**B. J. (No. 2), R. S. (No. 2),
Á. L. (No. 2), P. L.
and G. P.**

**P. (No. 3), P. (No. 8), B. (No. 4),
H. (No. 3) and S.**

v.

EPO

122nd Session **Judgment No. 3691**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr R. B. J. (his second) on 5 May 2011, Mr M. U. R. S. (his second) on 17 May, Mr Á. Á. L. (his second) and Ms M. P. L. on 20 May (her complaint was corrected on 24 June) and Mr J. G. P. on 21 May, the EPO's single reply of 20 September, the complainants' rejoinder of 2 December 2011 and the EPO's surrejoinder of 16 March 2012;

Considering the complaints filed against the EPO by Mr A. P. (his third) and Mr L. P. (his eighth) on 6 May 2011, Mr J. B. (his fourth) on 21 May 2011, and Ms D. H. (her third) and Mr D. S. on 25 May 2011, the EPO's single reply dated 19 September 2011 and corrected on 6 October 2011, the complainants' rejoinder of 18 January 2012 and the EPO's surrejoinder of 27 April 2012;

Considering the applications to intervene filed by 167 EPO staff members between May and September 2011 and the EPO's comments thereon of 23 December 2011;

Considering the applications to intervene of Mr M. A., Mr T. D., Mr W. G. and Mr R. T. K. of 12 January 2012 and the EPO's comments thereon of 2 February 2012;

Considering that between April and September 2015 Mr H. S., Mr R.-M. M., Mr B. R., Mr R. K., Ms N. H.-H., Ms C. F. and Mr H. P. informed the Registrar of the Tribunal in writing that they wished to withdraw their application to intervene, and that the EPO had no objection to the withdrawals;

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 case may be summed up as follows:

The complainants challenge the salary deductions made following their participation in strikes.

Throughout 2006 and in early 2007 strikes were organised at the European Patent Office, the EPO's secretariat, against the planned introduction on 1 January 2007 of a new reporting method known as PAX (Productivity Assessment for Examiners). The complainants participated in these strikes. At the time of the facts, they all worked full-time, except Ms H. and Mr S., who worked at the rate of 80 per cent.

By a communiqué dated 22 December 2006 the President of the Office informed all EPO staff that after examining an appeal filed in 2006 the Internal Appeals Committee (IAC) had concluded that the composition of the 2006 General Advisory Committee (GAC) was invalid. He had therefore decided that the introduction of the PAX reporting method would be re-submitted for consultation by the 2007 GAC.

In February 2007 the complainants, as well as 787 other staff members, filed generic appeals against the salary deductions made following strike days. The complainants contested the very principle of such deductions and their method of calculation. Mr P., Mr P. and Mr B. claimed reimbursement of the amounts deducted with interest, moral

damages, as well as costs. Ms H. and Mr S. also contested the basis for the calculation of the deductions. Mr B. J., Mr R. S., Mr Á. L., Ms P. L. and Mr G. P. claimed reimbursement of the amounts deducted in June 2006, November 2006, December 2006 and January 2007, with interest, as well as moral damages and costs.

On 21 March 2007 the complainants were informed that their appeals had been referred to the IAC for an opinion. A hearing was held on 15 June 2010, based on a test case procedure with test appellants, including Mr B. J., Ms H. and Mr S. The IAC issued its opinion on 8 December 2010. It unanimously recommended dismissing the test appeals as irreceivable in part, as only the claims for reimbursement of the deductions made over the last three months before the date of filing of the appeals were receivable. A majority recommended dismissing the test appeals as unfounded. A minority recommended reimbursing part of the salary deductions with interest and awarding 500 euros in costs. The IAC unanimously recommended that the claim for damages on account of excessive delay made by Ms H. be allowed and that she be awarded 250 euros on that account.

By a letter of 9 February 2011 Mr B. J. was informed of the decision of the Vice-President in charge of Administration (VP4), acting by delegation of power from the President, to reject his appeal as irreceivable in part and entirely unfounded. That is the decision impugned by Mr B. J. Mr R. S., Mr Á. L., Ms P. L. and Mr G. P., who were not test appellants, impugn the decision contained in a letter dated 25 February 2011 informing them that VP4 had also decided to reject their appeals as unfounded unless they requested continuation of the proceedings in their case or decided to refer the matter to the Tribunal. All five ask the Tribunal to quash the impugned decisions and to order the reimbursement of the amounts deducted due to participation in strike days, with interest. They seek a total of 4,000 euros in moral damages, including 1,000 euros for the excessive delay in the proceedings, as well as 1,000 euros in costs. They ask that, in accordance with Article 11 of its Rules, the Tribunal request the former and current Vice-President in charge of Legal and International Affairs

(VP5) to testify in writing with respect to their allegations of abuse of power.

