H. (No. 4), K. (No. 11), K.-F. (No. 2),
R., S., T. (No. 10) and others
v.
EPO

128th Session **Judgment No. 4195**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms A. D. E. H. against the European Patent Organisation (EPO) on 30 January 2013 and corrected on 18 May, the EPO's reply of 30 August, the complainant's rejoinder of 30 October 2013, the EPO's surrejoinder of 10 February 2014, the complainant's further submissions dated 3 March 2016 and the EPO's final comments thereon of 29 July 2016;

Considering the applications to intervene in Ms H.'s complaint filed by Mr B. S. on 14 June 2013 and by Ms D. G. on 23 July 2013, and the EPO's comments thereon dated 29 October 2013;

Considering the eleventh complaint filed by Mr A. C. K. against the EPO on 20 December 2012, the EPO's reply of 3 July 2013, corrected on 17 July, the complainant's rejoinder of 23 October 2013 and the EPO's surrejoinder of 31 January 2014;

Considering the 69 applications to intervene in Mr K.'s complaint (listed in Annex 1 to this judgment) and the EPO's comments thereon;

Considering the complaint filed by Ms M. R. against the EPO on 22 December 2012, the EPO's reply of 15 May 2013, the complainant's rejoinder of 24 July and the EPO's surrejoinder of 25 November 2013;

Considering the application to intervene in Ms R.'s complaint filed by Mr S. F. on 14 November 2013 and the EPO's comments of 27 February 2014;

Considering the complaint filed by Mr F. S. against the EPO on 30 January 2013 and corrected on 16 April, the EPO's reply of 31 July, the complainant's rejoinder of 30 October 2013 and the EPO's surrejoinder of 10 February 2014;

Considering the second complaint filed by Ms A. L. K.-F. against the EPO on 29 January 2013 and corrected on 11 May, and the EPO's reply of 31 July, no rejoinder having been filed by the complainant;

Considering the complaints filed against the EPO by Mr P. O. A. T. (his tenth) and 29 other persons (listed in Annex 2) on 1 February 2013, the EPO's single reply of 24 June, the complainants' rejoinder of 3 October 2013 and the EPO's surrejoinder of 13 January 2014;

Considering the 66 applications to intervene filed in Mr T.'s complaint (also listed in Annex 2) and the EPO's comments thereon;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the cases may be summed up as follows:

The complainants challenge the decision to modify the conditions governing sickness insurance for employees' spouses.

Facts relevant to this case may be found in Judgment 2994, delivered in public on 2 February 2011. It will be recalled that in November 2007 the President of the European Patent Office, the EPO's secretariat, proposed to the Administrative Council a set of measures aimed at curbing the Office's increasing expenditure on sickness insurance. These measures, which concerned the conditions of insurance applicable to employees' spouses, involved amending Article 83 of the Service Regulations for permanent employees of the European Patent Office as well as the Implementing Rules thereto. The amendments were approved by the Administrative Council on 14 December 2007 in decisions CA/D 29/07 and CA/D 30/07 with effect from 1 January 2008.

Prior to the amendment of Article 83, employees' spouses were automatically covered by the Office's sickness insurance scheme at no

extra cost, regardless of their income and of whether or not they were also covered by another scheme, such as a compulsory national health insurance scheme. Under the new version of Article 83, however, a contribution was payable in respect of spouses gainfully employed outside the Office if they were exempted by national law from affiliation to a compulsory health insurance scheme and if they had no other primary health insurance cover, except where their earnings fell below a defined threshold. Furthermore, gainfully employed spouses who were entitled to reimbursement of their medical expenses under another primary health insurance scheme were now obliged to seek reimbursement from that scheme in the first instance, before claiming the balance of their medical expenses, if any, from the Office's scheme. Thus, they were entitled only to complementary cover under the Office's scheme, except where the primary cover restricted the choice of medical provider. These measures and the corresponding contribution levels were announced to the staff in Circular No. 304 of 21 December 2007.

The amendment also affected the situation of divorced spouses. When an employee or pensioner of the Office divorces, the former spouse ceases to be covered by the Office's sickness insurance scheme. Under the old rules, the former spouse's cover would resume in the event that she or he became entitled to a survivor's pension following the death of the employee or pensioner. Under the new rules, surviving former spouses were excluded from cover under the Office's scheme.

