Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

d. l. F. d. A. (No. 2)

v.

EPO

125th Session **Judgment No. 3963**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. d. l. F. d. A. against the European Patent Organisation (EPO) on 7 April 2014 and the EPO's reply of 4 August 2014, the complainant having declined 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 hold oral proceedings, for which neither party has applied;

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

The complainant alleges that the Organisation has breached its duty of care in relation to possible taxation of the invalidity allowance.

On 14 December 2007 the Administrative Council of the EPO adopted decision CA/D 30/07, amending the rules on invalidity with effect from 1 January 2008. As from that date, permanent employees under 65 years of age who could no longer carry out their duties owing to invalidity were to be assigned to non-active status. As a result, they would no longer receive an invalidity pension, which was subject to national income tax, but a tax-exempt invalidity allowance. Pursuant to that decision, the complainant, who had stopped working in 2006 on account of his invalidity and was therefore drawing an invalidity

pension, was assigned to non-active status and granted the new allowance.

On 18 October 2007 the complainant had made enquiries with the Staff Committee about his status and the information to be given to the local tax authorities as proof that this allowance was tax-free. As announced in an e-mail from the EPO of 19 October 2007, the complainant received a first information note dated 14 January 2008 explaining his new administrative status and the nature of the new invalidity allowance, which specified that the latter would not be subject to national income tax. On 30 January 2008 he received a tax exemption certificate in respect of this allowance, for submission to the national tax authorities.

In a letter of 6 February 2008 the complainant again asked what reply he should give to the national tax authorities when they asked him to pay income tax on the invalidity allowance. In a letter of 12 March 2008 the EPO reiterated that the invalidity allowance was not subject to national taxation and that, if income tax were charged, it would defend that position and provide the complainant with all the requisite support.

In the event, between 2008 and 2010 the tax authorities of some member States took the opposite view that the new allowance was taxable.

It was against this background that on 4 August 2009 beneficiaries of the invalidity allowance received a letter from the Organisation inviting them to report any problems encountered with their national tax authorities and assuring them that it would provide them with support. The complainant enquired about the nature of this support and, on 17 December 2009, he received the reply that in January 2010 the Organisation intended to send a further information note on the subject to all persons drawing the invalidity allowance. This second note was finally sent on 20 May 2010, but in the meantime, on 7 May 2010, the complainant had filed an internal appeal asking the EPO to "honour its duty of care and explain clearly the steps to be taken to declare the invalidity [allowance] to the tax authorities", as well as the steps to be taken if those authorities disagreed with the Organisation about the non-taxation of the allowance. Despite the information provided in the note

of 20 May, on 10 June 2010 the complainant decided to maintain his internal appeal, which was forwarded to the Internal Appeals Committee.

After hearing the parties, on 26 November 2013 the Committee delivered its opinion in which the majority of its members recommended that the appeal should be dismissed as irreceivable, because no decision adversely affecting the complainant had been taken, and as unfounded. By a letter of 5 February 2014, which constitutes the impugned decision, the President of the European Patent Office, the EPO's secretariat, decided to follow that recommendation.

The complainant asks the Tribunal to set aside the impugned decision, to order the EPO to redress "by all possible means" all the injury which, he says, he has suffered; to order it to provide him with sufficient support and to take the requisite steps to avoid any future moral or financial injury resulting from the introduction of the new rules on invalidity; and to order it pay him compensation in the amount of 25,000 euros for moral injury, including that caused by the length of the proceedings, procedural expenses and a lump sum of 5,000 euros for costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable, first because it is not directed against an act with an adverse effect and, secondly, because the complainant has not exhausted the internal means of redress, since some issues exceed the scope of the internal appeal. Subsidiarily, it submits that the complaint is unfounded.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of 5 February 2014 by which the President of the Office dismissed his internal appeal, which he had based on the EPO's duty of care to provide him with the relevant information regarding national tax requirements in respect of the new system of invalidity benefits.

2. As the facts set out above show, before the internal appeal was filed the EPO replied to a number of the complainant's queries.

In his internal appeal of 7 May 2010 the complainant broadly asked the EPO to explain "clearly" the steps to be taken to declare the invalidity allowance to the tax authorities, as well as the steps to be taken if those authorities disagreed with the Organisation about the non-taxation of the allowance. On 20 May 2010, after his internal appeal had been filed, the EPO sent him an information note explaining that the issue of whether or not the allowance was taxable was a separate issue to that of whether there was an obligation to declare it, which depended on national law. The note also explained how to declare the invalidity allowance where this was required under national law. The EPO further invited the persons concerned to report any problems that they encountered with national tax authorities and explained the kind of legal and financial support they would receive. If necessary, the EPO, assisted by a tax adviser, would help the persons concerned to appeal, request a stay of execution or reduce any advance payments. Lastly, the EPO gave the assurance that if the payment of tax could not be avoided despite appeal proceedings, it would pay an advance and would ultimately defray the portion of taxes directly related to national income tax on the invalidity allowance in the event that an appeal proved unsuccessful. In an e-mail of 10 June 2010 the complainant simply stated that, in light of the contents of the note of 20 May 2010, he was maintaining his appeal, without indicating in what way he considered the information to be inadequate.