The EPO submits that the complaints of Mr B. J., Mr R. S., Mr Á. L., Ms P. L. and Mr G. P. are entirely unfounded. It contests the necessity of the request for written statements from the former and current VP5.

Mr P., Mr P., Mr B., Ms H. and Mr S. all impugn the above-mentioned decision contained in the letter of 25 February 2011 before the Tribunal. They ask the Tribunal to quash the impugned decision and to order the reimbursement of the amounts deducted due to participation in strike days. They seek moral damages under several heads as well as costs. They also ask the Tribunal to order certiorari and to give guidance as to the appropriate level of compensation for excessive delay in the proceedings.

The EPO submits that the complaints of Mr P., Mr P., Mr B., Ms H. and Mr S. are receivable only in so far as they seek to be reimbursed for the deductions made during the last three months before the date of filing their appeals, and that they are entirely unfounded.

By a letter of 26 August 2015 the EPO informed the Registry that it had taken measures to implement Judgment 3369, delivered on 9 July 2014, on salary deductions for strike actions by staff members working part-time for those complainants and interveners concerned in the present case. The EPO paid arrears and interest to those to whom the calculation method set out in Judgment 3369 was beneficial. In addition, all complainants and interveners concerned received 3,000 euros for damages and costs, even if they were not paid arrears and interest.

CONSIDERATIONS

1. A number of EPO employees went on strike throughout 2006 and the beginning of 2007 against the new reporting method "PAX" which was to be implemented on 1 January 2007. On 22 December 2006, through Communiqué No. 19, the President of the Office informed staff members that the IAC had concluded, in the context of an appeal filed in 2006, that the composition of the 2006 GAC was improper. He had

therefore decided not to implement the PAX on 1 January 2007 as his relevant previous decision regarding the PAX was based on the advice of an improperly composed GAC and was therefore unlawful.

2. In the present complaints, ten complainants and 164 interveners impugn the 9 and 25 February 2011 decisions of VP4, taken by delegated authority from the President, with regard to the internal test appeal proceedings which led to the IAC single opinion IA/16/07. The decision dated 9 February 2011 was addressed to the test appellant Mr B. J. chosen to represent the 787 generic appeals that were filed against the salary deductions made following strike days. In the decision of 9 February, VP4 rejected the test appeals against the deductions related to their strikes as irreceivable in part and unfounded in their entirety and agreed with the majority opinion of the IAC which found that there was no abuse of authority or bad faith established by the President's course of action. It was noted that the President had communicated his decision not to implement the PAX on 1 January 2007 in an expedient and diligent manner (i.e. within 11 days of receiving the IAC's opinion) and that an earlier communication date would not have ended the industrial action as the strikes continued even after the publication of Presidential Communiqué No. 19.

The decision of 25 February 2011, addressed to all other appellants, notified them that the IAC had reached an opinion, an anonymous version of which was forwarded to them, and that VP4 had decided to reject the test appeals (as noted in the 9 February decision mentioned above). They were additionally informed of the following:

> "[F]or the same reasons VP4 has also decided to reject as unfounded your own appeal in this matter, unless within one month of the receipt of this letter you request in writing continuation of the appeal proceedings in your own case. In this case you are requested to provide reasons why your case should be treated differently from the test appeals. You are further informed that, if you do not request continuation of the appeal proceedings, you may file a complaint with [the Tribunal] as set out in Article 109 [of the Service Regulations for Permanent Employees of the European Patent Office] or intervene in a complaint filed by another party to [IA/]16/07. In this case the Office will not consider your complaint as irreceivable for failure to exhaust the internal means of appeal."

3. The complainants ask the Tribunal to quash the 9 and 25 February 2011 decisions as applicable to them; order the reimbursement of the deductions applied to salaries and allowances relating to strike days under Article 65 of the Service Regulations, with interest; order an award of moral damages for the President's abuse of power, the unlawful restriction of the right to strike, undue delay in the internal procedure, and unequal treatment by the IAC; and to award costs. Some complainants also ask the Tribunal to order reimbursement of the overpaid social security premiums and seek an order of certiorari and guidance as to the appropriate level of compensation for excessive delay in the internal appeal proceedings. Complainants who were working 80 per cent part-time at the time of the strikes subordinately request the reimbursement of the salary deductions made at a rate of one-twenty-fourth instead of the one-thirtieth rate subtracted for full time employees.

