H. (No. 6)

v.

EPO

132nd Session **Judgment No. 4432**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 2 September 2019, the EPO's reply of 27 January 2020, the complainant's rejoinder of 5 May and the EPO's surrejoinder of 30 September 2020;

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 the decision to accept only part of the recommendations of the Appeals Committee on his appeal against the postponement of a strike ballot by the President of the European Patent Office (the EPO's secretariat).

In June 2013 the EPO's 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 authorises the President 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". Circular No. 347 relevantly provides

that a group calling for a strike must represent at least 10 per cent of all employees and that, upon receipt of a call for strike, the Office is responsible for organising a strike ballot, which must be completed within one month from the date of the call for a strike.

On 16 May 2014 the Central Staff Committee (CSC) notified the President of the Office of a call for strike by a group of staff members calling themselves the "UNITY initiative", who had designated the CSC as their representative or interlocutor. The complainant was one of the 903 signatories. Strike actions were foreseen on 25 and/or 26 June 2014, which would have coincided with the meeting of the Administrative Council at which the extension of the President's appointment was to be discussed. On 28 May the President announced in Communiqué No. 54 that it would not be possible to organise a ballot before the beginning of July, for two reasons. Firstly, the election process for electing staff representatives (including the CSC members) was under way, and the newly-elected CSC members would not take up their functions until 1 July. In the meantime, according to the President, it was impossible to conduct meaningful discussions with representatives who would not be in a capacity to do so throughout the process. Secondly, he argued that the organisation of a strike ballot during the ongoing electoral campaign would create confusion and could create inequality between the candidates. He proposed to meet with the CSC on 4 July to discuss the matter.

In the event, the planned strike action did not take place. On 14 August 2014 the complainant lodged a request for review, challenging Communiqué No. 54 as well as CA/D 5/13 and Circular No. 347. His request for review was rejected and the matter was referred to the Appeals Committee. A hearing took place on 20 April 2018 and the Committee issued its opinion on 11 April 2019. It found that the President ought to have discussed with the designated interlocutor (that is, the outgoing CSC members) at the outset the perceived problem arising from the fact that the strike would coincide with the staff representation elections. The Committee unanimously concluded that, by failing to enter into any dialogue and effectively presenting the signatories of the UNITY initiative with a *fait accompli*, the President had taken disproportionate action and had violated their right to strike. A majority of the Committee (two of its three members) considered that this finding would provide "sufficient satisfaction" to the complainant and that no damages should be awarded for the violation of his right to strike, whereas the third member considered that an award of at least 3,000 euros in moral damages

would be appropriate. The Committee unanimously recommended an award of 450 euros for delay.

By a letter of 12 June 2019, the Vice-President of Directorate-General 4 (DG4), acting by delegation of authority from the President, informed the complainant that she had decided to allow his appeal in part. Specifically, she accepted the Appeals Committee's unanimous recommendation to award him 450 euros in moral damages for delay, as well as the majority's recommendation not to award damages for breach of the right to strike, and rejected his remaining claims. That is the impugned decision.

The complainant asks the Tribunal to set aside Circular No. 347 and CA/D 5/13 *ab initio*. Alternatively, he requests that specific provisions of those texts, as detailed in his internal appeal, be amended so as to ensure that they conform to relevant ILO Conventions and to Article 4 of the European Social Charter and Article 28 of the Charter of Fundamental Rights of the European Union; that certain provisions that he views as disproportionate, arbitrary and/or ill-founded be deleted or amended; that the Tribunal clarify whether the wording of Circular No. 347 requires or implies that there must be a "legitimate interlocutor" in the event of a call for strike; and that redress be granted for breach of the acquired rights and legitimate expectations of EPO staff. He claims moral damages in the amount of 10,000 euros for breach of his right to strike in connection with the UNITY initiative and for "taking away his fundamental right to freedom of association"; a further award of moral damages in respect of the duration of the procedure; and costs in the amount of 500 euros.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. In 2013 the Administrative Council of the EPO, by decision CA/D 5/13 of 27 June 2013, amended the Service Regulations to add Article 30a concerning the right to strike and related changes to Articles 63 and 65 concerning directly or indirectly the reduction of remuneration when a staff member was absent from work or on strike. These changes were to take effect, and did, on 1 July 2013. On 28 June

2013 the President promulgated a circular, Circular No. 347, entitled "Guidelines applicable in the event of strike", again effective 1 July 2013.

2. It is desirable to make one general observation at the outset and before considering the merits of the pleas. In these proceedings the complainant seeks relief that, in substance, involves a declaration that CA/D 5/13 and Circular No. 347 are each unlawful and that each should be set aside. As to the Circular, the Tribunal is satisfied, having regard to its case law and its Statute, that it has jurisdiction to declare the Circular unlawful and set it aside (see, for example, Judgments 2857, 3522 and 3513). The position is not so clear in relation to CA/D 5/13 which, if it were set aside, would likely have the legal effect of setting aside current (at least as at the time the proceedings in the Tribunal were commenced) provisions of the Service Regulations. While the Tribunal can examine the lawfulness of provisions of a general decision (see, for example, Judgments 92, consideration 3, 2244, consideration 8, and 4274, consideration 4), whether it has jurisdiction to set aside a provision of the Service Regulations is a significant legal question on which the Tribunal's case law is unclear. It should be resolved in an appropriate case by a plenary panel of the Tribunal constituted by seven judges, which is not presently possible.

