S. (No. 9)

v.

EPO

135th Session **Judgment No. 4626**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr D. S. against the European Patent Organisation (EPO) on 19 September 2017, the EPO's reply of 7 February 2018, the complainant's rejoinder of 8 May 2018, the EPO's surrejoinder of 15 August 2018, the EPO's additional submissions of 27 October 2021 and the complainant's final comments of 21 February 2022;

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 rules introduced with effect from 1 July 2013 governing the exercise of the right to strike at the European Patent Office (the EPO's secretariat).

Facts relevant to this case are to be found in Judgment 4430, delivered in public on 7 July 2021. Suffice it to recall that in June 2013, after having consulted the General Advisory Committee (GAC), the President of the Office submitted to the Administrative Council a proposal for a new legal framework governing the right to strike. This proposal was adopted by the Administrative Council on 27 June 2013 in decision CA/D 5/13, which entered 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 set out some basic rules concerning strikes, defining what was meant by a "strike" and indicating, amongst other things, that a call for a strike could be initiated by a staff committee, an association of employees, or a group of employees. Paragraph 10 of Article 30a authorised 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 also took effect on 1 July.

On 27 September 2013 the complainant submitted a request for review to the President, challenging both Circular No. 347 and CA/D 5/13. He argued, in particular, that these texts were contrary to "international case law" and had been adopted following an "incorrect consultation of the GAC", because the composition of that body at the material time was flawed. His request for review was rejected in November 2013 as irreceivable and unfounded, and on 16 December 2013 he lodged an appeal with the Appeals Committee. He was, at that time, an alternate member of the GAC. The Appeals Committee resorted to the summary procedure provided for in Article 9 of the Implementing Rules to Articles 106 to 113 of the Service Regulations, because a majority of its members considered that the appeal was manifestly irreceivable in that it was directed against a general decision, whereas the internal appeals procedure was a procedure whereby staff members could only challenge individual decisions causing an individual adverse effect. In an opinion dated 2 May 2017, the majority recommended that the appeal should be dismissed on that basis. By a letter of 30 June 2017, the Vice-President of Directorate-General 4 (DG4) informed the complainant that he had decided, by delegation of power from the President, to reject the appeal as manifestly irreceivable in accordance with the majority recommendation of the Appeals Committee.

In his complaint filed on 19 September 2017, the complainant impugns the decision of 30 June 2017 and asks the Tribunal to set aside "the decision of 16 December 2013 to reject the internal appeal" and to remit the case to the EPO for reconsideration in a properly constituted Appeals Committee. He seeks moral damages for procedural delays, for "falsely applying a summary procedure", and for breach of the *stare decisis* principle, "causing the complainant emotional stress and additional workload, by rendering it necessary to file the present complaint". He also claims costs, and he seeks an award of 100 euros in moral damages for each staff member in post at the time of the contested decision, particularly for the extended period of uncertainty "affecting thousands of staff on an important issue".

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

On 7 July 2021 the Tribunal delivered Judgment 4430, dealing with complaints filed by two other staff members who likewise challenged CA/D 5/13 and Circular No. 347. The Tribunal found that Circular No. 347 was unlawful and set it aside on the grounds that it violated the right to strike in several respects. For the reasons given in consideration 11 of that judgment, the Tribunal considered it both inappropriate and unnecessary to make a determination in those proceedings concerning the lawfulness of CA/D 5/13.

By a letter of 24 September 2021, the complainant was informed that, in view of his pending complaint challenging CA/D 5/13 and Circular No. 347, the EPO had decided to apply the outcome of Judgment 4430 to him. The EPO therefore paid him 2,000 euros in moral damages and 800 euros in costs, and it invited him to withdraw his complaint, but the complainant chose not to do so.

