

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S. (No. 10)

v.

EPO

137th Session

Judgment No. 4805

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr D. S. against the European Patent Organisation (EPO) on 31 January 2018, the EPO's reply of 7 May 2018, the complainant's rejoinder of 31 August 2018 and the EPO's surrejoinder of 5 December 2018;

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 Circular No. 359 on the European Patent Office closure policy in 2015.

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 alleging 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, the GCC, an “inferior body” to the GAC, was consulted instead of the GAC. Consequently, the staff’s acquired right with respect to consultation was breached, and his personal right as a deputy member of the GAC in 2014 was also breached. Third, the GCC was irregularly constituted when the proposal leading to Circular No. 359 was examined as some of the GCC members were Vice-Presidents. 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”. The complainant’s request for review having been rejected, on 22 September 2015, he filed an internal appeal with the Appeals Committee maintaining his arguments and seeking the quashing of the decision to reject his request for review as well as Circular No. 359. He reiterated the claim for compensation he had made in his request for review. He added that he sought the setting up “[f]or the future, [of] a consultation process in a proper consultation body” such as the GAC, as well as moral damages and costs.

The Appeals Committee heard the complainant and deliberated on his appeal on 25 April 2017. The majority issued its opinion on 14 September 2017 stating that the Appeals Committee was composed

in accordance with applicable rules. It recommended rejecting the appeal as partly irreceivable. Indeed, the complainant's request that a new consultation process took place was premature as his claim related to future decisions. It added that a review of decision CA/D 2/14, as claimed by the complainant, was not possible and that all his arguments in that respect must be disregarded as he had failed to explain in which way that decision had an unfavourable bearing on the contested Circular. The majority also held that the request for review of the Circular, a general decision, was filed before the Circular had a negative impact on him. Indeed, at the time he filed his request, it could not be excluded that he might ultimately have asked for days of absence during the closure of the Office at the end of the year, his challenge to the Circular was therefore irreceivable. On the merits, the majority held that the appeal was unfounded. The consultation process that led to the adoption of Circular No. 359 was made in conformity with applicable rules, and the GCC was properly composed. Indeed, Vice-Presidents and members of the Management Committee (MAC) were validly appointed as members of the GCC. The majority also concluded that the Circular was lawful as it was taken for objective reasons. It added that the number of leave days to be taken when the Office was closed should not be measured against annual leave entitlements alone as any type of leave could be taken.

One member issued a dissenting opinion to address the composition of the Appeals Committee. In his view, the Appeals Committee was not composed in accordance with applicable rules nor with Judgment 3785 or the legal principles of impartiality. He also found that the Circular was tainted with a procedural flaw with respect to the GCC consultation.

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 he had rejected his appeal as partly irreceivable, and "unfounded in its entirety". He endorsed the reasons explained by the majority in its opinion in that respect. With respect to the composition of the Appeals Committee, he endorsed the majority's opinion that it was composed in accordance with applicable rules and that its independence, expressly foreseen in these rules, was a

sufficient guarantee. That is the decision the complainant impugns before the Tribunal.

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 on Circular 359”. In addition, he asks the Tribunal to order that he be granted four additional leave days to compensate for the leave days he was obliged to take in December 2015 and January 2016 and that all staff members receive one additional leave day to compensate them in part for the days they were obliged to take in December 2015. He also seeks moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable for lack of a cause of action. In addition, the complainant is not entitled to make claims on behalf of other staff members as he does not have a mandate to do so. It considers that the complaint is otherwise unfounded. 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 internal appeal. This is the impugned decision.

2. This complaint directly concerns Circular No. 359 in which the President determined official holidays for 2015, 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). 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 Circular.

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