H. (No. 7)

v.

EPO

132nd Session **Judgment No. 4435**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 20 December 2019, the EPO's reply of 19 May 2020, the complainant's rejoinder of 6 June and the EPO's surrejoinder of 13 October 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, who is a former permanent employee of the European Patent Office, the EPO's secretariat, challenges the deductions from his remuneration that were made in respect of his absences for strike participation as well as the lawfulness of the general normative decisions on which those deductions were based.

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. As a result of the amendment of Article 65, the salary deduction for absence due to participation in a strike was set at 1/20th of the monthly remuneration per day of absence, and the same deduction rate was applied to

unauthorised absences. Until then, a deduction of 1/30th per day had been applied in both cases.

Paragraph 10 of the new Article 30a of the Service Regulations 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". CA/D 5/13 and Circular No. 347 entered into force on 1 July 2013, establishing a new legal framework for the exercise of the right to strike at the EPO.

The complainant participated in strikes in October 2013 (one full day) and December 2014 (one full day and three half-days). In December 2013 and March 2015 he lodged requests for review challenging the salary deductions made in respect of his absences for strikes as well as the general decisions on which those deductions were based, namely CA/D 5/13 and Circular No. 347. His requests for review were rejected as unfounded and the matter was referred to the Appeals Committee for an opinion. As numerous similar appeals had been filed, the Appeals Committee joined them and resorted to its "test appeal" procedure. The complainant was selected as one of the test appellants. His request for an oral hearing was denied and the Appeals Committee dealt with the appeals solely on the basis of written submissions. It issued its opinion in August 2019.

The Appeals Committee considered that the appellants could only challenge the underlying general decisions to the extent that they had been applied to them. In other words, it considered that the provisions of CA/D 5/13 and Circular No. 347 which were directly related to the contested salary deductions could be challenged, but not the other provisions of those texts. So far as is relevant to the present complaint, the majority of the Committee (two of its three members) found that the 1/20th deduction rate could not be considered excessive, disproportionate or arbitrary, but represented an approach which, "overall", was not unfair. The fact that the same rate was applied to unauthorised absences did not mean that absence for strike action was equated with unauthorised absence. Moreover, given that the loss to the employer, in terms of loss of labour, was the same in both cases, it was not arbitrary to apply the same deduction rate. They recommended that the appeals be rejected as unfounded and that no costs be awarded. The third member

of the Committee, however, considered that the 1/20th rate was contrary to the principle of payment for services rendered, because in months comprising more than 20 working days an employee could potentially be deprived of up to three days' remuneration for days actually worked. The Appeals Committee unanimously recommended awarding damages for delay in the proceedings.

In a decision of 9 October 2019, the Vice-President of Directorate-General 4 (DG4), by delegation of authority from the President, rejected the complainant's appeal as unfounded, in accordance with the majority opinion of the Appeals Committee, but awarded him 450 euros in moral damages for delay. That is the impugned decision.

The complainant asks the Tribunal to set aside CA/D 5/13 and Circular No. 347 *ab initio* and to order the EPO to refund him the amounts deducted from his remuneration in excess of those that would have been deducted prior to the amendment of Article 65 in respect of his absences for strike participation, with interest. He claims moral damages in the amount of 800 euros for breach of his acquired rights as well as 1,000 euros for offending his dignity as a staff member, for procedural flaws in the internal appeal proceedings and for violation of his right to strike. He also seeks moral damages in respect of the delay in the procedure, and costs in the amount of 500 euros. Alternatively, he asks the Tribunal to order the withdrawal of the parts of CA/D 5/13 and Circular No. 347 relating to the excessive salary deductions.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part and unfounded for the remainder.

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 make 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 took effect on 1 July 2013. On 28 June 2013 the President of the Office 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.

4. However, the complainant impugns the two specific decisions to deduct amounts from his salary which are discussed shortly. Those decisions were individual decisions. Accordingly and consistent with the Tribunal's existing case law, in challenging those individual decisions the complainant can challenge the general decision upon which the individual decisions are based and, in this particular case, the application of an amended statutory rule allegedly in breach of the complainant's right to strike (see, for example, Judgment 2089, consideration 2).

5. It is desirable to set out the terms of Articles 63 and 65 of the Service Regulations, as amended by CA/D 5/13.

Article 63 relevantly provided:

"**Unauthorised absence**

(1) Except in case of incapacity to work due to sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior. Any unauthorised absence which is duly established shall lead to a deduction of the remuneration of the permanent employee concerned pursuant to Article 65(1)(d).

[...]"

Article 65 relevantly provided:

"**Payment of remuneration**

(1) (a) Payment of remuneration to employees shall be made at the end of each month for which it is due.

