

**118th Session**

**Judgment No. 3363**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr C.O.D. L. against the European Patent Organisation (EPO) on 26 January 2010, the EPO's reply of 10 May, the complainant's rejoinder of 18 August, corrected on 1 September, the EPO's surrejoinder of 13 December 2010, the complainant's additional submissions of 30 May 2011 and the EPO's comments thereon dated 8 September 2011;

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

Having examined the written submissions;

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

A. Facts relevant to this case are to be found in Judgment 3146, delivered on 4 July 2012, concerning the complainant's second complaint. Suffice it to recall that on 9 December 2008 the EPO's Administrative Council adopted decisions CA/D 27/08 and CA/D 32/08. The former decision revised the salaries and other elements of the remuneration of permanent employees of the EPO by, among other things, replacing as from 1 January 2009 the monthly basic salary scales in Tables 1 to 4 of Annex III to the Service Regulations for Permanent Employees of the EPO with

monthly gross salary scales. The latter decision, which entered into force on 1 January 2009, amended the Regulation on Internal Tax by, among other things, revising the tax rates and tax brackets.

In March 2009 the complainant challenged decisions CA/D 27/08 and CA/D 32/08 by way of letters he sent to both the President of the Office and the Chairman of the Administrative Council. He asserted, inter alia, that his gross salary had been reduced by one third as a result of the implementation of decision CA/D 27/08 and that the combined effect of both decisions was an unacceptable reduction of his net salary. The Administrative Council determined that his appeals related to the implementation of decisions CA/D 27/08 and CA/D 32/08. They were forwarded for further action to the President, who concluded that they were unfounded and referred them to the Internal Appeals Committee (IAC) for an opinion. The appeals were registered under RI/14bis/09. The complainant was so informed on 15 July 2009.

By a letter of 28 July 2009 to the President of the Administrative Council, the complainant alleged that the representatives of EPO Member States in the Budget and Finance Committee and the Administrative Council were liable, by way of what he characterised as their intentional actions or their “grossly negligent breach of duty of care”, or both, for decisions CA/D 27/08 and CA/D 32/08 and what he deemed to be the adverse consequences of those decisions. Amongst other relief, he claimed damages for present and future injury and he requested specific action on the part of the Administrative Council, the EPO, the Office and the Member States. In the event that the President of the Administrative Council could not grant the relief he claimed, he asked that his letter be treated as an internal appeal.

In document CA/168/09 of 7 October 2009 the President of the Office proposed that the complainant’s appeal of 28 July should be forwarded to her for further action. At its 119th session held from 27 to 30 October 2009 the Administrative Council unanimously decided, as summarised in document CA/131/09 of 13 November 2009, that as the complainant was claiming, among other things,

compensation and damages resulting from the implementation of decisions CA/D 27/08 and CA/D 32/08, his appeal should be referred to the President. By a letter of 3 December 2009, the complainant was informed that the President had concluded that his appeal was irreceivable and unfounded and that she had referred it, registered under RI/161/09, to the IAC for an opinion.

On 14 December the complainant was notified that, by agreement of the IAC and pursuant to his own request, his appeals which had been registered under RI/14bis/09 would be dealt with separately from those of other employees who had also challenged decisions CA/D 27/08 and CA/D 32/08 and their implementation. His appeals were thus registered under RI/14ter/09. Following an exchange with the Chairman of the IAC, by an e-mail of 16 December 2009 the complainant was notified that the appeals registered under RI/14ter/09 would be examined in conjunction with six other related internal appeals (RI/40/09, RI/48/09, RI/63/09, RI/115/09, RI/161/09, RI/162/09) which he had filed previously.

While the internal appeal proceedings for the aforementioned appeals were ongoing, the complainant filed his second and third complaints with the Tribunal on 5 October 2009 and 26 January 2010 respectively. Regarding his second complaint, the Tribunal held in Judgment 3146 that the Administrative Council's referral of his appeals (registered first under RI/14bis/09 and then under RI/14ter/09) to the President was lawful and that, as a decision from the IAC was still pending, his second complaint was irreceivable for failure to exhaust the internal means of redress.