CONSIDERATIONS

1. The following discussion proceeds against the background emerging from the facts just described. The complaint was filed on 19 September 2017. The impugned decision identified in the complaint form was a decision of the Vice-President of DG4 of 30 June 2017. In

that decision the Vice-President rejected an internal appeal which had been brought by the complainant on the basis that it was manifestly irreceivable and, in so doing, accepted the opinion of the majority of the Appeals Committee. He observed, in relation to an argument that the Appeals Committee had not been regularly composed, that its "composition is therefore fully in line with the applicable provisions". This opinion aligned with the views of the majority of the Appeals Committee but not the minority.

2. The primary relief that the complainant seeks, as identified in the complaint form, is that the "decision of 16 December 2013 to reject the internal appeal as manifestly irreceivable is quashed". He also seeks an order that "the case is sent back to the defendant organisation for reconsideration in a properly constituted appeals committee". The consequential relief he seeks is moral damages on several bases and an order for costs. On 16 December 2013, the complainant lodged his appeal which was addressed in an opinion of the Appeals Committee of 2 May 2017. His reference in the relief to a decision of 16 December 2013 is manifestly erroneous and is to be treated as a reference to the decision of the Vice-President of DG4 of 30 June 2017.

3. In September 2021, the complainant was invited to withdraw his complaint having regard to steps the EPO had taken to implement, in relation to him, judgments concerning actual or proposed strike action of EPO staff. Specifically, he was paid 2,000 euros in moral damages and 800 euros in costs, as the EPO had been ordered to pay the complainants in the proceedings leading to Judgment 4430. The complainant declined this invitation and, in his final comments dated 21 February 2022 filed with the Tribunal, indicated he wished to persist with his complaint as it addressed important procedural issues concerning his internal appeal. He argues the issue was not moot and refers to Judgment 2856, consideration 5. He also appears desirous of obtaining a determination about the validity of Article 7 of the Administrative Council's decision CA/D 2/14. This latter point can be disposed of immediately. In Judgment 4550 the Tribunal determined the Article was unlawful and set it aside. This issue is now plainly moot. The

Tribunal will return to the question of the "procedural issues" shortly. However, it is not clear, having regard to the complainant's final comments, whether his various claims for moral damages are abandoned. Out of an abundance of caution, those claims are addressed in the following consideration.

4. Much of the argument of the complainant in his pleas concerning moral damages appears to proceed on the premise that if there was a legal error attending a decision, or delay in the making of a decision, or delay in the finalisation of an appeal or proceedings in the Tribunal, then, without more, an entitlement to moral damages arises. As noted in another judgment given this session (Judgment 4644, consideration 7), this premise is incorrect. Moral damages are awarded for moral injury and the complainant bears the burden of proving that injury and the causal link with the unlawful conduct of the defendant organisation (see, for example, Judgments 4157, consideration 7, 4156, consideration 5, 3778, consideration 4, and 2471, consideration 5). Delay, of itself, does not entitle a complainant to moral damages (see, for example, Judgments 4487, consideration 14, 4396, consideration 12, 4231, consideration 15, and 4147, consideration 13). Without attempting to describe, exhaustively, what might constitute moral injury, it includes emotional distress, anxiety, stress, anguish and hardship (see, for example, Judgments 4519, consideration 14, 4156, consideration 6, and 3138, considerations 8 and 14). There is no persuasive evidence of moral injury to the complainant (beyond the moral injury for the injurious impact of Circular No. 347 on his right to strike of the same character as compensated in Judgment 4430 and for which compensation has already been paid to the complainant) in respect of any of the events for which he seeks moral damages caused by the conduct of the EPO, even if unlawful. Accordingly, his complaint should, insofar as the complainant seeks moral damages for himself, be dismissed. He also seeks moral damages on behalf of all other staff. There is no legal basis for doing so, particularly having regard to the terms of Article VIII of the Tribunal's Statute.

5. The pleas concerning procedural issues which the complainant wishes to persist with, are directed towards sustaining a conclusion that an order should be made that his internal appeal be reconsidered by what he describes, as noted earlier, as a "properly constituted appeals committee". However, certainly in this case, such an order would only be made if there was any purpose served by the reconsideration of the internal appeal. None is pointed to in the final comments of the complainant. Accordingly, it is unnecessary to address the procedural issues he continues to maintain.

6. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