

**H. (No. 8) and R. (No. 11)**

**v.**

**EPO**

**131st Session**

**Judgment No. 4385**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr W. H. H. (his eighth) and Mr L. R. (his eleventh) against the European Patent Organisation (EPO) on 27 February 2013, the EPO's reply of 26 June, the complainants' rejoinder of 9 July and the EPO's surrejoinder of 14 October 2013;

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 are permanent employees of the European Patent Office, the EPO's secretariat, who challenge a general decision concerning tax adjustment.

On 29 June 2007, based on a proposal by the President of the Office dated 11 June 2007, the EPO's Administrative Council adopted decision CA/D 25/07, deleting Implementing Rule 42/6 to the Pension Scheme Regulations with effect from 1 January 2009. This had the effect of transferring the obligation to fund the tax adjustment paid to EPO pensioners from the EPO Member States to the EPO.

At the time the Administrative Council took its decision, the complainants were members of the General Advisory Committee (GAC). In August 2007 they lodged internal appeals with the President arguing that decision CA/D 25/07 was procedurally flawed as it was taken without the prior consultation of the GAC required by the Service

Regulations. Mr H. also argued that it was substantially flawed because it was taken upon a proposal of the Administrative Council, rather than upon a proposal from the President. On 25 September and 4 October 2007 the complainants were informed that the President considered that decision CA/D 25/07 did not affect the rights of pensioners benefitting from the tax adjustment but concerned only the relations between the Organisation and the Member States. Their appeals, as well as those of three other staff members (also serving as members or alternate members of the GAC at the relevant time) were referred to the Internal Appeals Committee (IAC) for an opinion. The Office submitted its position on 22 June 2010.

The IAC issued a single opinion on 5 March 2012 after having heard the parties. It unanimously found that there was a breach of the duty to consult the GAC, but that the President was under no legal obligation to refuse to submit the proposal leading to the adoption of decision CA/D 25/07. A majority of the IAC members recommended granting the complainants 2,500 euros each in moral damages for the infringement of their right to consultation as GAC members, 500 euros each for the undue delay in the internal appeal procedure, to reimburse them for costs upon submission of evidence and dismiss the remainder of their requests. The minority recommended to quash the contested decision and award each of the complainants 2,500 euros in moral damages, 6,000 euros in punitive damages, 2,500 euros for the excessive delay and 500 euros in costs.

In May 2012 the complainants were informed that the IAC's opinion was still being examined and that they would be informed of the final decision taken by the President as soon as possible. Having received no decision by September 2012, the complainants informed the Administration that they would file a complaint with the Tribunal if the President had not taken a final decision by 20 December 2012. No decision was taken.

They filed their complaints with the Tribunal on 27 February 2013 asking it to quash the implied decisions rejecting their appeals, which are the impugned decisions in these proceedings, as well as general decision CA/D 25/07. They further request the Tribunal to issue an explicit order to reinstate the *status quo ante*, at least until such time as a new decision is adopted following a lawful procedure. They claim moral and punitive damages as considered appropriate by the Tribunal, which should take into account the length of procedure until the issuance of the IAC's

opinion, the lack of care shown by EPO by not making a final decision within one year of the issuance of the said opinion and the failings of the procedure before the Administrative Council. They also seek an award of costs in the amount of 500 euros each.

The EPO asks the Tribunal to dismiss the complaints as partially irreceivable *ratione materiae* and unfounded on the merits. It states that this may be a “time consuming and fruitless case”.

In their rejoinder, the complainants argue that the sole purpose of the latter statement is to insult and attempt to intimidate them. They request the Tribunal to comment on the appropriateness of such statement and take it into account when awarding them moral damages.

#### CONSIDERATIONS

1. This judgment concerns two complaints filed on 27 February 2013 by two staff members of the EPO. The complainants’ arguments are embodied in one brief and arise from the same factual circumstances. The complaints are joined and the Tribunal will rule on them in a single judgment.

In their jointly filed brief, the complainants impugn the President’s implied rejection of their internal appeals against the decision of the Administrative Council CA/D 25/07 to delete Implementing Rule 42/6 to the Pension Scheme Regulations with effect from 1 January 2009.