(b) Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths and

- where the actual number of days for which pay is due is fifteen or less, the number of thirtieths payable shall equal the actual number of days for which pay is due;
- where the actual number of days for which pay is due is more than fifteen, the number of thirtieths payable shall equal the difference between the actual number of days for which pay is not due and thirty.

(c) Notwithstanding the provisions of (b), where remuneration is not payable in respect of a complete month owing to participation in a strike, the monthly amount shall be divided into twentieths to establish the due deduction for each day of strike on a working day.

(d) Notwithstanding the provisions of (b), where remuneration is not payable in respect of a complete month owing to unauthorised absence, the monthly amount shall be divided into twentieths to establish the due deduction for each day of unauthorised absence on a working day.

(e) Where entitlement to any of the allowances provided for in Article 67 commences at or after the date of entering the service, the employee shall receive such allowance as from the first day of the month in which such entitlement commences, provided that any request for the allowance is submitted within six months of the date on which entitlement commences, unless otherwise provided in these Regulations. If an allowance is requested after expiry of the above six-month period, it shall be granted retroactively but only for the six months preceding the month in which the request was submitted, except in a duly substantiated case of force majeure. On cessation of such entitlement the employee shall receive the sum due up to the last day of the month in which entitlement ceases.

> (f) All permanent employees in receipt of an allowance shall inform the President of the Office immediately in writing of any change which may affect their entitlement to that allowance.
>
> [...]"

6. Article 63 as amended prohibited a member of staff from being absent without prior permission (unless incapacitated by sickness or accident) and provided that an unauthorised absence would result in a deduction of remuneration. Article 65 as amended created the mechanism for implementing the deductions spoken of in Article 30a and Article 63. Insofar as a strike is concerned, the deduction is for "each day of strike on a working day", as it also is, in the same amount, for "each day of unauthorised absence on a working day".

7. The complainant was a member of the staff of the EPO at relevant times. He participated in a one-day strike in October 2013 and a one-day strike in December 2014. Also in that latter month, he participated in three half-day strikes. Subsequently a deduction was made of 1/20 of his monthly remuneration for each of the one-day strikes and 1/40 of his monthly remuneration for each of the half-day strikes. These deductions were made pursuant to Article 30a(8) and Article 65(1)(c) of the Service Regulations. The complainant unsuccessfully sought a review of the decisions to make the deductions and thereafter appealed to the Appeals Committee. His appeal, along with a number of others, was unsuccessful in that the Vice-President of DG4, by decision dated 9 October 2019 made on delegated power from the President, followed the recommendation of the majority of the Appeals Committee to reject the appeals as unfounded insofar as they were receivable. This is the decision impugned in these proceedings.

8. The complainant raises a number of issues in his pleas, some narrowly focused and some not. It is convenient to address the quite specific issue whether the deductions were lawful.

9. Employees who strike by ceasing work are deploying a tool incidental to collective bargaining to place pressure on their employer, often in the context of a dispute about preserving or improving wages and working conditions, workplace safety, dismissals and freedom of association amongst other things. It is a tool employees have to redress the imbalance of power between them and their employer. Absent a

right to strike, it is open to an employer to ignore entreaties by employees advanced collectively to consider, let alone respond to, their grievances about wages and working conditions or, additionally but not exhaustively, the other matters referred to at the beginning of this consideration. However, at least ordinarily, the price the employees pay for deploying the tool is that they forfeit the remuneration they would otherwise have received had they worked (see Judgment 615, consideration 4).

10. Having regard to the complainant's pleas, he does not appear to put in issue that by striking, an employee would, or at least might, forfeit remuneration. Indeed at one point in his pleas he seeks to characterise time participating in a strike as a form of unpaid leave. That is to say, he accepts an employee could not expect to be paid for periods when on strike. The essence of his argument is that the method of calculation adopted in Article 65(1)(c) is unlawful.

11. Central to this argument is a contention that the deduction of 1/20 of salary authorised by Article 65(1)(c) involved an arbitrary and unjustified change from pre-existing practice. That practice had involved calculating amounts to be deducted from salary by reference to 1/30 of salary for absences whether lawful (including absences on strike) or unauthorised.

12. The complainant points to a variety of calculations which establish some disadvantage arising from the application of the new methodology in circumstances referable, in particular, to the number of days in any given month and when the strike occurred. The EPO points to a more favourable outcome in applying the new methodology if a strike period included a weekend.

