

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H. (No. 24)

v.

EPO

137th Session

Judgment No. 4802

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-fourth complaint filed by Mr W. H. H. against the European Patent Organisation (EPO) on 7 February 2018 and corrected on 2 March, the EPO's reply of 13 June 2018, the complainant's rejoinder of 17 September 2018 and the EPO's surrejoinder of 9 January 2019;

Considering the letter of 12 January 2023 by which the EPO informed the Registry of the Tribunal that it had paid 100 euros in moral damages to the complainant for the irregular composition of the Appeals Committee, as was done in Judgment 4550;

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 contests the European Patent Office closure policy in 2015 and 2016.

The complainant was an employee of the Office, the Secretariat of the EPO. From 1 January 2014 to 30 June 2014, he was a member of the General Advisory Committee (GAC), appointed by the Central Staff Committee (CSC).

In March 2014, decision CA/D 2/14 amended the legal framework governing social dialogue and the internal appeals procedure. In particular, it replaced the GAC with the General Consultative Committee (GCC) as of 1 July 2014. The composition, functioning and competence of that consultative body were redefined. The decision also modified the rules governing the appointment of the members of the internal appeals body.

After consultation with the GCC, the President of the Office determined the official holidays for 2015 and so informed staff by Circular No. 359 issued in October 2014. In December 2014, the complainant filed a request for review of the Circular on the ground that it was flawed in three respects. First, the Circular foresaw four days of compulsory leave, which represented more than 13 per cent of his annual leave entitlements and hence violated Circular No. 22. Second, Circular No. 359 violated his acquired rights and legitimate expectations because, contrary to past practice, it did not foresee compensation for staff in Munich (Germany) whereas staff in Vienna (Austria) had additional days off in 2015. Third, the consultation process leading to the adoption of the Circular was conducted with the GCC, an “inferior body” to the GAC, and not the GAC. The complainant therefore requested to be compensated for all, or at least part, of the days on which the Office would be closed by being allocated additional days of annual leave. He also asked that the proposal concerning holidays in 2015 be sent back for a proper “statutory consultation”. His request for review was rejected and he filed an internal appeal with the Appeals Committee expanding on his arguments and claims; he requested for instance that, in the future, a proper consultation procedure be set up.

By Circular No. 369, issued in July 2015, the President of the Office informed staff of the determined official holidays for 2016. In August 2015, the complainant filed a request for review of that Circular alleging that it was flawed because it was presented to the GCC for information only even though the Circular indicated that the GCC had been consulted. The complainant added that the GCC was wrongly constituted. The complainant’s claims were similar to those he made in his first request for review. This request was also rejected, and he filed

an internal appeal with the Appeals Committee again expanding on his arguments and claims.

In January 2016, the complainant filed another request for review contesting the implementation of Circular No. 359. Since he had failed to take days off during the three days in December 2015 when the Office was closed, the Administration recorded compensation hours from his time account, which prevented him from benefiting from time deduction in the Managing of Unified Search and Examination (MUSE) programme, and it negatively affected his productivity. He therefore requested that “these decisions” be reviewed, that he be allocated additional days of annual leave to compensate him for the Office’s closure and the additional days of public holidays foreseen in Vienna compared to Munich, as per the EPO’s long-standing practice. He also asked to receive a MUSE time deduction, and that account be taken of the consequences of these extra days if there were any. He further asked that a proper “statutory consultation” be held. His request for review was rejected, and he filed an internal appeal with the Appeals Committee expanding on his arguments and claims, in particular he requested the setting aside of Circular No. 359 and that, in the future a proper consultation procedure be set up.

The Appeals Committee deliberated on the complainant’s three appeals jointly, and heard him in April 2017. It issued one single opinion on 14 September 2017. The majority found that the appeal was irreceivable in several respects. The decision not to allow the MUSE time deduction was not a challengeable decision, and the request to set up a proper consultation procedure was premature and beyond the scope of the appeal. In any event, he had no standing regarding that last aspect since he was no longer a member of a consultation body. In addition, it held that his arguments about the lawfulness of the rules governing the consultation procedure, as amended by decision CA/D 2/14, must be disregarded as he had failed to explain in which way that decision had an unfavourable bearing on the contested Circulars. One member issued a dissenting opinion to address the composition of the Appeals Committee and found that the appeal was receivable in its entirety.