2. In their capacity as members of the GAC at the relevant time, the complainants challenge that decision based on the uncontested fact that the GAC was not consulted, in accordance with the provisions of Article 38(3) of the Service Regulations, prior to the President’s 11 June 2007 proposal to the Administrative Council which led to the 29 June 2007 adoption of decision CA/D 25/07. They also submit that, as the Administrative Council had compelled the President to make the proposal, decision CA/D 25/07 was actually based upon a proposal of the Administrative Council, in violation of Article 10(2)(c) of the European Patent Convention.

3. The Tribunal finds it convenient to list the relevant provisions in force at the material time below.

Article 10(2)(c) of the European Patent Convention provides that the President of the Office “may submit to the Administrative Council any proposal for amending this Convention, for general regulations, or for decisions which come within the competence of the Administrative Council”.

Article 52(1) of the Pension Scheme Regulations provides that “Implementing Rules for giving effect to these Regulations shall be adopted by the Administrative Council acting on a proposal by the President of the Office and after consulting the General Advisory Committee”.

Article 38(3) of the Service Regulations provides as follows:

“The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

[...]”

Prior to the adoption of decision CA/D 25/07, Implementing Rule 42/6 to the Pension Scheme Regulations, entitled “Financing the adjustment”, provided as follows:

- “(1) The cost of the adjustment provided for in Article 42 of the Pension Rules shall be borne by the country in which the recipient thereof is subject to taxes on income for the period considered.
- (2) Expenditure arising under paragraph 1 of this Article shall be the subject of a separate Budget which shall be drawn up at the same time as the other Budgets of the Organisation. Final settlement of the contributions to this separate Budget shall be made at the end of the period to which it relates.”

Decision CA/D 25/07, adopted by the Administrative Council, provided as follows:

“Article 1

Implementing Rule 42/6 to the Pension Scheme Regulations shall be deleted with effect from 1 January 2009.

Article 2

The present decision shall enter into force on 1 January 2009.”

4. In accordance with the provisions above, the President of the Office should have consulted the GAC before proposing the deletion of Implementing Rule 42/6 to the Pension Scheme Regulations.

5. The two complainants and three other staff members (also serving as members or alternate members of the GAC at the relevant time) filed separate internal appeals with the President. Their appeals were forwarded to the IAC, which joined them and issued a single opinion, which included a majority and a minority report. The IAC was unanimous with regard to five elements of the appeals, including (relevantly to these complaints) the improper lack of consultation with the GAC and the fact that the President was not legally obliged to refuse to submit the proposal leading to the adoption of decision CA/D 25/07. In accordance with what was said in consideration 4 above, the Tribunal considers that the IAC was correct in concluding that there was a breach of the duty to consult the GAC. The Tribunal also considers that the President had the competence under Article 10(2)(c) of the European Patent Convention to decide whether or not it was expedient for the proposal to be made.

6. With regard to the allegation that the proposal for the deletion of Implementing Rule 42/6 to the Pension Scheme Regulations was actually made by the Administrative Council through its undue influence on the President, the Tribunal finds that this ground is unfounded. The evidence shows that, after a period of debate and discussion between the President and the Administrative Council, the President freely decided to prepare the proposal, which was duly submitted by his Office on 11 June 2007.

7. The Tribunal observes that the deletion of Implementing Rule 42/6 affects the relationship between the Organisation and the Member States. As previously mentioned, the Tribunal finds that the GAC should have been consulted in accordance with the applicable provisions. In these circumstances, the Tribunal will not set aside the impugned decisions, nor decision CA/D 25/07. However, the complainants are entitled to compensation for the violation of the President's obligation to consult the GAC. The Tribunal sets the compensation at 2,500 euros each for moral and punitive damages stemming from this violation. The complainants are also entitled to costs in the amount of 400 euros each. All other claims shall be dismissed.

DECISION

For the above reasons,

1. The EPO shall pay each complainant 2,500 euros for moral and punitive damages.
2. It shall also pay each complainant costs in the amount of 400 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 11 December 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 18 February 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