Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P. (E.) (No. 4)

v.

EPO

121st Session **Judgment No. 3620**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs E. P. against the European Patent Organisation (EPO) on 8 July 2013, the EPO's reply of 30 July 2014, the complainant's rejoinder of 25 August, the EPO's surrejoinder of 26 November and the complainant's additional submissions of 15 December 2014;

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 is challenging the decision to retroactively implement the transitional measure accompanying the replacement of the former invalidity pension with an invalidity allowance.

On 14 December 2007 the Administrative Council of the EPO adopted decision CA/D 30/07 abolishing the invalidity pension system and replacing it with an invalidity allowance scheme with effect from 1 January 2008. Article 29 of CA/D 30/07 provided for a transitional measure aimed at ensuring that employees who were already in receipt of an invalidity pension on 1 January 2008 would continue to receive the same level of benefits when their invalidity pension was changed to an invalidity allowance. The complainant was informed in August 2008 that she had been placed on non-active status due to invalidity with effect from 1 July 2008 and since that date she has been in receipt of an invalidity allowance.

The legality of the transitional measure contained in Article 29 was challenged through a number of internal appeals. The Internal Appeals Committee (IAC) found that the transitional measure was unlawful on the ground that the General Advisory Committee (GAC) had not been consulted prior to its adoption and that its approval procedure was therefore unlawful. It recommended that the flaw be remedied by consulting the GAC solely in respect of the transitional measure and by the President of the European Patent Office, the EPO's secretariat, subsequently submitting to the Administrative Council a new draft decision for adoption of a new provision to take retroactive effect as of the date when the previous regulation entered into force.

In order to remedy this failure to consult, the President submitted in August 2012 a document concerning the disputed transitional measure to the GAC for consultation and recommended its approval with retroactive effect from 1 January 2008. After having received a divided opinion on the matter from the GAC, on 8 October 2012 he resubmitted his initial proposal to the Administrative Council, asking it to adopt the transitional measure with retroactive effect from 1 January 2008. On 26 October, the Council endorsed the President's proposal and adopted decision CA/D 15/12, confirming the retroactive measure with effect from 1 January 2008.

On 3 December 2012 the complainant initiated two internal appeals against decision CA/D 15/12, one being submitted to the President of the Office, the other to the Chairman of the Administrative Council. In the latter appeal, she asked the Administrative Council to annul decision CA/D 15/12 on the ground that it unlawfully gave retroactive effect to the transitional measure, and to award her moral damages and costs.

On 20-21 March 2013, at its 135th session, the Administrative Council unanimously decided that the complainant's appeal, which it treated as a request for review under the applicable provisions of the Service Regulations for Permanent Employees of the European Patent

Office (hereinafter "the Service Regulations"), was manifestly irreceivable and dismissed it. The complainant was notified of the Council's decision by the Chairman of the Administrative Council in a letter dated 11 April 2013, which is the impugned decision. The Chairman indicated in his letter that this was a final decision which could be challenged by filing a complaint with the Tribunal.

The complainant asks the Tribunal to quash the decision of 11 April 2013 and to confirm that the transitional measure introduced through CA/D 30/07 and endorsed retroactively in CA/D 15/12 is null and void, with the result that the status quo ante (that is, the system in force prior to 1 January 2008) is maintained. She seeks compensation for "all real damages", with compound interest, moral damages under several heads and costs.

The EPO, which was authorised by the President of the Tribunal to limit its reply to the issue of receivability, submits that the complaint is irreceivable because it is directed against a general decision which has no direct adverse effect on the complainant's situation. In light of the fact that the Tribunal has recently ruled that challenges to general decisions of this nature are irreceivable, it invites the Tribunal to order the complainant to bear part of the costs that it has incurred in defending this case.

CONSIDERATIONS

1. The complainant is an employee of the EPO. She had been on sick leave from 13 April 2007. By December that year she was reaching a position where her sick leave would be exhausted. Thereafter steps were taken internally to review her position culminating in a letter from the Administration informing her that as from 1 July 2008 she would receive, pursuant to the Service Regulations, an invalidity allowance. An allowance rather than an invalidity pension was payable because of the following decisions taken by the Administrative Council. On 14 December 2007, the Administrative Council made a decision which had the effect of abolishing the invalidity pension and replacing it with an invalidity allowance effective 1 January 2008 and created a

transitional measure in relation to staff then in receipt of the invalidity pension. As a result of a successful challenge to the legality of the transitional measure, a further decision (CA/D 15/12) was made by the Administrative Council on 26 October 2012 endorsing the original transitional measure with retroactive operation.

On 3 December 2012 the complainant filed an internal appeal against decision CA/D 15/12, which the Council decided to treat as a request for review. At a meeting on 20 and 21 March 2013, the Administrative Council decided that the request was manifestly irreceivable. This was communicated to the complainant by a letter dated 11 April 2013 from the Chairman of the Administrative Council. This is the impugned decision in the complaint filed by the complainant on 8 July 2013. The Tribunal notes that the EPO encouraged the complainant to file a complaint with the Tribunal in the last paragraph of the letter of 11 April 2013 but now challenges its receivability.

2. Before considering the issue of receivability, one procedural issue should be addressed. On 3 May 2012 the complainant filed another complaint before the Tribunal, her third complaint, in which she raises several issues including the lawfulness of decision CA/D 15/12. She requests that her fourth complaint be joined with her third complaint. However, it is appropriate to deal with them separately because the legal issues raised are sufficiently different to warrant their separate consideration. No order joining the complaints should be made.

3. The argument advanced by the EPO on the question of receivability is comparatively straightforward. The point made is that decision CA/D 15/12 involved the establishment of a regulatory legal framework which required implementation by the President through individual decisions. The EPO refers to a line of judgments of the Tribunal to the effect that a complainant can impugn a decision of this character only if it directly affects her or him. A general decision cannot be impugned by a staff member unless and until it is applied in a manner prejudicial to her or him. The EPO refers to a number of authorities including a comparatively recent judgment, Judgment 3291, under 8. The complainant seeks to answer this argument in her rejoinder

by saying that she was directly and adversely affected by the decision. However she does not point to any decision implementing CA/D 15/12 directly affecting her either after the decision was made on 26 October 2012 or during the period of its retroactive operation. That decision concerned the transitional measure applicable to individuals already in receipt of an invalidity pension at the time when the new scheme came into effect on 1 January 2008. The complainant was not in the class affected by the transitional measure. Consequently, the EPO's argument should be accepted and the complaint should be dismissed as irreceivable.

4. In these circumstances, it is unnecessary to deal with an issue between the complainant and the EPO about the complainant's costs. Consistent with the general approach of the Tribunal, no costs order should be made in the complainant's favour given that her complaint should be dismissed. The EPO seeks a costs order against the complainant on the basis that she continued to pursue her complaint after Judgment 3291 was drawn to her attention in correspondence from the EPO's lawyers in May 2014. The Tribunal concludes that such an order should not be made in the circumstances of the case, particularly where the complainant had commenced proceedings (on 8 July 2013) before the relevant decision had been published (5 February 2014).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