

B. (No. 3) and B. (No. 3)

v.

EPO

133rd Session

Judgment No. 4484

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaints filed by Mr R. B. and Mr D. B. against the European Patent Organisation (EPO) on 29 March 2020, the EPO's reply of 20 July, the complainants' rejoinders of 7 August and the EPO's surrejoinder of 5 November 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 none of the parties has applied;

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

The complainants challenge the decisions to reject their claim for reimbursement of deductions made as from December 2015 to a compensatory allowance following their career progression and the ensuing increase in their salary.

Until the end of December 2005, the complainants were paid a flat-rate allowance (commonly known as the "Van Benthem allowance") for work performed outside normal working hours and on non-working days. As from 1 January 2006, the Administration decided to abolish this allowance. The complainants challenged this decision, which led to Judgment 2972.

In Judgment 2972, delivered in public on 2 February 2011, the Tribunal found, at consideration 10, that "[t]he only reasonable way the EPO could discharge its duty of care to cushion against financial hardship was to pay by way of allowance the difference between the

actual amount of the Van Benthem allowance as at 31 December 2005 (1,206.32 euros in the case of the first complainant and 1,354.54 euros in the case of the second) and the shift allowance payable in accordance with Article 58(2) of the Service Regulations until such time as the shift allowance should equal or exceed the actual amount of the Van Benthem allowance paid on 31 December 2005”.

By letters of 26 February 2015 both complainants were informed that, as from 1 January 2015, they were appointed to posts within Job Group 6. They were also informed that, pursuant to Judgment 2972, they would continue to receive the allowance of 1,206.32 euros and 1,354.54 euros, respectively. However, due to the implementation of a new career system as from 1 July 2015, any increase of their basic salary, led by promotion, step advancement or salary adjustment would be deducted from the said allowance.

By letters of 31 March 2015 the complainants accepted their appointments but expressed disagreement with the deduction announced in the letters of 26 February 2015.

In December 2015 the complainants were awarded a step advancement. Their payslips for December 2015 reflected a decrease in the amount paid for the allowance.

On 29 February 2016 both complainants requested the review of the decision to reduce the amount of the allowance. Their requests for review were dismissed by decisions of 28 April 2016.

On 26 May 2016, the complainants lodged internal appeals requesting that the decision to reduce the amount of the allowance be set aside and claiming 10,000 euros in moral damages, 10,000 euros in punitive damages, as well as costs.

During a meeting held on 7 March 2018 the EPO acknowledged that since July 2015 (*sic*) it had erroneously deducted from the allowance salary increases deriving from annual salary adjustments. Consequently, the corresponding amounts were reimbursed to the complainants, with interest, for the period July 2015 to December 2017 and the EPO stopped deducting from the allowance increases in salary ensuing from annual salary adjustments.

As the complainants’ internal appeals were identical, the Secretariat of the Appeals Committee registered the appeals under the same reference and forwarded them to the Appeals Committee for a single opinion.

In its opinion of 18 December 2019 the Appeals Committee unanimously recommended dismissing the appeals as partly moot and unfounded for the remainder. Indeed, the reduction of the allowance for reasons of career progression was in its opinion lawful. The Appeals Committee also recommended awarding the complainants 250 euros in moral damages for the delay in the internal appeal proceedings.

By letters of 18 February 2020, the complainants were informed that, in accordance with the recommendation of the Appeals Committee, their appeals were dismissed as partly moot and entirely unfounded for the remainder. They were awarded 350 euros in moral damages for the delay in the internal appeal proceedings. Those are the impugned decisions.

The complainants ask the Tribunal to set aside the decisions to reduce the allowance, to be reimbursed with interest the difference between the amounts they should have received pursuant to Judgment 2972 and the amounts they have actually received and to award them moral damages in an amount of no less than 10,000 euros each. They also each claim 10,000 euros in punitive damages, as well as costs.

The EPO asks the Tribunal to dismiss the complaints as irreceivable in that the complainants lack a cause of action as the level of their remuneration has remained unaffected and they have suffered no financial loss. It submits, on a subsidiary basis, that the complaints are entirely unfounded.