At various dates between January and March 2008, the complainants, who considered that these new measures breached their acquired rights, submitted requests for review to the President of the Office, challenging the decision to levy additional sickness insurance contributions for their spouses as evidenced by their payslips, as well as the underlying decision to amend Article 83 of the Service Regulations. They sought reimbursement of the additional contributions, the quashing of the amendments to Article 83, moral damages and costs. More than a hundred similar requests for review were filed. Some employees also filed requests for review with the Administrative Council, which forwarded them to

the President. Following an initial rejection of the requests for review, the matter was referred to the Internal Appeals Committee (IAC).

The IAC resorted to its "test appeal" procedure and issued a single opinion on all the appeals on 5 June 2012. A majority of the IAC's members found that the additional contributions for spouses involved a breach of acquired rights insofar as they resulted in an overall contribution (for employee and spouse) exceeding 2.4 per cent of the employee's basic salary. The majority considered that employees had an acquired right to the continued application of the 2.4 per cent ceiling for sickness insurance contributions expressly provided for in Article 83(1) of the Service Regulations. Regarding the obligation for spouses to use the Office's scheme as secondary insurance, a majority of the IAC considered that this did not involve any breach of acquired rights. As for the issue of insurance cover for former spouses, the IAC unanimously considered that this measure likewise involved no breach of acquired rights. The IAC thus recommended, by a majority, that all additional insurance contributions, including those paid to an external insurance scheme by reason of the introduction of the contested measures, be reimbursed with interest, and that each test appellant should be paid 500 euros for the delay in the proceedings, but that no moral damages should be awarded.

By individual decisions dated 20 September or 6 November 2012, the President of the Office rejected the IAC's recommendations and dismissed the appeals as unfounded. He considered that none of the contested measures breached the employees' acquired rights and that no compensation was due in respect of the duration of the proceedings, given the complexity of the matter and the fact that a test appeal procedure had been followed. These are the decisions that the complainants impugn before the Tribunal.

They ask the Tribunal to set aside the impugned decisions, to order the reimbursement of the additional spouse contributions levied since 2008, and to award them moral damages and costs.

The EPO submits that the complaints should be dismissed as partly irreceivable and otherwise unfounded.

CONSIDERATIONS

1. On 14 December 2007, by decisions CA/D 29/07 and CA/D 30/07, the Administrative Council adopted an amendment to Article 83 of the Service Regulations and its Implementing Rules, as proposed by the President of the Office, with the aim of curbing the Office's increasing sickness insurance expenditure. The amendment took effect from 1 January 2008 and introduced three new measures to the conditions governing the Office's sickness insurance scheme. Under the previous scheme, the spouses of EPO employees were insured free of charge, irrespective of their income, and whether or not they were also covered by another scheme, such as a compulsory national health insurance scheme. The new measures, challenged in the present complaints, are as follows:

(a) an additional monthly sickness insurance contribution is payable for employees' spouses who are gainfully employed outside of the Office, whose earnings exceed 50 per cent of the basic salary of grade C1, step 3, and who have no other insurance of their own;

(b) spouses who have other insurance coverage are now required to use that insurance as primary insurance and to use the Office's insurance only as complementary insurance, except where the other scheme limits the choice of healthcare provider;

(c) it is no longer possible for a former (divorced) spouse to obtain cover under the Office's scheme upon the death of a permanent employee.

2. A total of 109 internal appeals were submitted to the President against the adopted amendments to the sickness insurance scheme (as listed above). Five of the appellants simultaneously submitted appeals to the Chairman of the Administrative Council. At its 114th meeting, the Administrative Council decided to refer those appeals back to the President of the Office for further consideration. The IAC decided to examine the appeals by means of a test appeal procedure. According to the IAC's 5 June 2012 opinion, "[a]ll the test appellants similarly claimed that the free insurance cover for the entire family enshrined in Art. 83(1)

[of the Service Regulations] had been a significant element, indeed a key condition in their decision to accept a post at the Office, while some of them additionally stated that they had subsequently decided to remain at the Office on this basis and that in any event the Office should not be permitted to amend these provisions unilaterally". The IAC's recommendations, which the President rejected in the impugned decisions, are summarised above.

3. Each of the complaints involves one or more of the same substantial questions, namely whether the EPO breached the complainants' acquired rights by: (a) requiring employees to pay a sickness insurance contribution in respect of gainfully employed spouses who had previously been insured free of charge; (b) requiring spouses who have other insurance, to use the Office's insurance only as a complementary scheme; and (c) abolishing the right of former (divorced) spouses to obtain cover under the Office's sickness insurance scheme upon the death of the permanent employee. Accordingly, the Tribunal finds it convenient to join the complaints.

4. Some of the complaints raise a threshold issue regarding the competence of the President of the Office and the Administrative Council's referral to him of the appeals filed with the latter.

