

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

D. (No. 12)

v.

EPO

134th Session

Judgment No. 4558

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 3 September 2020, the EPO's reply of 27 October, the complainant's rejoinder of 27 November 2020 and the EPO's surrejoinder of 20 January 2021;

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

Having examined the written submissions;

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

The complainant impugns the decision not to reimburse the costs incurred in connection with his third complaint to the Tribunal.

Facts relevant to this case are to be found in Judgments 4556 and 4557 on the complainant's tenth and eleventh complaints, also delivered in public this day. Suffice it to recall that in 2011, the complainant made various attempts to obtain a complete copy of the medical file for, in particular, the period when he had been treated by Dr Ki., an external doctor who had provided services to the European Patent Office, the EPO's secretariat, at its office in Berlin, Germany, from 1992 to 2003. As Dr Ko., the Office's medical adviser since 1 January 2005, did not have the medical file kept by Dr Ki., who had died in the meantime, Dr Ko. told the complainant that it was physically impossible to provide

him with the file in question. Dr Ko. added that he did not have any file for the complainant and advised him to contact Dr Ki. directly.

In a letter of 16 December 2011 to Dr Ko., the complainant repeated his request that he be sent “all the documents [comprising his] medical file” by 17 January 2012. If that were impossible, he stated that his letter should be treated as an internal appeal. On 15 February 2012 the complainant was informed that his request could not be granted as the Office did not have access to the medical files kept by former external doctors. His request was then registered as an internal appeal and referred to the Internal Appeals Committee (IAC), which delivered its opinion on 15 December 2014 recommending that the appeal be rejected. That recommendation was endorsed by the President of the Office in a decision of 9 February 2015. The complainant impugned that decision in his third complaint to the Tribunal.

Judgments 3694 and 3785 were delivered in public on 6 July and 30 November 2016 respectively. Although these judgments concerned cases that did not involve the complainant, they found the membership of the IAC at the time when it issued its opinion of 15 December 2014 to be unlawful. The President of the Office therefore withdrew his decision of 9 February 2015 and on 1 March 2017 remitted the complainant’s internal appeal to a differently composed IAC.

After a fresh consideration of the appeal and the provision of further explanations by the parties, the IAC delivered a unanimous opinion on 26 June 2019. It recommended that the complainant be awarded 5,000 euros in compensation for the moral injury resulting in particular from the Office’s failure to safeguard his personal medical data and the sum of 750 euros for the undue length of the procedure, but that the other claims should be dismissed.

In Judgment 4256, delivered in public on 10 February 2020, the Tribunal noted the withdrawal of the President’s decision of 9 February 2015 and dismissed the complainant’s third complaint on the grounds that it had become devoid of object. However, it noted that the complainant may have incurred costs in filing a complaint against a decision which had been presented to him as a final decision that could be impugned before the Tribunal. As the withdrawal of the impugned

decision was not caused by the complainant but by the way in which the EPO had interpreted its own rules, the Tribunal held that he might be entitled to costs and stated that such costs should be considered in the resumed internal appeal proceedings.

By letter of 15 May 2020 the complainant was informed that the President of the Office had decided to endorse the IAC's recommendations in the opinion delivered on 26 June 2019. That decision was impugned in the complainant's tenth complaint.

On 27 April 2020, before that decision was taken, the complainant, referring to Judgment 4256, requested the Conflict Resolution Unit to reimburse the costs incurred in connection with his third complaint. On 6 July he was informed, first, that the Unit had not had sight of any invoices in this respect, which therefore needed to be submitted, and second, that the President had already taken a final decision on that point, namely the decision of 15 May 2020. On 10 July 2020, considering that this decision was not final as far as the question of costs was concerned, the complainant reiterated his request for reimbursement on the basis of the invoices that he submitted, and then lodged a request for review. In an email of 21 July 2020, the Conflict Resolution Unit proposed paying the complainant the sum of 2,500 euros to close his case for good. It added that if he was dissatisfied, the only option was to contact the Tribunal directly as a request for review was not the correct procedural path. That is what the complainant impugns in the present complaint.

