

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (Nos. 12 and 15)

v.

EPO

(Application for execution)

(Application for interpretation and execution filed by the EPO)

132nd Session

Judgment No. 4413

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgments 3887 and 3986 filed by Mr F. B. on 31 October 2019, the reply of the European Patent Organisation (EPO) of 29 October 2020, Mr B.'s rejoinder of 25 December 2020 and the EPO's surrejoinder of 12 February 2021;

Considering the application for interpretation and execution of Judgment 3887, as clarified by Judgment 3986, filed by the EPO on 16 October 2020 and Mr B.'s reply of 5 January 2021;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In the complaint which led to Judgment 3887, delivered in public on 28 June 2017, Mr B. impugned the final decision of the President of the European Patent Office, the EPO's secretariat, of 21 November 2013. That decision confirmed the President's 6 September decision to dismiss the complainant for misconduct, pursuant to Article 93(2)(f) of the Service Regulations for permanent employees of

the Office, with a reduction of his pension entitlements by one third. In Judgment 3887, the Tribunal decided in relevant part the following:

- “1. The decision of 21 November 2013 is set aside in the part regarding confirmation of dismissal for misconduct in accordance with Article 93 of the Service Regulations, as is the same part of the decision of 6 September 2013.
2. The case is sent back to the EPO in accordance with consideration 13 [...]
3. The EPO shall pay the complainant 20,000 euros in moral damages.”

In consideration 13 of Judgment 3887, the Tribunal found as follows: “The complainant’s refusal to fulfill his obligations with regard to his work as an examiner is well-established. However, the President’s decision to dismiss the complainant under Article 93(2)(f) of the Service Regulations is vitiated by the fact that neither the President, nor the Disciplinary Committee could have made a proper assessment of the allegations without taking into account whether the complainant acted intentionally, and in control of his faculties, or if the complainant suffered from a mental illness that prevented him from behaving in accordance with his obligations as a permanent employee. Therefore, the principle of due process and the duty of care require the Disciplinary Committee, in accordance with Article 101(3) of the Service Regulations [...] to order a medical assessment of the complainant by an expert, and the convening of a Medical Committee if necessary. The medical expert(s) shall also take into consideration all documents in the file submitted to the Tribunal.”

2. On 13 October 2017 Mr B. filed his first application for execution of Judgment 3887, which led to Judgment 3986. He requested the Tribunal to quash the implicit decision of the President to refuse to execute Judgment 3887 in full; to quash the three “summons” to attend medical appointments issued either by the Director of the Health and Safety Directorate or by the Principal Director of Human Resources; to reinstate him in the same situation he was in on 29 July 2013, with all legal consequences; and to award him material and moral damages and costs. He contended that orders 1 and 2 of the Tribunal’s decision in Judgment 3887 had not been executed. The sole order that the Organisation had executed was order 3, concerning the payment of 20,000 euros for moral damages. The complainant relevantly submitted that: the decision of 21 November 2013 and the earlier decision of 6 September 2013

had been cancelled by the Tribunal and therefore no longer existed; accordingly he was to be considered an employee of the EPO with all legal consequences. In its reply, the EPO, in addition to requesting clarifications, asserted that it had taken appropriate measures to implement Judgment 3887 and that the complainant had refused to undergo the proposed medical psychiatric examinations. The EPO added that it had not only paid the amount of 20,000 euros awarded to the complainant for moral damages, but it had spontaneously awarded the complainant, who had retired in November 2016, an amount equivalent to the difference between the reduced amount of pension entitlements paid to him as from November 2016 and the full amount of pension entitlements, with 5 per cent interest.

3. In Judgment 3986, delivered in public on 26 June 2018, the Tribunal dismissed the complainant's application in its entirety, specifically stating that the complainant had ceased to be an EPO employee and his request to be reinstated must be dismissed. In providing explanations as to how Judgment 3887 must be interpreted and executed, the Tribunal relevantly stated, in considerations 8 and 9: "If the complainant refuses to undergo the medical examination as required and scheduled by the Disciplinary Committee, the medical assessment will be carried out by a medical expert in psychiatry only on the basis of documents [...] It will be up to the President to make the final decision, taking into account the opinion of the Disciplinary Committee, the provisions in force at the time of the new decision and the duty of care. The parties must work together in good faith to execute the judgment [...]".

4. On 21 June 2018 the complainant filed a complaint against the EPO as its President had failed to take an express decision on his request of the payment of his full salary from July 2017 onwards. The Tribunal summarily dismissed it by Judgment 4128, delivered in public on 6 February 2019, because "the determination that the complainant was not reinstated and that consequently he ha[d] no right to the payment of salary as from July 2017 [was] *res judicata*".

5. By Judgment 4202, delivered in public on 3 July 2019, the Tribunal joined and summarily dismissed: (a) the complainant's application for execution of Judgments 3887 and 3986, filed on 11 October 2018,

and (b) the complainant's complaint contesting the implied rejection of his 9 August 2018 request to the EPO President to execute Judgments 3887 and 3986 and to provide him with information regarding his disciplinary case, also filed on 11 October 2018. In Judgment 4202 the Tribunal found that, concerning the application for execution of Judgment 3986, the disciplinary proceeding complied with the steps described in that judgment for executing Judgment 3887 and that this procedure was ongoing and the Disciplinary Committee had dealt with the complainant's disciplinary case. Insofar as the complainant sought reinstatement, the Tribunal recalled that in Judgment 4128, considerations 4 and 5, it had decided the following:

“[...] the decision of 21 November 2013 was set aside only ‘in the part regarding confirmation of dismissal for misconduct in accordance with Article 93 of the Service Regulations, as [was] the same part of the decision of 6 September 2013’.

