Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

K. (No. 21)

v.

EPO

135th Session **Judgment No. 4642**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-first complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 15 April 2019, the EPO's reply of 23 October 2019, the complainant's rejoinder of 16 March 2020 and the EPO's surrejoinder of 30 September 2020;

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 contends that the EPO failed to keep records of his administrative status.

Facts relevant to this case are to be found in Judgment 4640, also delivered in public this day, on the complainant's third complaint. Suffice it to recall that between July 2009 and April 2010 the complainant lodged four internal appeals in which he made a certain number of claims regarding the fact that his administrative status was unclear after he had been detached to various projects. In July 2012 the Internal Appeals Committee (IAC) considered these appeals jointly and found that the European Patent Office, the EPO's secretariat, had not discharged its duty of care and was responsible for several unlawful acts that had caused damage to the complainant. In addition to recommending

an award of damages, it recommended that a series of actions be undertaken by the Office in order to clarify the complainant's administrative status.

By letter of 24 September 2012, the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President of the Office, allowed in part the complainant's internal appeal. He decided to refer the complainant's case for a job grade evaluation with regard to the position he occupied as of 2006 to the Controlling Office. He further stated that, based on that evaluation, it would be possible to conclusively determine the complainant's job title and to issue a job description as well as to assign him a reporting and a countersigning officer. He decided to award the complainant a global compensation payment of 8,000 euros.

On 21 November 2012 the complainant filed his third complaint before the Tribunal impugning that decision and alleging that the EPO had not taken actions to implement the decision.

On 14 March 2014 the complainant sent five different emails to the Human Resources (HR) requesting a copy of several documents that he could not find in his personal file. He was referring specifically to (1) his probationary report for the period 1 October 2000 to 30 April 2001 for the position of Brand Manager, (2) the decision to appoint him to the post of Brand Manager, (3) his employment status confirming his continued employment in the Principal Directorate of Patent Administration, (4) the decision to transfer him to the Application Management Directorate General 2, and (5) the decision indicating the post, grade and career group to which he was transferred in the Application Management Directorate General 2 and the responsibilities attached to that post.

On 25, 26, 27 and 28 July 2014 the complainant lodged four requests for review with regard to four of the five documents he had requested on 14 March 2014. By letter of 7 August 2014 HR transmitted to the complainant clarification on his administrative status and specified that the letter did not constitute a decision but was merely a "recap of information" on his administrative status, and, as such, cannot not be challenged.

By letter of 19 September 2014, the complainant's four requests for review submitted in July 2014 were rejected as irreceivable as they did not fall within the scope of a review of an individual decision affecting the rights and obligations of a staff member and the matter was manifestly time-barred. It was also concluded that the issue of his administrative status was partly *res judicata*, given that his assignment to the post of Brand Manager was the subject of Judgment 3273, delivered in public on 5 February 2014, and that the matter was raised in his internal appeals that led to the decision of 24 September 2012, impugned in his third complaint pending before the Tribunal.

On 23 December 2014 the complainant lodged an internal appeal which was registered as RI/174/14. On 5 August 2015 the Appeals Committee unanimously found the appeal to be manifestly irreceivable and, by a letter of 16 September 2015, the complainant was informed of the rejection of his appeal. The complainant challenged that decision before the Tribunal on 14 November 2015 in his ninth complaint.

By letter of 1 March 2017, the complainant was informed that following Judgment 3785, in which the Tribunal found that the composition of the Appeals Committees sitting between January 2015 and November 2016 was flawed, the President had decided to withdraw the final decision of 16 September 2015 impugned in the complainant's ninth complaint and to refer his case back to a newly composed Appeals Committee. He invited the complainant to withdraw his pending complaint before the Tribunal.

The internal appeal RI/174/14 was re-registered as RI/2017/018. In a report of 19 November 2018, the majority of the Appeals Committee recommended rejecting the appeal as manifestly irreceivable, but to award the complainant 300 euros for the length of the procedure. The minority recommended rejecting the internal appeal as irreceivable and to award moral damages in the amount of 1,500 euros for the length of the procedure.

By letter of 18 January 2019, which is the impugned decision, the complainant was informed of the decision of the Vice-President of DG4, taken by delegation of power from the President, to endorse the majority opinion of the Appeals Committee. According to the Vice-

President, the Appeals Committee rightly considered that no recommendation could be issued on the substance in view of Judgment 3273 and the pending third complaint. The complainant was awarded 300 euros as compensation for the length of the procedure.

The complainant asks the Tribunal to set aside the impugned decision of 18 January 2019. He seeks moral damages in the amount of 10,000 euros for the EPO's failure to comply with the 24 September 2012 decision and to provide the requested documents. He further asks 5,000 euros and 10,000 euros respectively for the EPO's gross negligence and for the unwarranted stress impacting his health. He also seeks damages in the amount of 1,500 euros for the length of the procedure.

