

D. (No. 5) and F. (No. 11)

v.

EPO

135th Session

Judgment No. 4575

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr A. D. (his fifth) and Mr T. F. (his eleventh) against the European Patent Organisation (EPO) on 4 and 5 November 2020 respectively, the EPO's single reply of 8 March 2021, the complainants' single rejoinder of 12 April 2021 and the EPO's surrejoinder of 20 July 2021;

Considering the application to intervene in both complaints filed by Mr F. B. on 11 May 2021 and the EPO's comments thereon of 12 October 2021;

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 none of the parties has applied;

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

The complaints concern compensation following the refusal to allow the Central Staff Committee to publish two documents on the EPO's Intranet.

The complainants are employees of the European Patent Office, the secretariat of the EPO, and were at the material time members of the Central Staff Committee. In June 2016 the Central Staff Committee made a presentation entitled "The EPO Justice System: Institutionalized Injustice?" and requested the Office that it be published on the Intranet.

The Principal Director of Human Resources rejected that request on 22 July 2016 explaining that the document was not in line with the principles of respectful and truthful publications or with the Code of Conduct. They were therefore asked to review the document before it could be published. The Central Staff Committee replied on 7 October 2016 with an “open letter” indicating that it maintained its request that the aforementioned presentation be published, adding that it also wished that the open letter be published. Having received no reply, the Central Staff Committee reiterated its requests late November 2016 but again received no reply.

In early March 2017 each complainant, in his capacity as member of the Central Staff Committee, filed a request for review contesting the implied decision to refuse to publish the documents in question on the Intranet. Their requests were rejected on 2 May 2017. Mr D. filed an appeal with the Appeals Committee on 2 June 2017 and Mr F. on 2 August 2017.

The Appeals Committee issued a single opinion on 10 June 2020. It unanimously held that the refusal to publish the documents lacked a sufficient factual justification and was therefore illegal. The unlawfulness of the refusal was “aggravated”, according to the Appeals Committee, by the manner in which the Office had handled the requests: waiting one month to respond to the Central Staff Committee’s initial request and failing to respond to the open letter of 7 October 2016. A majority declined, based on the Tribunal’s case law, to recommend that the complainants be personally granted moral damages as they had filed their appeal in their capacity as staff representatives. The majority considered that the unequivocal finding of illegality in itself afforded adequate satisfaction to the complainants. However, one member of the Appeals Committee recommended awarding each complainant 1,000 euros in moral damages in view of the severity of the breach of law which had unjustifiably restricted the exercise of their fundamental rights to freedom of association and freedom of speech. The Appeals Committee unanimously recommended that each complainant be awarded 150 euros in moral damages for the length of the proceedings.

By a letter of 7 August 2020, the Vice-President of Directorate-General 4, acting on behalf of the Office, informed each complainant that the Office had decided to endorse the Appeals Committee's unanimous recommendation that the refusal to allow the request for publication was unlawful. The Office also endorsed the recommendation of the majority of the members of the Appeals Committee not to grant them moral damages in that respect as they had filed their appeal in their capacity as elected staff representatives. The Vice-President stressed that this decision was in line with the Tribunal's well-established case law, in particular Judgments 3671, 3258 and 3522. The Office nevertheless agreed with the unanimous recommendation to grant them, and the other two appellants, 150 euros each in moral damages for the length of the proceedings, and an additional 100 euros each for "the time that elapsed until the issuance of this decision". Since they had filed their appeals as staff representatives, the amounts would be credited to the staff representation as a whole, that is to say to the specific budgetary line of the staff committees related to training and duty travel. That is the decision each complainant impugns before the Tribunal.

Each complainant asks the Tribunal to award him 5,000 euros in "damages", or alternatively that one euro be credited to each staff member like, as alleged, in Judgments 2857 and 2875. Or, "[o]ptionally" if the Tribunal rejects the claim, they seek the payment of 500 euros each to their personal account. They ask the Tribunal to order the EPO to transfer 150 euros each to their personal accounts for the length of the proceedings and an additional 100 euros each for "the time that elapsed until the issuance of the decision".

The EPO asks the Tribunal to dismiss certain aspects of the complaints as irreceivable, in particular in relation to the claim for punitive damages and the claims made on behalf of staff. The complaints are otherwise deemed unfounded.

CONSIDERATIONS

1. The complainants, by means of distinct but identical complaints, impugn in part the same final decision dated 7 August 2020. By this decision, the Vice-President of Directorate-General 4 endorsed the 10 June 2020 opinion of the Appeals Committee, and therefore allowed the main part of the complainants' internal appeal challenging the refusal to publish on the Intranet of the EPO a presentation and an open letter from the Central Staff Committee. The 7 August 2020 decision:

- (i) acknowledged the unlawfulness of the refusal of publication;
- (ii) denied moral damages related to the unlawfulness of the refusal;
- (iii) awarded moral damages in the total amount of 1,000 euros (250 euros for each of the four appellants before the Appeals Committee) for the excessive length of the internal appeal procedure, but decided that the compensation would be credited to the staff representation as a whole, by crediting the specific budgetary line of the staff committees related to training and duty travel.

2. The decision is impugned to the extent that it:

- (i) dismissed the ancillary claim for moral damages allegedly suffered due to the unlawfulness of the refusal of publication;
- (ii) established that the amount of 1,000 euros awarded as moral damages for the length of the internal appeal would be credited to the staff representation as a whole rather than to the complainants personally.