13. Article 65(1)(c) cannot be viewed in isolation. Its amendment did involve the alteration of a long-standing practice that, in relation to strikes and other unpaid lawful absences, any deduction of salary per day would be calculated by reference to 1/30 of the monthly salary. This methodology was discussed in Judgment 615, which concerned the EPO and strike action by staff and was delivered in public in June 1984, almost three decades before the adoption of the amendments to the Service Regulations introducing Article 65(1)(c). Those amendments

together with Circular No. 347 created a regime within the EPO which, while confirming a limited right to strike, nonetheless placed significant limitations on the exercise of that right which, at least as to Circular No. 347, was unlawful because it violated the right to strike (see Judgment 4430, also delivered in public this day). Article 65(1)(c) together with Article 65(1)(d) (adopting the 1/20 method) stand apart from the method of calculating salary deductions for other purposes (the 1/30 method).

14. The question that immediately arises, in the Tribunal's view, is whether Article 65(1)(c) is punitive. In its pleas, the EPO acknowledges that the 1/30 method would still be used to calculate salary deductions for other authorized absences which include unpaid leave on personal grounds, parental leave and family leave. The EPO argues absences on such leave include weekend days as part of, to use the EPO's expression, the absence period (because such leave must be for a minimum of 14 days), which justifies the use of the 1/30 method. But this, in the context of the present discussion, is a flawed argument. To speak of an "absence period" obscures the fact that if, for example, a member of staff was on 14 days authorized leave on personal grounds, she or he would, at least ordinarily, be absent from work for 10 working days. In relation to each of those working days 1/30 of the monthly salary is deducted. Conceptually, weekend days are days of rest for which the employer pays.

15. Moreover, if in any respect, the deduction for working days on strike could materially exceed, in aggregate, the amount a staff member would have earned had they worked, then the provision is punitive in character. The complainant has demonstrated this is so by reference to an example involving a strike for an entire month where the number of working days for that month exceeds 20 (a common occurrence). In such a circumstance, the amount deducted for working days on strike for that month by application of Article 65(1)(c) would exceed the monthly salary payable for that month.

16. While the following, of itself, does not establish Article 65(1)(c) is punitive, it is nonetheless the position that the amount deducted for each day of unauthorised absence (which is, *prima facie*, misconduct) is the same as the amount deducted for each day a member of staff is

on strike, which is entirely lawful conduct. This lends support to a conclusion that Article 65(1)(c) is punitive. The EPO relies on observations in Judgment 566, consideration 5, in which the Tribunal said: "Even where a strike is not an abuse of right an organisation would of course be entitled to make special rules on salary deductions different from the rules on absence from duty for other reasons". However, these observations cannot be taken to be a license to adopt rules in relation to salary deductions for absences on strike which are of a punitive character.

17. In the result, Article 65(1)(c) did not authorise the lawful deduction of the amounts actually deducted from the salary of the complainant for the occasions on which he went on strike.

18. A further issue raised by the complainant concerns the procedures adopted in the internal appeal proceedings. He argues that when he filed his appeals the governing procedural rules conferred a right to an oral hearing if requested. When the time came for the hearing, the procedural rules, so he argues, had been altered and deprived him of this right and the Appeals Committee acted as if this was so. These circumstances found a claim by the complainant for moral damages. But even if the complainant's analysis is correct, having regard to the subject matter of the internal appeals and the issues they raised (almost entirely legal), it is difficult to see what prejudice the complainant suffered by being restricted to written submissions. Put slightly differently, a complainant must establish the foundation for the award of moral damages (see Judgments 4231, consideration 15, and 4147, consideration 13). As the complainant has singularly failed to do so in this case, his claim for moral damages on this basis will be dismissed.

The complainant also seeks moral damages for the delay in the internal proceedings. He was awarded 450 euros for the delay. The Tribunal is satisfied this is adequate.

19. In circumstances where the deduction actually made for specified conduct was unlawful under the subsisting Service Regulations, it is appropriate to apply the pre-existing Service Regulations (see Judgment 365, consideration 4). Accordingly the EPO must reimburse the complainant the amounts deducted for the full or part working days on which he was on strike in 2013 and 2014, with interest at 5 per cent

per annum, less the amounts which could have been deducted under the Service Regulations as they existed before the amendments made by CA/D 5/13. The complainant is entitled to costs, which are assessed in the sum of 800 euros.

DECISION

For the above reasons,

1. The EPO shall reimburse the complainant the amounts deducted for the full or part working days on which he was on strike in 2013 and 2014, with interest at 5 per cent per annum, less the amounts which could have been deducted under the Service Regulations as they existed before the amendments made by CA/D 5/13.
2. The EPO shall pay the complainant 800 euros costs.
3. All other claims are dismissed or are moot.

In witness of this judgment, adopted on 22 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