The EPO asks the Tribunal to dismiss the complaint as irreceivable. On a subsidiary basis, it asks the Tribunal to dismiss the complaint as unfounded on the merits.

CONSIDERATIONS

1. The complainant requests the Tribunal to order the production of his personal file. The request is rejected as the file is unnecessary for the determination of the issues raised in this complaint.

2. The complainant initiated the procedures underlying the present complaint by sending five emails to HR on 14 March 2014 requesting five separate documents. He stated that he could not recall having received or countersigned them and he had been unable to find them in his personal file. The reason he gave for requesting the subject documents was that they were crucial for his professional career and to reflect properly his administrative status in his personal file. He requested the following documents:

(1) a copy of the probation report for the period 1 October 2000 to 30 April 2001 related to his detachment to the Epoline Directorate where he carried out brand management tasks and responsibilities during the period 1 October 2000 to 31 October 2006;

(2) a copy of his appointment to the post of Brand Manager;

(3) a copy of HR's confirmation of his employment in the Principal Directorate of the Patent Administration in which he was originally employed before his detachment to the Epoline Directorate, which appointment ended on 1 October 2003;

(4) a copy of the decision to transfer him to Application Management Directorate General 2 (DG2) on 1 October 2007; and

(5) a copy of the decision indicating to which post, grade and career group he was assigned and what were his responsibilities when he was transferred to Application Management DG2 on 1 October 2007.

3. Having received only an acknowledgement of his request for the documents, the complainant lodged four requests for review of HR's implied rejection of his request for documents (2), (3), (4) and (5) alleging that he was adversely affected by that implied rejection by which the Administration had violated the applicable Service Regulations and due process. By letter dated 19 September 2014, the Director of HR Customer Interface informed the complainant that his requests for review were considered irreceivable, inter alia, as being "manifestly time-barred" since, if he considered that he was adversely affected by the non-issuance of the documents he should have taken appropriate action within the timelines stipulated in Articles 106-108 of the Service Regulations, given that he had sufficient time to review the contents of his personal file after signing on 25 March 2009 to acknowledge that he received the electronic copy of that file. The Director further stated that the request for review was also irreceivable as the complainant's administrative status was *res judicata* to the extent that he requested the documents for the purpose of properly reflecting his administrative status and that, moreover, his appointment to the post of Brand Manager was the subject of Judgment 3273 in which the Tribunal dismissed his complaint. It is noteworthy that the issue of determining the complainant's administrative status in the EPO was the subject of an internal appeal which led to the decision of 24 September 2012, which the complainant impugned before the Tribunal in his third complaint.

4. The present complaint is directed against the decision contained in the letter of 18 January 2019 which the complainant impugns. In that letter, the Vice-President of DG4, by delegation of power from the President of the Office, accepted the recommendation of the majority of the Appeals Committee to dismiss the complainant's internal appeals as manifestly irreceivable having treated the appeals under the summary procedure in Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations. Article 9 permits the Appeals Committee to deliver an opinion by a majority limited to the receivability of an appeal if it considers the appeal to be manifestly irreceivable or manifestly unfounded. Under that Article, an internal appeal may be considered to be manifestly irreceivable, inter alia, if it does not challenge an individual decision within the meaning of Article 108 of the Service Regulations; or if it challenges a decision having the authority of *res judicata* or a final decision within the meaning of Article 110, paragraph 4, of the Service Regulations; or if it challenges an individual decision which should have been subject to the review procedure pursuant to Article 109, paragraph 1, of the Service Regulations.

5. In his internal appeal against the rejection of his request for review and in his complaint, the complainant has justified his requests for the documents on the basis that they were necessary to clarify major documentation gaps in his employment history because of issues concerning whether his staff reports were being written by lawfully mandated reporting and countersigning officers which hindered the proper determination of his employment and administrative status in the EPO. He has also stated that they were necessary for the issuance of correct staff reports to properly finalize his job evaluation. He has referred to statements in the 13 July 2012 report of the IAC (which the President accepted in part in the decision of 24 September 2012) to the effect that his (the complainant's) requests for certain documents were perfectly reasonable; that it was objectionable that the Office never gave him a list of his job specification notwithstanding his repeated requests and that providing the documents and information which he requested was transparent, good administration and for the EPO's discharge of its duty of care. The complainant has submitted that the

EPO failed to discharge its duty of care to him and acted negligently by failing to provide him with the requested documents, which should have been in his personal file, pursuant to applicable rules. The complainant has stated that since the EPO did not communicate with him before the end of 2012 when various issues identified in the President's 24 September 2012 decision should have been resolved and had not filed any of the official documents required by the applicable rules, he initiated procedures, which have culminated in a number of complaints to the Tribunal. These included his third complaint, which concerns the application of the President's final decision of 24 September 2012 regarding the clarification of his employment and administrative status in the EPO. He has argued that the principle of *res judicata* was inapplicable to his assignment to the post of Brand Manager as there was no documentary evidence that he was ever assigned to that post. He has further argued that the notion that his requests for the documents were manifestly time-barred was without merit given the provisions of Articles 31 and 32 of the Service Regulations, as well as Circular No. 262 which lists documents that must be placed on a staff member's personal file.