The complainants request:

- (i) to be awarded 5,000 euros as moral damages, or, alternatively, one euro per staff member to be credited to each staff member;
- (ii) the transfer to their personal accounts of 250 euros each (that is the compensation awarded by the EPO for the length of the procedure in favour of each appellant);
- (iii) alternatively, the transfer to their personal accounts of 500 euros each, should the Tribunal reject their first claim.

3. As the two complaints impugn the same final decision, are based on the same material facts, raise the same issues of fact and law, and, in addition, the complainants' arguments are embodied in one brief, they may be dealt with in a single judgment and are therefore joined.

4. Mr B., a former staff representative, has filed with the Tribunal an application to intervene pursuant to Article 13 of the Rules of the Tribunal, alleging to be in a situation similar to that of the complainants.

5. The EPO raises the following threshold issues:

- (i) the complaints are partly irreceivable, insofar as the complainants request the award of punitive damages, never asked before the internal appeal body;
- (ii) the complaints are partly irreceivable, to the extent that the complainants request an award of moral damages in favour of all staff members in the amount of one euro per staff member.

6. The first issue is misconceived. No claim is made for punitive damages.

7. As to the receivability of the complainants' request for an award of moral damages in the amount of one euro per staff member, the Tribunal notes that its jurisdiction *ratione personae*, pursuant to Article II of the Statute, is of an individual nature. The Tribunal can only order that the Organisation pay compensation for damages to the complainants (Article II, paragraph 5, of the Statute of the Tribunal), and not to third parties. For this reason, the Tribunal will not follow Judgment 2857, which underpins the complainants' argument on this topic.

8. By their first plea, which grounds the claim for moral damages, the complainants allege, to the extent now presently relevant, that:

- (i) the judgments quoted by the Appeals Committee in order to deny the award of moral damages do not represent the established case law of the Tribunal; in other cases the Tribunal awarded moral damages to staff members acting in their capacity as staff representatives;
- (ii) it would be contradictory to award staff representatives moral damages for the length of the internal appeal proceedings and deny them moral damages for the unlawfulness of the decision;
- (iii) the EPO acted in bad faith and the refusal of publication was an unlawful censorship.

9. The claim for moral damages is unfounded.

According to a recent precedent, decided by the seven judges of the Tribunal, a complainant, acting as a staff representative, is not entitled to an award of moral damages (see Judgment 4550, consideration 20). By their very nature, violations of the rights of staff representatives cannot, under any circumstances, give rise to any personal right to financial compensation.

Depending on the circumstances of the case, a moral injury, due to its nature, can be restored not only by means of a sum of money. While the Tribunal considers that it is beyond its power to order a public apology (see Judgment 2762, consideration 31), it determines that the annulment of the impugned decision can be considered by itself a form of redress of moral injury (see Judgments 1745, consideration 12, and 1481, consideration 8). In a case similar to the present, concerning censorship in violation of freedom of communication, the Tribunal affirmed that the EPO, by requiring prior authorization for the dispatching of mass emails, breached the complainants' freedom of communication. Nonetheless, in that case, the Tribunal, as to the redress for moral injury, held that the annulment of the impugned decision was in itself a sufficient remedy for any moral injury the complainants may have conceivably suffered (see Judgment 4551, consideration 16).

Similarly, in the present case, it must be held that the 7 August 2020 decision admitting the unlawfulness of the censorship related to the publication of two documents, together with the publicity given to

this decision on the Organisation's website, were already sufficient redress for any moral injury.

10. By their second plea, that grounds their second claim, the complainants submit that:

- (i) the decision to credit the damages to the staff representation as a whole, namely to the specific budgetary line of the staff committees related to training and duty travel, is unlawful, since this budgetary line is not available directly to the Central Staff Committee, which cannot freely manage its travel and training budget;
- (ii) the training and duty travel budget of the staff committees is provided by the EPO, under the Office's obligations provided for in Article 34(3) of the Service Regulations for permanent employees of the Office and in Circular No. 356;
- (iii) by allocating the compensation to that budget, the EPO is simply transferring an amount of money to itself and not to the injured party.

11. This claim is unfounded.

The Tribunal decides that, although there may have been some inconsistencies regarding this issue in its previous case law, the exclusion of the entitlement of staff representatives to personal financial compensation extends to moral damages resulting from excessive length in the internal appeal proceedings.

In the present case the moral damages for the excessive length of the internal appeal proceedings were awarded by the Organisation and not by the Tribunal. Accordingly, the specific issue in this case is whether the action taken by the Organisation to pay damages in the way it did was lawful.

12. The complainants lodged their internal appeals only in their capacity as members of the Central Staff Committee. It follows that the injury for the excessive length of the internal appeal proceedings was suffered by the Central Staff Committee and the staff representation as a whole, not by the staff representatives individually. Since the

complainants acted in the interest of the Central Staff Committee and on its behalf, the EPO's decision to award compensation for damages by crediting the budgetary line of the staff committees related to training and duty travel was lawful. In Judgment 4550, consideration 20, the Tribunal considered that the mechanism followed by the EPO was not inappropriate. This lends support to the same conclusion in the present case. Moreover, the Tribunal notes that the complainants do not suggest any viable alternative mode of compensation of an injury specifically suffered by the Central Staff Committee and the staff representation as a whole.

13. It follows from the foregoing that the complaints should be dismissed. As a consequence, Mr B.'s application to intervene should also be dismissed, without there being any need to rule on the objection raised by the EPO to the receivability of the application.

DECISION

For the above reasons,

The complaints are dismissed, as is the application to intervene.

In witness of this judgment, adopted on 9 November 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, Mr Jacques Jaumotte, Judge, Mr Clément Gascon, Judge, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 28 November 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

JACQUES JAUMOTTE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