CONSIDERATIONS

1. The Tribunal finds it convenient to join these complaints and render a single judgment on them, as they raise the same issues of fact and law.

2. The complainants impugn the decisions, dated 18 February 2020, issued by the Chief Corporate Policies Officer, by delegated authority from the President of the Office. Those decisions accepted the unanimous recommendation of the Appeals Committee to reject their internal appeals as partly moot and unfounded for the remainder, as well as the Committee's further recommendation to award each complainant 250 euros in moral damages for undue delay in the internal proceedings. The impugned decisions also awarded each complainant a further 100 euros in moral damages "for the additional length of [the] procedure

until the issuance of [those decisions]” for a total of 350 euros “for the length of the internal appeal proceedings”.

3. In their underlying internal appeals, the complainants had challenged the decisions, which were implemented in their December 2015 and January 2016 payslips, to reduce the amount of the allowance which was introduced following Judgment 2972. This was to compensate the complainants for the abolition of a flat-rate allowance they had previously received for work performed outside normal working hours and on non-working days. Indeed, the complainants had already contested in 2005 the decision to abolish that allowance as from January 2006. They had argued that this decision breached their acquired right and their legitimate expectation to continue to receive the allowance, as well as the EPO’s duty of care. Those challenges eventually led to Judgment 2972, delivered in public on 2 February 2011, in which the Tribunal determined that in the circumstances of the case it was impossible to conclude that the complainants had an acquired right to an immutable allowance calculated at 34.37 per cent of their basic monthly salary (see consideration 8). It also determined that they had no legitimate expectation to continue to receive that allowance as it was not supported by the Service Regulations for permanent employees of the European Patent Office and was at odds with the EPO’s right to assign different patterns of shift work. The Tribunal however determined that the EPO must have known that the complainants had entered into financial obligations on the basis of the practice which was long-standing. The Tribunal further determined that in a context where there was a continuing need for security work to be performed at night, the EPO had a duty of care to ensure that the new arrangements did not cause the complainants financial hardship (see consideration 9).

4. The Tribunal’s reasons for this latter determination, as well as the results, were stated as follows in consideration 10 of Judgment 2972:

“The obligation to ensure that the new arrangements did not cause financial hardship to the complainants was and is entirely independent of the EPO’s obligation to pay the complainants the full amount of their basic salary as adjusted from time to time. The latter obligation is fundamental and there is no basis on which any part of basic salary can be set off against the obligation to ensure that there was no hardship to the complainants as a result of the changed shift patterns. Neither the transitional allowance as originally paid to the complainants nor that subsequently paid in accordance with the recommendations of the Internal Appeals Committee preserved the

complainants' basic salary as adjusted from time to time. The only reasonable way the EPO could discharge its duty of care to cushion against financial hardship was to pay by way of allowance the difference between the actual amount of the Van Benthem allowance as at 31 December 2005 (1,206.32 euros in the case of the first complainant and 1,354.54 euros in the case of the second) and the shift allowance payable in accordance with Article 58(2) of the Service Regulations until such time as the shift allowance should equal or exceed the actual amount of the Van Benthem allowance paid on 31 December 2005. It follows that the [impugned] decisions of 21 August 2008 will be set aside and orders made for the payment to each complainant for so long as he works shifts outside normal working hours, of an allowance in accordance with these reasons less those sums already paid in accordance with the recommendation of the Internal Appeals Committee. The EPO must pay interest on the resulting differences at the rate of 8 per cent per annum from due dates until the date of payment."

5. In Judgment 3109, delivered in public on 4 July 2012, on the EPO's application for interpretation of Judgment 2972, the Tribunal explained, in consideration 2, that Judgment 2972 entitled each complainant to such sum of money by way of compensatory allowance which, when added to the Article 58(2) shift allowance, will ensure that, over and above their basic salary as adjusted from time to time, they would each receive the same amount of money as they received by way of the Van Benthem allowance on 31 December 2005. The Tribunal further stated that if the amount payable under Article 58(2) increased, the amount of the compensatory allowance would decrease by the corresponding amount (see consideration 2). Concerning the period for which the compensatory allowance must be paid, the Tribunal recalled its statements in Judgment 2972 that payment should be made "to each complainant for so long as he works shifts outside normal working hours" and that it was clear from its terms that Judgment 2972 was not based on acquired rights or the working of night shifts, but on the Organisation's "duty of care to ensure that the new arrangements did not cause financial hardship to [the complainants]" (see consideration 3).

6. In a letter dated 26 February 2015, the Director of Directorate 4.3.2 informed the first named complainant of his promotion from grade C4, step 13, to which a basic salary of 4,699.28 euros was attached, to grade B3, step 09, to which a basic salary of 4,892.83 euros was attached. In a similarly dated letter, the Director informed the second named complainant of his promotion from grade C5, step 11, to which a basic salary of 4,978.23 euros was attached, to grade B4,

step 06, to which a basic salary of 5,112.16 euros was attached. The letters also informed the complainants that from 1 January to 30 June 2015 they would continue to receive the allowance of 1,206.32 and 1,354.54 euros, respectively. However, as from 1 July 2015, due to the implementation of a new career system, any increase in their basic salaries on account of their promotion, step advancement or salary adjustment “will be taken into account for the determination of the [level of their subject allowance] and will be deducted accordingly” from their respective monthly allowances of 1,206.32 euros and 1,354.54 euros. In letters each dated 31 March 2015 the complainants accepted their promotion but expressed disagreement with the proposed method of calculation of the allowances. They argued that it was in contradiction with consideration 10 of Judgment 2972. They reserved their rights “to contest any calculation that [caused them] injury, be it at the time of a step advancement, of a promotion, or of a salary adjustment” and subsequently challenged the decisions when the deductions were implemented in their December 2015 and subsequent payslips. The subject allowances were reduced from 1,206.32 euros to 1,096.20 euros and from 1,354.54 to 1,139.15 euros per month, respectively.

7. Inasmuch as in 2018 the EPO acknowledged that the salary increases resulting from the annual salary adjustments should not have been deducted and reimbursed the complainants the sums deducted for the period July 2015 to December 2017, with interest, the Appeals Committee correctly concluded that the consolidated appeals were moot to the extent that they challenged the amounts that were deducted based on their salary increases resulting from the annual salary adjustments. Noteworthy, in their complaints, the complainants acknowledge the reimbursement and state that this aspect of the original challenged decisions is no longer controversial. Consequently, the impugned decisions correctly accepted the Committee’s recommendation to reject that aspect of the internal appeals as moot to that extent. Accordingly, the Tribunal dismisses the complainants’ requests to set aside the impugned decisions to this extent.

8. The other element of this case is concerned with the deductions which are being made from the complainants’ compensatory allowance in respect of their career progression. The Appeals Committee correctly considered that the reductions therefrom were permissible and lawful.

As the Committee noted, the compensatory allowance was meant to serve as a means of mitigating the adverse financial effects that the reorganisation had had on the complainants' income in 2005 and not as a permanent financial bonus, and that moreover, ten years after the commencement of that entitlement the EPO slightly reduced the compensatory allowance, while nonetheless maintaining the complainants' income at a stable level. In the Tribunal's view, this reasoning is in line with the Tribunal's analyses in Judgments 2972 and 3109, consideration 3, particularly as the complainants no longer perform shift work outside normal working hours. As the impugned decisions accepted the Appeals Committee's reasoning on this issue, the complainants' claims to the contrary are unfounded.

9. The Tribunal also dismisses the complainants' claims for moral and punitive damages. They submit that the impugned decisions caused them severe moral damages because the Administration contemptuously and with malicious intent ignored the decisions in Judgments 2972 and 3109 and should, as they put it, therefore be taught a lesson. This, they submit, was aggravated when the EPO offered to settle the dispute with a one-time payment, which they felt was so low that they rejected it as insulting to their dignity. They have not however provided evidence of injury suffered resulting from the challenged decisions to attract moral damages, as the case law requires (see, for example, Judgment 4156, consideration 5). Moreover, there is no evidence that the impugned decisions hampered their careers (see, for example, Judgment 3198, consideration 25). The complainants provide no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 4286, consideration 19).

10. In the foregoing premises, the complaints will be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 21 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