The complainant requests the Tribunal to find his complaint receivable and well founded, to set aside the impugned decision and to order the EPO to reimburse in full the fees actually incurred and paid in connection with his third complaint, with interest at the rate of 5 per cent from 27 April 2020. He further claims compensation for the moral injury allegedly suffered, estimated at 5,000 euros, and an award of 1,000 euros in costs.

The EPO submits that the complaint is irreceivable in that, first, the email of 21 July 2020 is not a final decision for the purposes of Article VII, paragraph 1, of the Statute of the Tribunal and, second, the complainant failed to challenge the decision of 15 May 2020 within the

prescribed period of 90 days. It asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. In his twelfth complaint, the complainant requests the setting aside of what he describes as a decision taken by the Conflict Resolution Unit on 21 July 2020, the reimbursement in full of the fees actually incurred and paid to his lawyer in connection with his third complaint, which was disposed of in Judgment 4256, delivered in public on 10 February 2020, representing a sum of 6,098.75 euros, with interest at an annual rate of 5 per cent from 27 April 2020, and the payment by the Organisation of an additional sum of 5,000 euros for the moral injury that he submits he has suffered and 1,000 euros in costs.

2. The complainant requests that oral proceedings be held. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow the Tribunal to be properly informed of their arguments and the evidence. That application is therefore dismissed.

3. The present complaint is unusual in that it essentially seeks to secure compliance with a previous judgment of the Tribunal, Judgment 4256, in which the Tribunal stated the following in respect of numerous complaints against the EPO, including the complainant's third:

“5. Some of the decisions in question were already the subject of complaints before the Tribunal. This applies to each of the decisions impugned in these proceedings. The President of the Office considered that the complaints pending before the Tribunal were rendered moot by the withdrawal of his final decisions, and he invited the complainants to withdraw them. The EPO informed the Tribunal of this development in writing, providing a list of the complaints concerned. The present complainants refused to withdraw their complaints, despite the fact that the impugned decisions had been withdrawn.

6. Regarding the referral of the appeals back to the [IAC], this step taken by the President has already been challenged before the Tribunal. In the case leading to Judgment 4131, the complainant had argued before the [IAC] that the President's decision to refer his appeal back to it had no basis in law. The Tribunal rejected this argument in consideration 5 of Judgment 4131.

7. As for the withdrawal itself, the President revoked an unlawful decision in the Organisation's interests to avoid an unfavourable ruling by the Tribunal. The withdrawal of the final decisions on account of the unlawful composition of the [IAC] and the related action of referring the cases to a newly constituted [IAC] were rational steps lawfully taken by the President in light of Judgments 3694 and 3785. Accordingly the various arguments raised by the complainants to explain what the President should have done amount to mere speculation.

8. As a result of the withdrawal of the impugned decisions, the Tribunal can only conclude that the complaints are now without object. The legal foundation for the complainants' claims no longer exists, and their complaints must therefore be dismissed in their entirety. It follows that the applications to intervene are to be dismissed as well.

9. It is however noted that the complainants may have incurred costs in filing complaints against a decision which was presented to them as a final decision that could be impugned before the Tribunal. As the withdrawal of the impugned decisions was not caused by the complainants but by the way in which the EPO interpreted its rules, the complainants may be entitled to costs (see Judgment 2853, considerations 6 to 8). Such costs should be considered in the resumed internal appeal proceedings." (Emphasis added.)

4. The EPO challenges the receivability of the complaint on two grounds. First, it submits that the decision that dealt with the question of costs, left open by aforementioned Judgment 4256, was in fact the President's decision of 15 May 2020, which was the subject of the complainant's tenth complaint; his twelfth complaint was therefore not filed within the 90-day period stipulated in Article VII, paragraph 2, of the Statute of the Tribunal. Second, it contends that the email sent by the Conflict Resolution Unit on 21 July 2020 was not a final decision.

5. In respect of the first objection to receivability, there is no merit in the EPO's argument that the complaint is irreceivable because the complainant failed to comply with the 90-day time limit prescribed in Article VII, paragraph 2, of the Statute of the Tribunal.