On the merits, the majority held that the Circulars and the implementing decision to deduct compensation time from the complainant's account were lawful. The consultation procedure concerning Circular No. 359 was in line with applicable rules, but it was omitted with respect to Circular No. 369. However, the irregularity did not constitute a procedural flaw given that a regular consultation took place on the 2015 official holidays, and that the factual situation was almost identical for 2015 and 2016. While noting that the complainant did not articulate fully his arguments concerning the nomination of some GCC members, the majority concluded that the nominations of members of the Management Committee (MAC) and Vice-Presidents to the GCC were not illegal. On the merits, it held that the modifications introduced in 2015 were reasonable and lawful. It also concluded that the decision to deduct automatically compensation hours in 2015 was lawful given that the days of leave the complainant had to take in late 2015 or 2016 pursuant to the contested Circulars were days that he would have had to take anyway unless he renounced to do so. However, the complainant did not assert that he would not make use of compensation hours at all.

By a letter of 14 November 2017, the Vice-President of Directorate-General 4, acting on delegation of authority from the President of the Office, informed the complainant that his appeals were rejected as partly irreceivable, and unfounded in their "entirety" for the reasons stated by the majority in its opinion. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to send the case back to the EPO for reconsideration by a properly constituted Appeals Committee. He seeks an award of moral damages and costs. Subsidiarily, if the Tribunal finds that the appeal procedure was not flawed, he asks the Tribunal to quash the impugned decision "due to a flawed consultation process" or on substance. He also asks the Tribunal to order that he, and all staff, be granted additional leave days in compensation for the leave days they had to take. He further seeks time deductions for the time when he was not at work and asks that any impact that these deductions would have had on bonuses or promotions be taken into account. Lastly, he seeks moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part. The decision to deduct compensation time had no adverse effect on the complainant and therefore was not an appealable decision. It argues that the complainant cannot enlarge before the Tribunal the scope of the dispute by requesting compensation in the hypothetical event that the time deduction may affect his career advancement. It considers that the complaint is otherwise unfounded. In addition, the complainant is not entitled to claim compensation for all staff as he did not provide a mandate in their name. The EPO asks the Tribunal to order that the complainant bears its costs alleging abuse of process on his part.

CONSIDERATIONS

1. The complainant, a former employee of the European Patent Office, the Secretariat of the EPO, was a member of the General Advisory Committee (GAC), appointed by the Central Staff Committee (CSC), from 1 January 2014 to 30 June 2014. On 14 November 2017, the Vice-President of Directorate-General 4, exercising the powers delegated by the President of the Office, endorsed the Appeals Committee's majority opinion and dismissed the complainant's three internal appeals. This is the impugned decision.

2. This complaint directly concerns Circulars Nos. 359 and 369 in which the President determined official holidays for 2015 and 2016, requiring staff members to register authorized absences during the Office's days of closure. The complainant accepts this is a general decision but alludes to a right to challenge it.

3. In his pleas before the Tribunal, the complainant makes no attempt to establish even an arguable case that this general decision either negatively impacted him immediately or this was likely (Judgment 4119, consideration 4). His reliance on a document containing pleas made during the internal appeal is impermissible (Judgments 3692, consideration 4, and 3434, consideration 5). In the absence of any argument which might persuade the Tribunal that this essential

foundation of his case was even arguably correct, it is not open to the complainant to immediately develop lengthy arguments about the abolition of the GAC, the composition of the General Consultative Committee (GCC) and whether consultation occurred or was necessary, and additionally challenge the internal appeal process. These last-mentioned matters are without purpose in the absence of any case concerning the lawfulness of the content of the Circulars.

4. In any event, since this complaint was filed, the Tribunal has determined in other proceedings that the pleas regarding the abolition of the GAC, the composition of the GCC and its consultation are unfounded (see Judgments 4714, consideration 9, and 4711, consideration 5). As to the alleged improper composition of the Appeals Committee, the Tribunal notes that the EPO has already awarded 100 euros to the complainant.

5. In light of the foregoing, the complaint will be dismissed.

6. The Tribunal is not satisfied that the present case has the characteristics which would justify an award of costs against the complainant (see, for instance, Judgments 4679, consideration 20, and 3196, consideration 7). The counterclaim for costs will therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as is the EPO's counterclaim for costs.

In witness of this judgment, adopted on 8 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER