R. (No. 21)

v.

EPO

132nd Session **Judgment No. 4433**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-first complaint filed by Mr L. R. against the European Patent Organisation (EPO) on 14 September 2019 and the EPO's reply of 10 February 2020, the complainant having chosen not 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 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 treat his participation in a strike as an unauthorised absence.

In May 2013 the President of the European Patent Office, the EPO's secretariat, consulted the General Advisory Committee (GAC) on a proposal that he intended to submit to the Administrative Council for a new legal framework governing the right to strike. At this time, some employees were participating in a campaign of industrial action organised by SUEPO (the Staff Union of the European Patent Office – a trade union which is not a statutory body of the EPO), which had been running for several months. Shortly after the GAC consultation, SUEPO invited its members to vote on a resolution to pursue the industrial action. On 27 June, after a favourable ballot, SUEPO published its "action plan for the summer 2013". One of the actions planned by

SUEPO was a picket strike which would take place on 2 July 2013 if the Administrative Council adopted the President's proposal.

In the event, the proposal was adopted by the Administrative Council on 27 June 2013 in decision CA/D 5/13, which was to enter into force on 1 July 2013. CA/D 5/13 created a new Article 30a of the Service Regulations concerning the right to strike and amended the existing Articles 63 and 65, concerning unauthorised absences and the payment of remuneration, to reflect the new strike rules. Article 30a sets out some basic rules concerning strikes, defining what is meant by a "strike" and indicating, amongst other things, that a call for a strike can be initiated by a staff committee, an association of employees, or a group of employees, and that the decision to start a strike must be the result of a vote by the employees. Paragraph 10 of Article 30a authorises the President of the Office to lay down further terms and conditions for the application of Article 30a. Relying on that provision, on 28 June 2013 the President issued Circular No. 347, containing "Guidelines applicable in the event of strike", which was also to take effect on 1 July. Circular No. 347 relevantly provides that the Office is responsible for organising a strike ballot and that, if the requisite number of votes is obtained, prior notice of a strike must be given to the President at least five working days before the event.

Also on 28 June 2013, the Vice-President of Directorate-General 4 (DG4) issued a Communiqué drawing attention to the new legal framework and informing staff that, as from 1 July 2013, any industrial action which did not comply with the new rules would not be considered as a strike, with the result that participation in such action was liable to be considered as unauthorised absence.

On 2 July 2013 the picket strike announced by SUEPO took place. On 9 July 2013 the complainant, who had participated in the strike, received a letter from the Principal Director of Human Resources informing him that, as the industrial action on 2 July did not comply with the new rules, his absence on that day was considered to have been unauthorised and a deduction from his pay would be made accordingly. No disciplinary action would be taken, however, in view of the fact that the new rules had entered into force only the day before.

On 5 August 2013 the complainant submitted a request for review to the President, challenging the decision contained in the letter of 9 July. He argued that the strike of 2 July had been properly called and

organised by SUEPO before Circular No. 347 had entered into force; that the Circular itself was unlawful; and that the Principal Director of Human Resources had no authority to take the challenged decision. This request for review was rejected by the President on 30 August 2013. That same day, the complainant lodged an appeal with the Appeals Committee.

As similar appeals had been filed by many other employees, the Appeals Committee decided to consolidate them and it issued a single opinion on 3 May 2019. The Committee recommended by a majority that the appeals be rejected as unfounded, but it unanimously recommended that each appellant be awarded 450 euros in moral damages for the excessive duration of the proceedings.

By a letter of 3 July 2019, the Vice-President of DG4, acting by delegation of power from the President, informed the complainant that she had decided to reject his appeal as unfounded, insofar as it was receivable, in accordance with the majority opinion of the Appeals Committee. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision that he was absent without authorisation on 2 July 2013 and to order the EPO to register his absence on that date as a day of strike. He requests that Article 30a of the Service Regulations and Circular No. 347 be repealed and he seeks an award of moral damages over and above the 450 euros already paid to him by the Organisation.

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

CONSIDERATIONS

1. At relevant times the complainant was a member of the staff of the EPO. On or about 9 July 2013 he received a letter from the Principal Director Human Resources. He was informed that activity he had participated in on 2 July 2013 was not industrial action authorised by Article 30a of the Service Regulations when read with Circular No. 347. Both these instruments operated from 1 July 2013. Article 30a was enacted by a decision of the Administrative Council, CA/D 5/13, made on 27 June 2013. He was also informed that as his participation in the activity was viewed as an unauthorised absence it had been

decided that an amount would be deducted from his remuneration pursuant to Articles 63(1) and 65(1)(d) of the Service Regulations.

2. The complainant appealed against this decision. The majority of the Appeals Committee considered the appeal (along with many others) was unfounded and recommended the appeal be dismissed, though it recommended that the complainant (and others) be awarded 450 euros in moral damages because of the excessive delay in the proceedings. By decision of 3 July 2019, the Vice-President of DG4, by delegation of power from the President, rejected the complainant's appeal. This is the decision impugned in these proceedings.

3. 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.

4. 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.

5. The added Article 30a of the Service Regulations relevantly provided:

"**Right to strike**

(1) All employees have the right to strike.

(2) A strike is defined as a collective and concerted work stoppage for a limited duration related to the conditions of employment.