The Tribunal considers that it is incorrect to argue that the complainant should in fact have impugned the decision of 15 May 2020 in this case. The decision of 15 May 2020 does not address the specific issue of the request for reimbursement of costs submitted by the complainant on 10 July 2020 and to which the email sent by the Conflict Resolution Unit on 21 July 2020 sought to respond.

The Tribunal first observes that, when Judgment 4256 was delivered in public on 10 February 2020, the internal appeal procedure, which was to be resumed following the withdrawal of the decision impugned in the complainant's third complaint, had already been completed as far as the stage before the IAC was concerned. The IAC's opinion following the resumption of the procedure, which the impugned decision of 15 May 2020 endorsed, had been delivered on 26 June 2019, and was moreover the subject of the complainant's tenth complaint. It is therefore impossible to conclude that the issue of costs might have been examined by the IAC in the resumed procedure. This is confirmed by a reading of the IAC's opinion, and the Organisation is wrong to contend that various paragraphs in that opinion indicate the contrary. The only damages which the IAC considered in that opinion when awarding the complainant the sum of 750 euros related to the undue length of the internal procedure. The issue of the complainant's costs relating to the appeal in the case leading to his third complaint was simply not considered in that opinion.

Second, in respect of the decision of 15 May 2020 to which the Organisation refers and which, it contends, took account of consideration 9 of Judgment 4256, delivered in public on 10 February 2020, the Tribunal finds that this contention is factually incorrect. There is nothing in that decision to suggest that such might be the case. The decision does not mention costs or the Tribunal's judgment of 10 February 2020. It merely refers to the President's endorsement of the opinion that the IAC delivered on 26 June 2019 – before the public delivery of Judgment 4256 – which recommends that the complainant be awarded the sums of 5,000 euros in moral damages and 750 euros for the length of the internal procedure. The contention that it was at the end of this new procedure and having considered the matter that the EPO found that there was no reason to

award the complainant costs, as the Organisation submits in its reply, is unfounded.

The first objection to receivability must therefore be dismissed.

6. In respect of its second objection to receivability, the EPO submits that the Conflict Resolution Unit's email of 21 July 2020, on which the present complaint is based, is not a final decision and was merely a part of a negotiation. In support of this argument, it refers to Judgment 4269, consideration 6.

It is true that the Unit's email of 21 July 2020 reads as follows:

"[...] The Office has now come to the conclusion that a payment in the amount of [...] 2,500 [euros] appears reasonable and justified to allow both parties to close this matter for good. This decision is based on the average amount of costs that the [Administrative Tribunal of the International Labour Organization] awarded at its 123rd to 128th session for costs incurred in court [...]"

"[...] [I]n the event that you still do not agree with the proposed amount, you only have the possibility to contact the Tribunal directly. Filing a request for management review, as you may have intended, is clearly not the correct procedural path to express your dissatisfaction. [...]" (Emphasis added.)

However, this is not a decision of the President of the Office but merely an offer from the Conflict Resolution Unit. Although the email describes the Unit's response as a "decision" by the Organisation, states that the complainant has no option but to contact the Tribunal directly if he disagrees, and adds that a request for review is clearly not the correct remedy in the circumstances, the fact remains that, according to Circular No. 341, concerning the dispute resolution policy at the EPO, the Unit's role is actively to support and coordinate the amicable conflict resolution process (Article 8), not to issue decisions.

The Tribunal observes that it is contradictory and regrettable that the Organisation submits before it that the decision communicated to the complainant was not final while it had nevertheless specified, in its email of 21 July 2020, that the complainant could not submit a request for review. While an organisation has a duty to correct any mistakes made by an employee in the exercise of her or his right of appeal, it has an even greater duty not to misdirect an employee to the wrong venue

by incorrectly telling her or him that a request for review is not the right remedy or that her or his only possible recourse is to file a complaint with the Tribunal and then criticise her or him for having followed its directions.

Above all, however, the Tribunal notes that an organisation cannot exempt the complainant from the requirement to exhaust internal remedies when the applicable provisions of the staff rules and regulations do not authorise it to do so, and still less indicate wrongly to the employee concerned that she or he can file a complaint directly with the Tribunal.