6. Article 31 of the Service Regulations, which is under the heading "Communication to staff", requires that all specific decisions regarding appointment and confirmation thereof at the end of the probationary period, promotion, transfer, determination of administrative status and termination of service of a permanent employee shall be communicated to the staff. Article 32, which is under the heading "Personal file", relevantly requires the personal file of a permanent employee to contain all documents relating to her or his administrative position and all reports relating to her or his ability, efficiency and conduct and any comments by her or him on such documents and reports. It further requires that such documents and reports be registered, numbered and filed in serial order and states that such documents may not be used or cited by the Office against a permanent employee unless they were communicated to her or him before they were filed. The Article also gives a permanent employee the right, even after leaving the service, to acquaint herself or himself with all the documents or

reports in her or his personal file. The complainant cites provisions of paragraphs 1.2, 1.3 and 1.4 of Circular No. 262 entitled Guidelines on personal files for EPO employees to the extent that they state that responsibility for administration of personal files shall rest with the Personnel Department; authority to consult the personal file of a current or former employee shall be the strictly personal right of its subject or his successors in title, and the right to examine documents contained in a personal file for official purposes shall be strictly reserved to persons who, by virtue of the duties they perform within the Office, legitimately have the need to do so.

7. The majority of the Appeals Committee members noted that before the complainant filed the internal appeal underlying the present complaint, he had filed his third complaint (regarding the clarification of his employment and administrative status) but did not explain the extent to which the internal appeal covered issues raised in his third complaint. The majority concluded that in the underlying internal appeal, the complainant's basic aim was the implementation of the President's 24 September 2012 decision and the IAC's prior 13 July 2012 recommendations and was raising issues which had the same purpose raised in his third and other complaints. The majority stated that this was contrary to the Tribunal's case law which forbids the litigation of the same issues in parallel proceedings. Citing consideration 6 of Judgment 2993, the majority of the Appeals Committee also concluded that the *res judicata* principle applied insofar as the internal appeal might have related to determining the complainant's administrative status prior to November 2006, which was the subject of Judgment 3273, particularly insofar as it related to his post of Brand Manager. The Tribunal holds that these conclusions were wrong in light of the arguments by which the complainant justified his requests for the documents.

8. As the minority of the Appeals Committee members correctly concluded, the complainant's internal appeal overlapped only partially with his disputes raised in other procedures but not his requests for the documents which had been denied. The minority however then wrongly

concluded that they regarded the appeal "as running in parallel with the [complainant's] requested procedure still pending before the Tribunal". The fundamental error in the opinion of the majority of the Appeals Committee (accepted in the impugned decision), as well as in the opinion of the minority, was their failure to recognize the EPO's obligations, pursuant to Articles 31 and 32 of the Service Regulations and paragraphs 1.2, 1.3 and 1.4 of Circular No. 262, to keep an appropriately updated personal file for the complainant, guided by those provisions, that would accurately show his employment history. They also failed to recognize the complainant's concomitant personal rights to have access to his personal file so updated, and, ultimately, to ensure that his file was kept in the manner required. The majority of the Appeals Committee thereby failed to recognize that the complainant's requests for the subject documents were discrete and went beyond the procedures he had initiated, thus precluding the application of the principle of *res judicata*, the rule against parallel litigation and irreceivability. The majority of the Appeals Committee thereby failed to recognize that the EPO's failure to provide the subject documents or to have them placed in his personal file amounted to acts that adversely affected the complainant, which gave him a right to contest the implied rejection of his requests for those documents under Articles 107 and 108 of the Service Regulations. The majority of the Appeals Committee also failed to recognize, by extension, that the EPO violated the complainant's rights under Articles 31 and 32 of the Service Regulations and Circular No. 262, as well as its duty of care to him (see, for example, Judgment 4072, under 8). The majority of the Appeals Committee members had accordingly failed to arrive at these conclusions because they did not consider all the relevant facts and drew wrong conclusions, thereby committing an error of law which tainted the impugned decision which endorsed their opinion. The impugned decision must therefore be set aside.

9. 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 adopted at 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 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, be dismissed.

DECISION

For the above reasons,

1. The impugned decision, dated 18 January 2019, is set aside.

2. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, 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

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