In the present complaint (his third) the complainant indicates on the complaint form that he impugns decision CA/168/09 of 7 October 2009 and decision CA/131/09 of 13 November 2009.

B. The complainant submits that the Administrative Council expressly rejected his internal appeal. As the Administrative Council took a final decision, and as the President of the Office is not competent to adjudicate on the issues of his case, he filed the present

complaint within the prescribed time limits and it is therefore receivable.

The complainant asks the Tribunal to rule on the merits of his complaint. He makes numerous claims and allegations. In particular, he contends that he has suffered material injury by the combined effect of decisions CA/D 27/08 and CA/D 32/08 in that his gross salary has been unlawfully reduced by approximately one third. Furthermore, he alleges that the process by which the decisions were taken was flawed; he accuses representatives of the Member States in the Budget and Finance Committee or the Administrative Council, or both, of breaching their duty of care by way of their intentional actions or their gross negligence.

The complainant asks the Tribunal to join the present complaint with his second complaint. He requests oral proceedings and he seeks disclosure of supplementary information held by the EPO, the Administrative Council and the Member States. He requests the Tribunal to decide on the merits of his complaint – in particular with respect to how the Administrative Council reached decisions CA/D 27/08 and CA/D 32/08 and how it processed his internal appeal – and he asks it to deal with his complaint in an “accelerated” manner. He asks it to order the EPO to change tables 17 to 20 of decision CA/D 27/08, to “repair[...] the situation”, and to “safeguard[...] his long-term claims”. He seeks damages related to the alleged breach of duty of care by representatives of Member States in the Budget and Finance Committee or the Administrative Council, or both. He further refers to all claims made in all of his related internal appeals, including but not limited to, requests for material, moral and punitive damages, disclosure, recalculation of the gross salary scales taking into consideration the “logically correct” internal tax, changes to his 2008 annual income statement and monthly payslips, as well as payment of the corresponding amounts due to him.

C. In its reply the EPO opposes the complainant’s request for joinder, asserting that his second and third complaints do not raise the same issues of fact and of law and that his main requests for relief in

each complaint differ. It opposes his request for oral proceedings on two grounds. First, the complainant filed his complaint with the Tribunal before the internal appeal proceedings were exhausted and without having taken advantage of the opportunity for oral hearings within those proceedings. Second, the EPO considers that the written submissions of the parties are sufficient for the Tribunal to adjudicate the present complaint.

The EPO contends that the complaint is irreceivable. It points out that the internal appeal procedure is ongoing and there has been no final decision on the complainant's appeal. Thus, he has failed to exhaust the internal means of redress within the meaning of Article 109(3) of the Service Regulations and Article VII, paragraph 1, of the Statute of the Tribunal. In addition, it states that several internal appeals relating to CA/D 27/08 and CA/D 32/08 that were lodged by other employees were also referred by the Administrative Council to the President of the Office for further action. Related complaints by those employees that were subsequently filed directly with the Tribunal in which it was claimed that such a referral was a procedural flaw have been summarily dismissed under Article 7 of the Rules of the Tribunal. In the EPO's view, the present complaint should be treated in the same manner, as it is clearly irreceivable. The EPO rejects the complainant's argument that he was compelled to file the present complaint in order to avoid losing his case on formal grounds. It asserts that he cannot, through this complaint, introduce all arguments and claims relating to his other internal appeals which are not the subject matter of the complaint, even if they relate to the same "theme" and may be jointly examined during the internal appeals procedure, which is still pending. Also, referring to the Tribunal's case law, it submits that his internal appeal was correctly redirected to the competent authority, the President of the Office. The EPO contends that, contrary to the requirements prescribed by the case law, the complainant's submissions are neither concise nor precise enough to allow for a thorough analysis. Lastly, it asserts that the Tribunal is not competent to order it to undertake an investigation of the alleged issue or to adopt specific measures in response to it.

The EPO replies on the merits subsidiarily. It rejects the complainant's assertion that he has been adversely affected by the combined implementation of decisions CA/D 27/08 and CA/D 32/08. The complainant's basic salary has been unaffected by the Administrative Council's decisions to formalise the existence of gross salaries and to revise the internal tax provisions. Also, the fact that the gross salaries were erroneously calculated until December 2008 would have had no consequence whatsoever on the level of basic salaries paid to EPO employees, which are the sole basis for determining employees' right to remuneration.