The outcome is that, ultimately, and contrary to the Tribunal's recommendation in Judgment 4256, consideration 9, the Organisation simply failed to consider in the resumed internal procedure the issue of the costs to which the complainant might be entitled other than by later proposing to pay him a sum that it never paid because he disagreed with the offer. The Organisation thereby implicitly but necessarily rejected the complainant's request for payment of those costs, without explaining to him why.

Nevertheless, it follows that while the complaint is not irreceivable because it is late, it is irreceivable because it is premature, since, given the Organisation's failure to issue a decision regarding costs, the complainant has not exhausted internal remedies.

7. However, in Judgment 4556 concerning the complainant's tenth complaint, also delivered in public this day, the Tribunal ruled on the merits of that complaint and dismissed it. In the particular circumstances of the present case, it will therefore be more appropriate for the Tribunal to rule directly on the question of the award of costs incurred in the third complaint, which was the subject of Judgment 4256.

8. The complainant seeks the full reimbursement, in an award of costs, of the legal fees which he incurred and paid in connection with his third complaint, totalling 6,098.75 euros. The Organisation submits that, in the light of the Tribunal's case law, the sum of 500 euros would be ample in the circumstances of the case. The Organisation notes that

in Judgment 4256 the Tribunal dismissed the complaint in its entirety and the complainant would therefore not ordinarily be entitled to costs.

However, in drawing attention to this point, the EPO disregards abovementioned consideration 9, where the Tribunal stated that the withdrawal of the impugned decisions was not caused by the complainants and that they, including the complainant in this case, might be entitled to claim costs. The sum of 500 euros proposed by the EPO is all the more surprising given that the email sent to the complainant by the Conflict Resolution Unit on 21 July 2020 referred to the Organisation's "decision" that a payment of 2,500 euros for these costs seemed reasonable and justified in the circumstances and was, according to the EPO, in line with the Tribunal's case law.

Since, in the complaints on the basis of which Judgment 4256 was delivered, the complainant claimed costs of only 5,000 euros, the Tribunal considers that, bearing in mind its finding in Judgment 4556, also delivered in public this day, that the tenth complaint was unfounded, the complainant's claim in this respect will be fairly redressed by reimbursing him the sum of 2,500 euros, as the EPO initially offered.

9. With regard to the complainant's additional claim for payment of moral damages in the amount of 5,000 euros, the Tribunal notes that, in Judgment 4324, consideration 3, it stated as follows:

"[...] international organisations that have recognised the Tribunal's jurisdiction are bound to take whatever action the decision in a judgment may require, which must be executed by the parties as ruled [...]"

It is true that consideration 9 of Judgment 4256 is not part of the decision in that judgment. This is not, however, a reason to ignore the meaning and scope of the Tribunal's finding that "[s]uch costs should be considered in the resumed internal appeal proceedings". Yet, as discussed above, the Organisation did not take any tangible action following this recommendation. The EPO's only response took the form of the reply from the Conflict Resolution Unit dated 21 July 2020, which referred to a "decision" to pay the complainant the sum of 2,500 euros under this head, which it did not pay owing to the fact that he disagreed with the

offer and which it now submits that it can reduce to 500 euros, which is not an adequate offer.

The Tribunal considers that, by so doing, despite what the Tribunal had stated in Judgment 4256, consideration 9, the EPO acted wrongfully towards the complainant, which warrants relief. In the Tribunal's view, this moral injury will be fairly redressed by awarding the complainant the sum of 2,500 euros.

10. As the complainant largely succeeds in his twelfth complaint, he is also entitled to costs in connection with these proceedings, which will be set at 750 euros in the light, in particular, of the fact that he did not engage a lawyer for the purposes of the present complaint.

DECISION

For the above reasons,

1. The EPO shall pay the complainant the sum of 2,500 euros as indicated under consideration 8, above.
2. The Organisation shall also pay the complainant moral damages in the amount of 2,500 euros.
3. It shall also pay him 750 euros in costs relating to these proceedings.
4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