4. Some complainants base their complaints on the grounds that their internal appeals before the IAC were receivable in their entirety. They assert that the President abused his authority by taking a decision based on the advice of a GAC which was later found to be improperly composed (IA/22/06). They claim that the deductions made from their salaries with regard to their participation in the strikes "may have been justified in law, but not in equity". With regard to issues of law, some complainants contest the fact that the EPO reduced the allowances payable to them but not the contributions which they had to pay into the funds. They state that the President acted arbitrarily in not also reducing the social security premiums by one-thirtieth and that in calculating salary deductions he did not take into account that some complainants were on 80 per cent part-time work and therefore were essentially "'punished' in a disproportional way if compared with full-time employees", which constitutes unequal treatment. Some complainants claim that the delegation of authority from the President to VP4 was flawed because the Act of Delegation was never published and, as it regarded an issue of "general political significance" within the meaning of this Act, VP4 had to refer the matter to the President, and therefore the decision by VP4 was taken without authority. The decision was not sufficiently reasoned as "incorporating by reference" the reasoning of

another internal appeal (IA/22/06) without making the essence of its content known constituted a formal flaw. The complainants claim that there was an excessive delay in the internal appeal proceedings, which began with the submission of their appeals at the beginning of 2007 and ended with the final decisions of 9 or 25 February 2011, and that this merits an award of damages.

5. As the ten complaints raise the same or similar issues, impugning two nearly identical decisions endorsing the same IAC opinion (IA/16/07) resulting from the test appeals, the Tribunal finds it convenient that they be joined and addressed in a single decision. The ten complaints and the 164 applications to intervene (seven interveners have withdrawn their applications) are receivable.

6. In its majority opinion regarding IA/16/07, the IAC rejected the claims regarding June and July 2006 payslips as irreceivable on the grounds that they were time-barred and rejected the remaining claims regarding the subsequent payslips as unfounded. Some complainants assert that their claims regarding the salary deductions carried out in their payslips for June and July 2006 were based on the publication of Presidential Communiqué No. 19 dated 22 December 2006, as only with that publication did they become aware that the President had endorsed the IAC's finding that the composition of the 2006 GAC was unlawful. As the decision to implement the PAX is what had prompted their strike actions, the complainants claim that the salary deductions, made as a consequence of their participation in the strikes, were not made in good faith and should be reimbursed as the strikes were rendered pointless by the unlawfulness of the decision. This claim is unfounded. The salary deductions were the necessary consequence of the complainants' participation in the strikes in accordance with the principle of payment for services rendered. The reasons for the strikes and the complainants' individual decisions to participate in the strikes are irrelevant. The deductions "merely give effect to a general rule, lawfully applied in the Organisation, which does not allow remuneration to be paid for services not rendered" (see Judgment 2516, consideration 6). The annulment of the unlawful decision to implement the PAX on 1 January 2007 was not

a relevant factor in the process which led to the impugned deductions, and the complainants' decisions to participate in the strikes were individual and personal. The deductions were made in accordance with the law and there is no reason for an equitable remedy. Moreover, it can be noted that the complainants have the right to formally contest any decision which affects them negatively by impugning it within the internal appeals system. Accordingly, the annulment of the unlawful decision did not have any bearing on the lawfulness of any of the contested deductions, nor on the time-limit for contesting their June and July 2006 payslips. The IAC and the impugned decisions were correct in finding the claims against the payslips for June and July 2006 to be irreceivable.

7. The complainants claim that the EPO breached its duty of good faith and their right to strike and that the President abused his authority. These claims are likewise unfounded. The complainants have not presented any evidence that the President acted in bad faith in deciding to implement the PAX with effect on 1 January 2007 based on the advice of the GAC which was later found to be irregularly composed. The President did not abuse his authority as he was acting within his competence both in deciding to implement the PAX on 1 January 2007 and in later deciding not to implement the PAX on that date. The President and the Staff Union became aware of the challenges to the decision to implement the PAX with the filing of internal appeal IA/22/06. However it should be noted that a pending internal appeal does not suspend the decision in question and, regardless of the outcome of the appeal, the opinion of the IAC is not binding and the President retains the right to take a final decision on the matter as she or he sees fit. The mere fact that the final decision (which in this case was not unlawful) may be unlawful does not mean that the decision was arbitrary. The claim that the employees who had planned to participate in the strikes should have been notified that the decision to implement the PAX as planned could be considered unlawful, is unfounded. Regardless, their assertion that it would have affected their decisions to participate in those strikes is belied by the fact that they continued to participate in the planned strikes even after the 22 December 2006 publication of Presidential Communiqué No. 19.

