporarily, had to have actually taken part in the blocking actions. On this point the Tribunal recalls, as it did in Judgment 2440, that, as the Appeals Committee rightly pointed out, the complainants' failure to reply to the form they were sent asking them whether they were taking part in the collective action could be construed as an argument in support of evidence of their participation, but could not justify irrefutably assuming participation. It is therefore necessary to determine whether the submissions before the Tribunal support the conclusion that the complainants did in fact participate in the blocking actions.

8. Mr B. did not reply to the form which asked him whether he was taking part in the actions, nor did he later declare that he had not participated in the collective action – though he could have done so, like some of his colleagues, before the Appeals Committee. During the period concerned, he did not hand in a single dossier and, while it is true that for part of the time he was on mission in Japan, he has offered the Tribunal no argument that

casts doubt on the assessments of his line manager and of the Appeals Committee.

9. Mr B. refused to reply to the form and did not subsequently allege that he had been mistakenly considered as having taken part in the blocking actions. He handed in no dossier during the period of the collective action and offers the Tribunal no evidence which might lead it to conclude that the Office was wrong in considering that he took part in the collective action.

10. Mr C. also refused to reply to the form. He did protest, both orally and in writing, on 21 and 27 June to the Director of Personnel, on 28 June and 6 July to his director, and again on 10 July to the President, at the fact that a withholding appeared on his payslip for June 2001, but at no time did he deny that he had taken part in the collective action; he merely told his director that "with regard to [his] participation or non-participation in the so-called dossier blocking action, [he had] pointed out that [the former had] all the information required to judge for [him]self". It is true that Mr C. was on sick leave for part of the period, but it appears from the Organisation's surrejoinder that he produced one file for 11 days' presence in April and two files for 17 workings days in the period April/May, which is from any point of view far below the usual average. As the Appeals Committee concluded, the Office was in the circumstances justified in assuming that he had taken part in the blocking actions, and he offers the Tribunal no evidence which might refute that assessment.

11. Ms S. refused to reply to her line manager's requests or to account for her drop in production. According to the defendant's assertions, which have not been denied, she did not hand in a single file during the period in dispute. There is no evidence which might indicate that she was mistakenly regarded as having taken part in the blocking actions.

12. Mr T. never clearly stated whether he intended to participate in the blocking actions but did not deny having participated during the proceedings before the Appeals Committee. According to a statement by his director, dated 25 August 2003, he "never clearly indicated that he was not taking part in the blockage". The director added:

"I showed [...] him and read out the content of [the] form.

I told him that, in view of the drop in recorded output which spoke for itself, there was no need to ask him whether he had taken part in the action (in other words it was clear to me that he was taking part). He did not deny this, adding, if I remember rightly, a few words to the general effect that I should make up my own mind. He did not sign the form."

In the circumstances, the Office could legitimately consider that Mr T. had taken part in the collective action.

13. Three of the five complainants claim damages for the injury they allegedly suffered as a result of a breach of the personal data protection rules. They appear to be referring to rights conferred on them by the Guidelines for the protection of personal data, in particular Article 11(e), according to which every person concerned is entitled "to financial compensation for damage resulting from unauthorised handling of his personal data". It appears from the submissions, however, in the light of the very detailed inquiry carried out by the Appeals Committee, that the staff members who took part in the collective action were not identified by processing personal data. Moreover, while the technical operations required for the salary withholdings entailed the use of electronic data processing, the use of such processing for the calculation of staff members' remunerations is duly authorised under the above-mentioned Guidelines.

14. The conclusion is that the complainants are not justified in complaining that the Office unlawfully withheld part of their salaries, so that they are not entitled to compensation for alleged injury or to the payment of interest for the period during which part of their salaries was withheld. The complainants' claims for the award of costs must also therefore be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

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