In his complaint the complainant mentions a letter of 2 September 2013 which, he says, at last provided "clear instructions", which would suggest that he regarded the previous ones as unclear. However, this letter merely expands on the general instructions that had already been given, and if the complainant considers it to be clearer, this is presumably because it answers the specific questions he had raised.

Having regard to the way in which the questions were formulated, the Organisation supplied answers which may be deemed adequate. The Tribunal therefore finds that, in the circumstances, the EPO honoured its obligation to provide information and its duty of care. Indeed, as the Tribunal observed in Judgment 3213, under 7, whilst international organisations have a duty of care towards their employees and must

provide clear rules and regulations as well as clarifications of such when requested, they cannot be solely responsible for every situation stemming from a misunderstanding of those rules.

It follows that the claim for the setting aside of the decision taken by the President of the Office on 5 February 2014 dismissing the complainant's internal appeal must be dismissed as unfounded, without there being any need to rule on its receivability.

3. The complainant asks the Tribunal to order the Organisation "to redress by all possible means the moral and financial injury which [he] has suffered as a result of the introduction of the new rules on invalidity".

In fact he considers that the new rules on invalidity adopted on 14 December 2007 by decision CA/D 30/07 are unlawful in that they infringe upon his acquired right to receive an invalidity pension and the General Advisory Committee was not consulted about the text adopted by the Administrative Council. He also considers that this decision has several adverse consequences for him, in particular the fact that the invalidity allowance must be declared and that, although the Organisation will defray any national tax that may be due, the tax base of the following year will increase.

In its reply the Organisation takes the view that in making this request to the Tribunal, the complainant is submitting claims and pleas which were not raised in the internal proceedings and which are therefore irreceivable before the Tribunal for failure to exhaust the internal means of redress.

4. Article VII, paragraph 1, of the Statute of the Tribunal reads: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations."

In accordance with the Tribunal's case law regarding compliance with this requirement to exhaust internal means of redress, a complainant may enlarge on the arguments presented before internal appeal bodies, but may not submit new claims to the Tribunal (see, for example, Judgments 3420, under 10, and 3626, under 4).

The very succinct internal appeal filed on 7 May 2010 had but one purpose: the complainant simply asked the Organisation "to honour its duty of care and to explain clearly the steps to be taken to declare the invalidity [allowance] to the tax authorities, as well as the steps to be taken if those authorities disagreed with the [Organisation] about the non-taxation of the [allowance]". All the debate in the internal proceedings focused exclusively on this issue.

5. In his internal appeal the complainant did not challenge the lawfulness of the new rules on invalidity, nor did he request that all possible steps be taken to offset the adverse consequences of these rules; these issues are therefore being raised for the first time in the proceedings before the Tribunal. As they are related to the complainant's inclusion in the new system of invalidity benefits, they may not be regarded as pleas in support of the sole claim presented to the Internal Appeals Committee, namely that the EPO was obliged to inform the complainant of the steps to be taken. All these arguments must therefore be rejected as irreceivable.

6. The complainant seeks an award of damages for the moral injury he suffered, on the one hand, owing to a serious breach of the duty of care and, on the other, owing to a procedural flaw stemming from a failure to consult the General Advisory Committee before the adoption of the new rules on invalidity. It follows from the findings in considerations 2 and 5, above, that these claims must be dismissed.

7. The complainant also requests compensation in the amount of 5,000 euros for the moral injury caused by the excessive duration of the proceedings which, he contends, lasted "more than [six] years". It must be noted that the duration alleged by the complainant includes phases after October 2007 when informal requests were made. However, for the purpose of determining the duration of the proceedings, the starting date must be deemed to be that on which the internal appeal was filed, namely 7 May 2010. As the date on which it was dismissed was 5 February 2014, the internal appeal proceedings lasted almost four years and not "more than [six] years". Nevertheless, the Tribunal considers that this

duration is still excessive. The EPO has not explained why it needed virtually two years as from the date on which the internal appeal was filed to submit its position thereupon. In view of the foregoing, the Tribunal finds that the complainant must be awarded moral damages in the amount of 3,500 euros for the inordinate length of the internal appeal proceedings.

8. As the complainant has succeeded in part, he is also entitled to costs, which the Tribunal sets at 500 euros. All other claims must be dismissed.

DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the amount of 3,500 euros.
2. It shall also pay him 500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