8. The claim requesting reimbursement for the overpaid social security premiums as the President acted arbitrarily in not also reducing the social security premiums by one-thirtieth is unfounded. The IAC was correct in finding that claim unfounded. The Tribunal also agrees that the social security contributions could not have been reduced. Employees on strike must be considered to be in service with regard to social security coverage and the days of strike are counted as regular days with regard to the accumulation of pension. Therefore, a reduction would only serve to unbalance the equilibrium between the respective rights and obligations of the employees and employer.

9. The claim regarding the President's delegation of authority to VP4 is unfounded. Contrary to the complainants' submissions, publication is not a requirement for the lawfulness of acts of delegation unless otherwise provided by the relevant rules. It is enough that the delegation be declared and, when a complainant calls for proof that power has in fact been delegated to a specific person, it is a matter for the organisation to produce such proof (see Judgment 2028, consideration 8(3)). In the present case the delegation of authority was proven in the letter dated 24 March 2011. The complainants assert that their situation falls under the provisions of Article 6 of the Act of Delegation, as amended by the decision of 19 July 2010, which states that "[i]n case the decision may have a general political significance, the person vested with the authority to decide shall refer the matter to the President of the Office". The Tribunal finds that, as the EPO was bound to make salary deductions with regard to strike days, the decision cannot be considered to have a general political significance, and, therefore, VP4 was acting within his power to decide.

10. The claim that the decision was not adequately motivated, because "incorporating by reference" the reasoning in another internal appeal (IA/22/06) without making the essence of its content known constituted a formal flaw, is unfounded. Indeed, the Tribunal observes that the content of the opinion in IA/22/06 was communicated to the staff in Presidential Communiqué No. 19. Moreover, the content of that

opinion is in any event irrelevant to the substance of the impugned decision.

11. The claim that the President did not take into account that some complainants were on 80 per cent part-time work and therefore were essentially "'punished' in a disproportional way if compared with full-time employees", which constitutes unequal treatment, is founded. This question was addressed in the complaint leading to Judgment 3369, in which the Tribunal found in considerations 7 to 10 that:

> "7. […] [T]he decision taken by the EPO to apply a deduction of one-twenty-fourth was due to the calculation, based on arithmetically irreproachable principles, that the complainant had absented herself, while participating in an eight-hour strike, for a period equivalent to 1.25 of her average working day, having regard to the specific terms of her part-time employment regime. In so doing, the EPO sought to implement an approach based on proportionality which led it to conclude, as stated in its submissions, that the remuneration of an employee who is absent due to a strike must be reduced by an amount equivalent to the duration of such absence as a proportion of the employee's normal working hours.
>
> Such an approach is certainly quite understandable in terms of equity and expediency. However, the Tribunal is bound to observe […] that this approach is legally inconsistent with the applicable statutory provisions, which are based on a different perspective in this regard.
>
> 8. Article 65 of the Service Regulations, concerning the '[p]ayment of remuneration', which establishes inter alia the principle of monthly payment, stipulates in subparagraph 1(b) that '[w]here remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths'.
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> This provision thus establishes the applicability to EPO employees of the 'thirtieths' or 'indivisible thirtieths' rule applied in many States and international organisations, according to which deductions made from an employee's remuneration in the event of absence – for instance in the event of a strike – are not calculated on a basis that is strictly proportionate to the duration of the employee's absence but on the basis of lump-sum fractions of one-thirtieth per day.
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> This rule precludes, by definition, the possibility of deducting an amount equivalent to a fraction other than a full number of thirtieths from the remuneration of an employee who has been absent on account of participation in a strike.

> 9. In the case of a part-time employee, the aforementioned provision of Article 65, subparagraph 1(b), must of course be applied in conjunction with the provisions of Article 56, paragraph 4, which stipulates that:
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> > 'A permanent employee shall be entitled, during the period for which he is authorised to work part-time, to remuneration proportionate to the working time authorised. He shall, however, continue to receive in full any dependants' allowances and education allowances to which he is entitled.'
>
> The thirtieths to be withheld in the event of absence for participation in a strike of an employee working part time must therefore be calculated on the basis of the foregoing definition of remuneration – and not, for instance, on the basis of the remuneration payable to a full-time employee.
>
> 10. It follows from the foregoing that the Administration of the EPO committed an error of law when it decided in this case to apply a deduction of one-twenty-fourth instead of one-thirtieth to the remuneration payable to the complainant."