[...]"

6. Of some importance is that the definition of strike in Article 30a contained several elements. The first was that it is a work stoppage which must be concerted. The second was that the stoppage must be collective. The third was that it is for a limited duration and the fourth was that the stoppage relates to the conditions of employment. The entire definition was descriptive of conduct. That is to say, it defined a strike as conduct of staff with those identified attributes. Article 30a(8) declares that strike participation shall lead to a deduction of remuneration.

7. It is also 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.

[...]"

8. Article 63 as amended prohibited a member of staff from being absent without prior permission (unless incapacitated by sickness or accident) and provided that 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 is, in the same amount, for "each day of unauthorised absence on a working day".

9. The complainant contends the deduction of $1/20^{th}$ of net remuneration for each day of a strike on a working day is unlawful as it is contrary to the principle of payment for services rendered. It can lead to deductions that are disproportionate and which amount to a sanction. The EPO contends that the deduction from salary was made in relation to the complainant, not because he was on strike (a deduction authorised by Article 65(1)(c) of the Service Regulations), which required a vote of a particular type, but rather because he was absent from work and this absence was unauthorised (a deduction authorised by Article 65(1)(d)

of the Service Regulations). This analysis of the EPO is wrong for two reasons, which arise in the alternative.

10. The first reason is this. As noted earlier, the definition of strike in Article 30a is descriptive of conduct (a collective and concerted work stoppage) and does not raise for consideration whether that conduct arose as a result of the procedures for calling a strike being followed. The complainant was on strike within the normal conception of that term. He was on strike as defined in Article 30a. Accordingly, he was on strike for the purposes of Article 65(1)(c). An adjustment to his salary should have been made under this provision. What he did was engage in a lawful activity albeit one that resulted in a deduction from salary. It should not have been stigmatised as an unauthorised absence from work and a deduction from salary made on that basis. The decision to make the deduction on the basis given was unlawful. Accordingly it should be set aside.

11. The second and alternative basis on which the deduction was unlawful, arose from the erroneous view of the EPO that there had been no lawful strike because there had been no vote in accordance with paragraph 3 of Circular No. 347. That is to say, there was no vote of employees office-wide or at sites concerned by the strike. But that provision is itself unlawful (see Judgment 4430, consideration 16). That is because it significantly derogated from the fundamental right to strike, recognised by this Tribunal as something employees are lawfully entitled to do (see Judgments 615, consideration 6, 2342, consideration 5, and 2493, consideration 11).

12. One further matter needs to be addressed. The complainant contends the Principal Director Human Resources had no authority to indicate in her letter of 9 July 2013 that future unauthorised absences would lead to disciplinary action. This issue arises because the letter of 9 July 2013 concluded with this observation:

> "[...] please also note that should such an unauthorised absence occur again, the Office will be obliged to take the necessary steps to enforce its rules of law (under inter alia Art. 63, 65 and 93 et seq. [of the Service Regulations])."

The text in brackets is a reference to provisions concerning, respectively, unauthorised absence, payment of remuneration and disciplinary measures. Thus the letter was saying that disciplinary action would be

taken and, by implication, any discretionary power not to initiate such action would not be exercised in favour of the staff member. The delegation of authority to the Principal Director Human Resources dated 1 November 2008 contains a qualification or limitation, namely if the exercise of the delegated authority "may have a political impact or may establish a precedent" the matter must be referred to the Vice-President Administration for decision. It can be inferred that a letter to the same effect was sent to other participants in the industrial action. The EPO's response is not to say that the letter did not involve the exercise of the delegated power, but rather to say "nothing in [the] letter suggest political or precedential import".

13. Particularly in the context of the organisation having adopted highly contentious provisions concerning strikes including a requirement that all staff (or sections of them) had to vote on the question of whether the strike should take place, the declaration that disciplinary action would necessarily be taken for an unauthorised absence which the organisation considered was not a strike, fairly clearly would have a political impact in the broadest sense of the expression. But the threat had no legal effect and no legal remedy is warranted, save for moral damages.

14. In his brief the complainant seeks moral damages for delay in the internal appeal process, deprivation of his right to follow a strike duly called by his workers' association and the threat just mentioned. He has already received 450 euros for the delay. That is adequate in the circumstances. He has not, in the factual context of this case, been deprived of a right to strike as alleged. However, the threat just referred to did involve an attempt to intimidate the complainant, aggravated by the adoption by the EPO of an erroneous interpretation of its own normative legal documents. It involved an attempt to stifle, by threat, the exercise of the lawful right to strike. The complainant is, for this, entitled to moral damages assessed in the sum of 4,000 euros.

15. In the result, the complainant has established that the letter of 9 July 2013 should be set aside and removed from the complainant's personnel file. The salary deduction for the unauthorised absence should be set aside and the EPO should repay the complainant the amount so deducted. The complainant is entitled to costs assessed in the sum of 800 euros.

DECISION

For the above reasons,

1. The decision to make a salary deduction pursuant to Article 65(1)(d) is set aside and the EPO shall repay the complainant the amount so deducted.
2. The EPO shall remove the letter of 9 July 2013 from the complainant's personnel file.
3. The EPO shall pay the complainant moral damages in the amount of 4,000 euros.
4. The EPO shall pay the complainant 800 euros costs.
5. 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