3. In Judgment 4430, adopted earlier in this session, the Tribunal determined that Circular No. 347 was unlawful and set it aside. Accordingly, insofar as the complainant raises this question in these proceedings, it is now moot. Indeed, in some respects, the complainant's pleas proceed on the basis that Circular No. 347 was lawful but not followed.

4. The complainant was a member of the staff of the EPO at relevant times. On 16 May 2014, the President received a call for strike proposed by just over 900 staff members proposing strike action on 25 and/or 26 June 2014. On 28 May 2014 the President issued Communiqué No. 54 indicating, in substance, the Office would not conduct a ballot within the short-term, giving reasons and concluding by saying "[...] the modalities of a strike ballot can only be discussed from beginning of July".

5. On 14 August 2014, the complainant filed a request for review of Communiqué No. 54, Circular No. 347 and CA/D 5/13. This request was rejected by the President on 15 October 2014. An internal appeal ensued, the Appeals Committee published its opinion on 11 April 2019 and by decision dated 12 June 2019 the Vice-President of DG4, acting by delegation of power from the President, allowed the appeal but only in part. This is the decision impugned in these proceedings.

6. It is necessary to identify what is and what is not in issue in these proceedings. The Vice-President of DG4 fairly clearly accepted in the impugned decision the conclusion of the Appeals Committee that the postponement of the strike ballot was unlawful. However no moral damages were awarded with the Vice-President adopting the view of the majority of the Committee that allowing the appeal in part "itself provided sufficient satisfaction". Implicitly, she rejected the general challenge to the lawfulness of Circular No. 347 and CA/D 5/13.

7. For reasons which will be apparent shortly, it is unnecessary to analyse in detail the reasoning of the Appeals Committee, effectively adopted by the Vice-President, why the decision to postpone the strike ballot was unlawful. Suffice it to note the reasoning addressed the interaction of the obligations arising under paragraph 3 of Circular No. 347 in relation to the timing of the ballot and the general powers of the President derived from the European Patent Convention and the proportionality of the President's action. At that time, the parties, and the President in particular, were proceeding on the basis that Circular No. 347 was lawful and operative and the President's conduct must be evaluated on the same assumption. Even if, legally, the provision by reference to which the President was acting (or not acting) had no effect and thus could not be contravened, his conduct involved an abuse of power.

8. It is unnecessary because fundamentally the jurisdiction of the Tribunal is to address alleged non-observance of the terms of appointment of a member of the staff of an international organisation or the non-observance of the Staff Regulations "as are applicable to the case" (Article II of the Tribunal's Statute). If non-observance of a Staff Regulation (or other applicable normative legal document) is conceded before the proceedings in the Tribunal are commenced (in this case non-observance of paragraph 3 of Circular No. 347), there is no justiciable

issue about non-observance for the Tribunal to determine. At least ordinarily, the reasons for the concession are irrelevant to the issue of non-observance.

9. A qualification to the observations in the preceding consideration is that even in the face of conceded non-observance, there may remain a justiciable issue about the appropriate relief or remedy. In the present case the complainant initially sought and still seeks moral damages. In his brief he seeks 10,000 euros moral damages "for depriving [him] of his fundamental human right to strike and taking away his fundamental right to freedom of association". But he was not deprived of the right, at least in its entirety. There was only a delay in taking a procedural step which may have led to a strike in which the complainant would have been involved. At best for the complainant, the facts reveal the EPO failed to comply with paragraph 3 of Circular No. 347 notwithstanding that it was bound by the rules it had itself issued until it amended or repealed them (see, for example, Judgments 963, consideration 5, and 3883, consideration 20). Putting it this way is not to suggest that the non-observance was trivial. The Organisation had put in place highly contentious provisions concerning a matter of fundamental importance, namely the right to strike. It could be expected that all elements of those provisions would be followed to the letter unless there was some insuperable reason for not doing so. In this case, there was not. The President acted unilaterally and arbitrarily in breach of the scheme the Organisation had adopted and, in any event, his conduct involved an abuse of power in that he purported to exercise a power which he did not have. The complainant is entitled to moral damages which are assessed in the sum of 6,000 euros.

10. The complainant raises an issue about the appropriate moral damages for the delay, of over four years, in resolving his internal appeal. He was granted 450 euros by the Organisation. This amount is inadequate having regard to the subject matter of the internal appeal, its importance not only to the complainant but more generally and the length of the delay. An appropriate amount is 2,000 euros.

11. Additionally, the complainant is entitled to an amount for costs, for which the Tribunal will award the sum of 500 euros that he claims.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 8,000 euros as moral damages, from which the amount of 450 euros awarded in the impugned decision shall be deducted if already paid.

2. The EPO shall pay the complainant 500 euros costs.

3. All other claims are dismissed or are moot.

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