The Tribunal notes that according to Judgment 3369 and the case-law cited therein, allowances are treated as basic salary with regard to deductions in the event of a strike. Consequently, the relevant impugned decisions (to the extent that the deductions exceeded the one-thirtieth rate of reduction for employees working at 80 per cent) must be set aside and the affected complainants and interveners who are in the same situation of fact and law are entitled to a reimbursement of the amount exceeding the one-thirtieth for every day of strike plus interest at 5 per cent per annum from the date of deduction to the date of payment for the months of November and December 2006, and January 2007. These complainants and interveners are also entitled to an award of moral damages for the unlawful deductions of part of their remuneration due to absences involving the exercise of the right to strike, which the Tribunal sets at 1,200 euros each.

12. Regarding the claim for damages deriving from the length of the internal appeal procedure, the complainants base their request on the assertion that not awarding all appellants moral damages for the delay is unequal treatment. While it is true that the IAC only awarded moral damages to Ms H., it must be noted that she was the only appellant who submitted a claim for damages before the IAC when she realized that her appeal would not be completed within a reasonable

time, thus she was obviously in a different position than the other appellants. One of the complainants, Mr B., asserts that he had also raised this issue before the IAC but he has not proven that such a claim was officially submitted to the IAC and in fact that assertion is contradicted by the document signed by the then Chairman of the IAC, dated 28 February 2012, stating inter alia that "according to the minutes taken and our recollection of the hearing of 15 June 2010, we can hereby confirm that in the present case only the test-appellant [Ms H.] requested moral damages for the undue length of the procedure. The other test-appellants did not." But, as noted in the Tribunal's case law, it is impractical for complainants to submit specific claims (in their appeals) against delays in the internal appeal procedure as they cannot know when the procedure will finish (see Judgments 2744, consideration 6, and 3429, consideration 4). However, the Tribunal considers that in the interest of justice and expediency, it would be appropriate for the IAC and the President to evaluate *ex officio* the length of the internal appeal proceedings and consider that in the possible award of moral damages. This is particularly so in cases which would otherwise be considered resolved internally but instead continue as complaints before the Tribunal for this one issue. In the present case the internal appeal proceedings lasted four years, the appeals were not particularly complex though the number of appeals that needed to be evaluated prior to the decision to consider test appeals was high (787 appeals), the effect that the delay had on the complainants, beyond the lack of legal certainty that such a delay imposes, was not significant, and the appeals themselves were largely unfounded. Having regard to the above, the Tribunal will award damages in the amount of 800 euros per complainant and per intervener for the egregious delay. As the complaints succeed in part, and as the complaints filed by the employees who worked 80 per cent part-time were more successful, the complainants who worked at 80 per cent are entitled to costs which the Tribunal sets at 1,000 euros per complainant and the remaining complainants are entitled to costs which the Tribunal sets at 400 euros each. Of the initial 171 applications to intervene, seven have been withdrawn. The remaining interveners, whose names are listed in the Annex to this Judgment and who are in a similar legal situation to that of the complainants, are entitled to the same relief granted to

the complainants in this judgment, except with respect to costs (see Judgments 2985, consideration 28, and 3571, consideration 10).

DECISION

For the above reasons,

1. The impugned decisions regarding payslips for the months of November and December 2006, and January 2007, to the extent that they exceeded the one-thirtieth rate of reduction for employees working at 80 per cent part-time, are set aside.

2. The EPO shall reimburse each of the complainants and interveners working 80 per cent part-time the amount exceeding the one-thirtieth rate of reduction for each day of strike plus interest at 5 per cent per annum from the date of reduction to the date of payment for the months of November and December 2006, and January 2007.

3. The EPO shall pay 2,000 euros in moral damages to the complainants (and interveners) who worked 80 per cent part-time, for the unlawful deductions of part of their remuneration and for the egregious delay in the internal appeal proceedings.

4. The EPO shall also pay each complainant who worked 80 per cent part-time costs in the amount of 1,000 euros.

5. The EPO shall pay each complainant (and interveners) who worked full-time moral damages in the amount of 800 euros for the egregious delay in the internal appeal proceedings.

6. The EPO shall pay each complainant who worked full-time costs in the amount of 400 euros.

7. All other claims are dismissed.

8. The withdrawal of suit by seven interveners is hereby recorded.

In witness of this judgment, adopted on 4 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

PATRICK FRYDMAN

DRAŽEN PETROVIĆ

ANNEX
LIST OF INTERVENERS REFERRED TO IN CONSIDERATION 12 OF THIS JUDGMENT AND IN POINTS 2, 3 AND 5 OF THE DECISION

Names removed.