[...] Following Judgments 3887 and 3986, the determination that the complainant was not reinstated [...] [was] *res judicata*. The EPO had no reason to reopen the case. [...]”

6. On 29 October 2018, Mr B. filed his eighteenth complaint, which was a repetition of his previous complaint and of his previous application for execution that the Tribunal had joined and summarily dismissed by Judgment 4202, the difference being that the 29 October 2018 complaint was directed towards the new EPO President. The eighteenth complaint was summarily dismissed as irreceivable by Judgment 4203.

7. In the present application for execution of Judgments 3887 and 3986, filed on 31 October 2019, Mr B. complains of the President's lack of response to his 13 August letter. He essentially requests the Tribunal: (a) to quash the President's implicit decision to refuse to execute Judgments 3887 and 3986; (b) to reinstate him in full as from 29 July 2013; (c) to provide him with information regarding the disciplinary proceeding; (d) to cancel all the detrimental consequences stemming from the President's refusals; (e) to order the President to implement without any further delay the whole decision of Judgment 3887, in particular the first and second orders in that decision, cited in consideration 1 of the present judgment; and (f) to award damages.

In its reply the EPO contends that it has taken all the measures requested in order to abide by Judgments 3887 and 3986. It argues that that those judgments have not been completely executed for two main reasons:

- (1) the complainant's refusal to undergo a psychiatrist's medical examination; and
- (2) the refusal by all solicited medical experts in psychiatry, based on their national systems of law, to carry out a medical assessment only on the basis of the numerous documents prepared or concerning the complainant in the Tribunal's records, without having examined the complainant.

8. On 16 October 2020 the EPO, in turn, filed an application for interpretation and execution of Judgment 3887 as clarified by Judgment 3986. In this application, the EPO states that it had convened a new Disciplinary Committee with the aim of ordering a medical assessment of Mr B. to ascertain whether his established refusal to fulfil his obligations with regard to his work as an examiner was intentional or whether a mental illness prevented him from behaving in accordance with his obligations as a permanent employee. The EPO contends that Mr B.'s refusal to undergo a psychiatrist's medical examination and the refusal by all solicited medical experts in psychiatry to carry out a medical assessment only on the basis of documents have rendered it impossible to complete the execution of the judgment. Therefore, it requests the Tribunal to give additional guidance to execute the judgment and to bring definite closure to the matter.

Specifically, the EPO asks the Tribunal:

- (a) to find that it has complied in good faith with the judgments and has executed them to its best extent;
- (b) to find that no further step can be taken without the cooperation of the complainant;
- (c) to find that there is no rationale for appointing a new medical practitioner to carry out a medical assessment of the complainant;

- (d) to determine, as requested by the Disciplinary Committee in its reasoned opinion of 20 December 2019, corrected on 14 April 2020, whether the EPO or Mr B. bears the burden of proof in respect of exonerating medical grounds and to specify the standard of proof to be applied;
- (e) if Mr B. bears the burden of proof, to lay down the course of action to be followed in view of his refusal to cooperate and, more specifically, to clarify whether it was intended that an old-style medical committee be convened and to specify what would be the legal consequences if Mr B. should not cooperate;
- (f) on a subsidiary basis, to confirm that, based on Judgment 3887 (consideration 16), the EPO may retroactively ground Mr B.'s dismissal on his unsatisfactory service without further consideration or recommendation of any committee and draw the appropriate financial consequences flowing from the substitution of grounds.

9. As these two applications concern the same judgments, they are joined and the Tribunal will rule on them in a single judgment.

10. The application for interpretation filed by the EPO, as based on the impossibility to execute Judgments 3887 and 3986, raises a threshold issue. The Tribunal finds that the two facts reported above under consideration 7 and proven by the EPO, have rendered impossible the complete execution of the two judgments. In the unusual circumstances of this case, the Tribunal will make no further orders for the execution of Judgments 3887 and 3986. Firstly, forcing Mr B. to undergo a medical examination would impair his fundamental rights to dignity and health. Secondly, the refusal of psychiatric experts to carry out an examination only on the basis of documents was an objective obstacle that made it impossible to fully execute the judgments. Neither of these obstacles can be attributed to the EPO. Accordingly, the Tribunal finds that the EPO could do nothing more to execute the judgments, and Mr B.'s application for execution must be dismissed.

11. Evidently, the answer to the question under 8(d) above arises from the requested medical examination. This request implied that the consciousness of improper behaviour must be considered a constitutive element of the misconduct and not an external element which excuses

the behaviour. Accordingly, the burden of proof of misconduct rests on the EPO, applying the standard of proof of misconduct according to the Tribunal's case law (see Judgment 4360, consideration 10).

12. In light of the above considerations and on the basis of the clarifications under considerations 10 and 11 above, the Disciplinary Committee will give its reasoned opinion to the President. The President, taking into account the Committee's opinion and in accordance with the procedural norms in force at the time of the new decision, will take a final decision.

DECISION

For the above reasons,

1. Judgments 3887 and 3986 are to be interpreted and executed in accordance with considerations 11 and 12 above.
2. Mr B.'s application for execution is rejected.
3. All other claims are dismissed.

In witness of this judgment, adopted on 25 May 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, 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.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