T. (No. 45)

v.

EPO

132nd Session **Judgment No. 4431**

THE ADMINISTRATIVE TRIBUNAL,

Considering the forty-fifth complaint filed by Mr I. H. T. against the European Patent Organisation (EPO) on 11 July 2018, the EPO's reply of 19 November, the complainant's rejoinder of 21 December 2018 and the EPO's surrejoinder of 8 April 2019;

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 challenges a decision of the Administrative Council introducing new rules for employees of the European Patent Office (the EPO's secretariat) concerning the right to strike.

In June 2013 the Administrative Council adopted decision CA/D 5/13, creating a new Article 30a of the Service Regulations for permanent employees of the European Patent Office concerning the right to strike and amending the existing Articles 63 and 65 concerning unauthorised absences and the payment of remuneration. Paragraph 10 of Article 30a authorised the President of the Office to lay down further terms and conditions for the application of Article 30a, including with respect to the maximum strike duration and the voting process. Relying on that provision, the President issued Circular No. 347 containing "Guidelines applicable in the event of strike". These two texts, which entered into

force on 1 July 2013, established a new legal framework for the exercise of the right to strike at the EPO.

In August 2013, acting in his capacity as a staff member and also as a staff representative, the complainant submitted a request for review of CA/D 5/13 to the Chairman of the Administrative Council. He alleged bad faith and abuse of power on the part of the President of the Office; procedural irregularities; violations of relevant ILO Conventions and recognised principles; arbitrary and impermissible restrictions on the right to collective action as enshrined in Article 6(4) of the European Social Charter and Article 28 of the Charter of Fundamental Rights of the European Union; and breach of acquired rights and legitimate expectations. His main request was that CA/D 5/13 be set aside.

In October 2013 the Administrative Council unanimously decided to dismiss the request for review as irreceivable and, subsidiarily, as unfounded. Under the rules then in force, this was considered to be a final decision that could be challenged directly before the Tribunal. The complainant filed a complaint (his twenty-seventh) in November 2013 impugning the rejection of his request for review. However, while that complaint was pending, the Tribunal adopted Judgments 3700 and 3796, which led the EPO to withdraw numerous final decisions on internal appeals that had not been taken by the competent authority, including the decision impugned by the complainant in his twenty-seventh complaint, and to resubmit the related requests for review or appeals for a new decision. The complainant was invited to withdraw his twenty-seventh complaint, as the impugned decision no longer existed, but he refused to do so, and that complaint was subsequently dismissed in Judgment 4255 on the grounds that it was without object.

Meanwhile, the complainant's original request for review was resubmitted to the President, who was the competent authority to take a decision on it. In April 2017 the President rejected the request for review as manifestly irreceivable and the matter was then referred to the Appeals Committee for an opinion. The Committee, resorting to its new summary procedure, likewise considered the appeal to be manifestly irreceivable, on the grounds that the complainant had not established that the adoption of CA/D 5/13 had had any immediate and direct effect on him. It also found that the complainant had not substantiated his appeal, as he merely referred to submissions made in his earlier request for review and in his twenty-seventh complaint before the Tribunal.

On 30 April 2018 the Principal Director of Human Resources, acting by delegation of authority from the President, took a new final decision on the appeal. In accordance with the unanimous recommendation of the Appeals Committee, she rejected the appeal as manifestly irreceivable. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as the Administrative Council's decision CA/D 7/17 of 29 June 2017, which, amongst other things, amended the provisions of the Service Regulations governing internal appeals. He also claims moral damages in the amount of 10,000 euros and costs in the amount of 4,000 euros, and he asks the Tribunal to join this complaint with his twenty-seventh complaint.

The EPO asks the Tribunal to dismiss the complaint as irreceivable, on the basis that the complainant has no cause of action, and, subsidiarily, as unfounded.

CONSIDERATIONS

1. At relevant times, the complainant was a member of the staff of the EPO and also a staff representative. On 11 July 2018 he filed a complaint with the Tribunal. The complainant sought the joinder of this complaint with an earlier complaint, his twenty-seventh. However that earlier complaint has already been decided (Judgment 4255), so joinder is, in any event, not possible. In the present complaint he challenges a decision of 30 April 2018 of the Principal Director of Human Resources, exercising powers delegated by the President, to reject an appeal challenging the adoption by the Administrative Council of decision CA/D 5/13. The appeal was viewed as irreceivable.

2. It is unnecessary, in this judgment, to discuss in any detail the contents of CA/D 5/13. Suffice it to say that it introduced a new article, Article 30a, into the Service Regulations concerning the right to strike and amended Articles 63 and 65 concerning unauthorised absences and the payment of remuneration. The complainant's initial challenge to the decision took the form of a request for review of CA/D 5/13 directed to the Chairman of the Administrative Council. Again without detailing what occurred by way of process and the effect on that process of several judgments of this Tribunal, the request for review was ultimately

resubmitted to the President but rejected. Thereafter the matter was referred to the Appeals Committee, which concluded the appeal was manifestly irreceivable, and this led to the final administrative decision of the Principal Director of Human Resources impugned in these proceedings.

3. In his notice of internal appeal dated 27 June 2017, the complainant raised several issues about the validity of CA/D 5/13, some by reference to submissions made in another document prepared for another purpose. However, explicitly in the notice of internal appeal itself, the complainant challenged the introduction of a new provision (Article 65(1)(c) of the Service Regulations) by CA/D 5/13, which resulted in a deduction of 1/20th of the monthly salary for each working day on which a member of staff was on strike. He contended in his notice of appeal that its effect was that "staff is dissuaded from participating in a lawful strike". Plainly enough, as a member of staff, the complainant was alleging that effect on him as well as his colleagues.

4. In concluding that the internal appeal was irreceivable, the Appeals Committee rejected any suggestion that CA/D 5/13 had an immediate and adverse effect on the complainant. However the gist of the complainant's argument in relation to Article 65(1)(c) was that it had had such an effect and, at least quite clearly implicitly, on his (and his colleagues') right to strike. The Tribunal, in its Judgment 3761, consideration 14, made clear that a general decision may, in certain circumstances, be impugned if it immediately and adversely affects individual rights. The complainant's argument involved such a contention. The conclusion of the Appeals Committee that his appeal was manifestly irreceivable failed to consider this question and was thus legally flawed. Also legally flawed was the adoption of the conclusion of the Principal Director of Human Resources in the impugned decision of 30 April 2018, rejecting the complainant's appeal as manifestly irreceivable.

5. The complainant seeks an order that the decision of 30 April 2018 be set aside. Such an order should be made. He seeks an order for moral damages in the sum of 10,000 euros but makes no attempt to identify the basis on which such an amount should be awarded. This claim should be rejected. The complainant is nonetheless entitled to costs assessed in the sum of 800 euros.

DECISION

For the above reasons,

1. The impugned decision of 30 April 2018 is set aside.
2. The matter is remitted to the EPO in order that the Appeals Committee consider afresh the appeal of the complainant lodged on 27 June 2017.
3. The EPO shall pay the complainant 800 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 15 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