It contends that the aforementioned decisions were taken after a flawless decision-making process. They were properly elaborated and adopted, without any adverse effect for the complainant.

D. In his rejoinder the complainant presses his pleas. He invites the Tribunal to determine which of his claims for relief are admissible in the present complaint and he reiterates his requests that the Tribunal order the EPO to disclose relevant information to him and that his second and third complaints be joined. In addition, in the event the Tribunal is unable to grant particular relief which he seeks, he asks, in the alternative, for an award of punitive damages. He clarifies that he is contesting the process that led to decision CA/D 27/08. Furthermore, in his view, the Administrative Council was the competent authority to adjudicate his internal appeal, and as it declined jurisdiction over the matter, he now seeks redress before the Tribunal.

E. In its surrejoinder the EPO maintains its position. It emphasises that the complaint is irreceivable. Also, referring to the case law, the EPO asks the Tribunal, in the event that it identifies receivable claims which the EPO has failed to identify, to refer those issues back to the EPO for comment before ruling on the merits in order to give full effect to the principle of adversarial proceedings. It asserts that the complainant has introduced a new claim for punitive damages, which is irreceivable.

F. In his additional submissions the complainant appends what he considers to be the relevant sections of minutes of a General Advisory Committee meeting (GAC/PV 9/2008) regarding salary adjustment and technical amendments to the regulation on internal tax. He argues that this document evidences a gross breach of the EPO's obligation under the Service Regulations to conduct good faith consultations.

G. In its final comments the EPO maintains its position in full. It submits that, contrary to the complainant's arguments, document GAC/PV 9/2008 is not evidence of any unlawful decisions or actions.

#### CONSIDERATIONS

1. The detailed background for the present complaint can be found in Judgment 3146. In summary, the complainant impugned the Administrative Council's decision to refer his appeals (later registered as RI/14ter/09 before the IAC) to the President for decision. The Council had declined jurisdiction as it found that his appeals related to the implementation of decisions CA/D 27/08 and CA/D 32/08. The President referred the appeals to the IAC for an opinion and the complainant impugned those and other decisions in his second complaint before the Tribunal. That complaint was dismissed (in Judgment 3146) "as the Administrative Council's referral of the complainant's appeals to the President was lawful, and the President took the view that the appeals were unfounded and consequently forwarded the appeals to the Internal Appeals Committee for decision, and as that decision is still pending, the complaint is irreceivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal since the impugned decisions cannot be considered final as the internal means of redress have not been exhausted".

2. Since the complainant has presented his case extensively in his written submissions the Tribunal sees no need to order oral proceedings. The complainant's request for oral proceedings is therefore rejected.

3. The complainant has filed several appeals with regard to various aspects of the implementation of decisions CA/D 27/08 and CA/D 32/08. These appeals have been forwarded to the IAC for an opinion (registered under RI/14ter/09, RI/40/09, RI/48/09, RI/63/09, RI/115/09, RI/161/09, RI/162/09) and the IAC has informed the complainant that they will be handled together. These appeals were still pending at the time that the complainant filed this complaint with the Tribunal.

4. In the present complaint, the complainant purports to impugn the President's proposal that his appeal be forwarded to her for further action and the Administrative Council's subsequent decision to do so. The Council again declined jurisdiction as it found that his appeal should be forwarded to the President considering that the complainant claimed compensation for any adverse consequences of the implementation of the Council's decisions. Whereas the main purpose of his second complaint, which led to Judgment 3146, was to obtain an increase in his net income, in the present complaint the complainant claims damages, inter alia for an alleged failure by the representatives of Member States in the Budget and Finance Committee and/or the Administrative Council to exercise their respective duties in the decision-making process which led to decisions CA/D 27/08 and CA/D 32/08 and he contests the lawfulness of those decisions, as well as their implementation, as reflected in his monthly payslips.

5. The Tribunal is of the opinion that, for the same reasons listed under considerations 10, 11 and 12 of Judgment 3146, the present complaint is irreceivable in accordance with Article VII, paragraph 1, of the Statute of the Tribunal.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