5. According to the established case law, all requests for review of individual decisions taken by the President must be lodged with and decided by the President. In the present cases, the challenged general decisions had to be implemented by individual decisions taken by the President of the Office. Accordingly, all requests for review had to be lodged with the President. Therefore, the appeals lodged with the Administrative Council were lawfully referred to the President for consideration (see Judgment 3700, under 12).

6. Prior to the contested amendment of the Service Regulations, Article 83(1) provided that:

> "In accordance with the Implementing Rules, a permanent employee, his spouse, his children and other dependants within the meaning of Articles 69 and 70 shall be insured against expenditure incurred in case of sickness, accident, pregnancy and confinement. One third of the contribution, calculated by reference to the basic salary of the employee, which is required to meet such insurance shall be charged to the employee, but so that the amount charged to him shall not exceed 2.4% of his basic salary."

Following the amendments that took effect on 1 January 2008, Article 83(1) read as follows:

> "(a) In accordance with the Implementing Rules, a permanent employee, his spouse, his children and other dependants within the meaning of Articles 69 and 70 shall be insured against expenditure incurred in case of sickness, accident, pregnancy and confinement.
>
> (b) One third of the contribution, calculated by reference to the basic salary of the employee, which is required to meet such insurance shall be charged to the employee, but so that the amount charged to him shall not exceed 2.4% of his basic salary.
>
> (c) Notwithstanding the provisions of paragraphs (a) and (b), a spouse who is in gainful employment outside the Office shall also be insured as provided for in paragraph (a), subject, where appropriate, to an additional contribution defined in the Implementing Rules for the present article."

7. The Tribunal finds that none of the three measures introduced in the amendments to Article 83 breached any acquired rights. According to the case law, "[i]n Judgment 61 [...] the Tribunal held that the amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment" (see Judgment 832, under 13). Judgment 832, under 14 (cited in part, below), poses a three-part test for determining whether the altered term is fundamental and essential. The test is as follows:

(1) What is the nature of the altered term? "It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so."

(2) What is the reason for the change? "It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted."

(3) What is the consequence of allowing or disallowing an acquired right and the effect it will have on staff pay and benefits, and how do those who plead an acquired right fare as against others?

8. In the present case, the alteration concerned terms of the Service Regulations. The amendment to Article 83, which introduced the three above-mentioned measures, was predicated on an attempt to limit the Office's healthcare expenditure which had been steadily increasing over the years. The consequence of the change was that it considered specific situations and guaranteed greater equality among married staff. Under the previous scheme, EPO staff who were married to other EPO staff members paid contributions for both spouses towards the sickness insurance scheme, whereas EPO employees who were married to non-EPO staff only paid a contribution for the EPO staff member and not for the spouse although both were fully covered by the sickness insurance scheme. Moreover, those who probably benefited the most from the previous scheme were those whose non-EPO spouses were gainfully employed with high incomes. In respect of the solidarity principle, and with an eye to the obligation to maintain sound financial management of the Organisation, the President proposed these new measures to balance the costs and benefits to all staff and their spouses.

9. The complainants consider that they had an acquired right to the continued application of the 2.4 per cent limit on the employees' contributions set by Article 83(1). However, the Tribunal considers that the conditions under which health insurance for employees' spouses is provided do not give rise to an acquired right. The Organisation is entitled to adjust the contribution rate if there are compelling reasons (including budgetary reasons), within reasonable limits. The Tribunal

is satisfied in this case that the increased contribution rate resulting from the additional contribution for spouses is reasonable, justified and modest.

10. The complainants contend that the breach of their acquired rights also amounts to discrimination, but the Tribunal finds, as it did in a similar case, that the Organisation "has not discriminated against them: far from it. Its purpose was to remove an unfair advantage the Rules used to confer on them. Such corrective action may not be treated as breach of acquired rights even if the advantage was enjoyed for a long time" (see Judgment 1242*, under 24).

11. As the complaints fail on the merits, it is unnecessary to deal with the various objections to receivability raised by the EPO. The Tribunal has not addressed the subsidiary arguments raised by the various complainants in their pleas as the complaints fail on the principal issue. The written material provided by the parties has been sufficient to enable the Tribunal to resolve these complaints without the requested oral hearings.

12. In light of the above considerations, the complaints must be dismissed. Given that these joined complaints will be dismissed because they are unfounded, the applications to intervene must also be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 21 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

* *Recte* 1241.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ

Annex 1

Sixty-nine interveners (in alphabetical order):

(Names removed)

Annex 2

Mr P. O. A. T. and the 29 following complainants
(in alphabetical order):

(Names removed)

Sixty-six interveners (in alphabetical order):

(Names removed)