Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

H. (No. 8)

v.

EPO

139th Session **Judgment No. 4988**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 12 July 2019 and corrected on 29 July 2019, the EPO's reply of 20 November 2019, the complainant's rejoinder of 25 February 2020 and the EPO's surrejoinder of 8 June 2020;

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;

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

The complainant, who was a patent examiner in the area of competence G01R in Berlin, Germany, contests the general decision to close that area of competence as well as the individual decision to reassign him pursuant to that closure.

Facts relevant to this case can be found in Judgment 4798, delivered in public on 31 January 2024. Suffice it to recall that, in 2008, the European Patent Office, the EPO's secretariat, discussed the restructuring of Directorate-General 1 and the future direction of its

Berlin sub-office. It developed the concept of "area of competence", which referred to the concentration of all work relating to a technical field with a single group of examiners working on one site of employment where Directorate-General 1 was active. In December 2008, the staff was informed of the decision to create and implement the area of competence in the Berlin sub-office.

On 9 November 2011, the President of the Office introduced a procedure to support the implementation of areas of competence in Directorate-General 1 ("the implementation procedure"). It provided, inter alia, an "Implementation Resolution Process" if the areas of competence implementation plans led to complaints. It provided that if the complaint could not be resolved by the parties in disagreement, any party could submit the complaint to the Vice-President of Directorate-General 1, in writing, one month after the publication of the final implementation plan. The Vice-President would then submit the complaint to the Area of Competence Implementation Support Committee with the request to mediate or provide a recommendation. After receiving a closure report from the Committee, the Vice-President took a decision on the complaint. The President's decision also provided that the "creation and implementation of an [area of competence] shall be stopped until [the Vice-President of Directorate-General 1's] decision has been communicated to all parties concerned".

On 10 October 2014, the Vice-President of Directorate-General 1 published the final cluster area of competence plans for 2015, which foresaw, inter alia, the transfer of the area of competence G01R in Directorate-General 1 from Berlin, Germany, to Munich, Germany, as from 1 January 2015. Hence, the area of competence G01R, which was split between Munich and Berlin, would be on one site only.

On 16 October 2015, the complainant was informed that he was reassigned, as of 1 January 2016, to a different technical field and Directorate in Berlin. In January 2016, he requested a review of the 16 October 2015 decision to "pursue the decision to close the [area of competence] G01R in Berlin" and to reassign him and his colleagues to a new technical field. His request was rejected, and he filed an appeal

with the Appeals Committee early June 2016 against that rejection. His appeal was registered under the appeal number RI/2016/070.

In the meantime, on 9 December 2015, the Vice-President of Directorate-General 1 informed the complainant that he had received the recommendations of the Area of Competence Implementation Support Committee on the internal complaint the complainant had filed against the final cluster area of competence plans for 2016, and that he had decided to move him, as of 1 January 2016, to a new technical field. On 8 March 2016, the complainant requested a review of the 9 December 2015 decision to "pursue the decision to close the [area of competence] G01R [in] Berlin" and the decision to reassign him, and his colleagues, to a technically new and different field and directorate as of 1 January 2016. The request was rejected in May 2016, and he filed an appeal with the Appeals Committee in July 2016. The appeal was registered under RI/2016/087.

The Appeals Committee heard the complainant orally in September 2018. It rendered, on 15 February 2019, a joint opinion on appeals RI/2016/070 and RI/2016/087. The Appeals Committee rejected the complainant's procedural comments concerning the oral hearing and its composition on the ground that applicable rules were followed, and that he was not put at a disadvantage. It held that his appeals were receivable only insofar as they were directed against individual decisions having a direct effect on his rights and duties. Hence, it found that appeal RI/2016/070 was irreceivable insofar as the complainant challenged the 16 October 2015 decision, which was not a final decision given that he had an internal complaint pending before the Area of Competence Implementation Support Committee against the final cluster area of competence plans for 2015. Only the decision of 9 December 2015, which was taken on the internal complaint, constituted an appealable administrative decision. The Appeals Committee found no formal flaw, which could lead to the conclusion that the President did not exercise his discretion lawfully or that the reassignment decision was unjustified. It stressed that the general decision to transfer the area of competence G01R was a general management decision for which it could not assess the appropriateness. It stressed that its lawfulness could

only be examined in the context of an appeal against the individual implementing decision. It therefore recommended dismissing the appeal in its entirety. Taking into consideration the circumstances of the case, in particular its complexity, it found that the duration of a little more than two years between the filing of the appeal and the final deliberation of the Appeals Committee was appropriate. It therefore recommended not awarding any moral damages in that respect.

By a letter of 15 April 2019, the Vice-President of Directorate-General 4, acting on delegation of authority from the President, informed the complainant that she endorsed the Appeals Committee's recommendation for the reasons it stated, except regarding the conclusion that the decision to close the area of competence G01R was of a general nature. In her view, the decision to close the area of competence in question was an "organisational decision" that was not open to challenge. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to declare the Appeals Committee's opinion null and void, and to complement the fact finding and taking of evidence. He also asks the Tribunal to declare the closure of the area of competence G01R in Berlin "illegitimate", to recognise the partiality of the involved officers and to "reset the final implementation plan to the original final implementation plan by reinstalling the [area of competence] G01R in Berlin in the status defined in the original final implementation plan, i.e. as 'Already full [area of competence]' and 'completed'". He further requests the Tribunal to quash the "decisions" to transfer him to a different area of competence, to award him moral damages in the amount of 1,000 euros per month to be calculated from June 2014 until the Tribunal publishes its decision. Lastly, he seeks compensation for procedural delays, compound interests at the rate of 6 per cent per annum on all amounts due and costs.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable for failure to exhaust internal means of redress insofar as he contests the decisions to close the area of competence G01R in Berlin and, on a subsidiary basis, as unfounded in its entirety. It adds that, in any event, the decision to close the area of competence G01R

in Berlin was an organisational decision and thus it was not open to challenge.

CONSIDERATIONS

1. The complainant requests the joinder of the present complaint (his eighth) with his fifth and seventh complaints. His fifth complaint has already been rejected by the Tribunal in Judgment 4256, delivered in public on 10 February 2020. Accordingly, the request for joinder with his fifth complaint is moot. As to the complainant's seventh and eighth complaints, although they concern facts and decisions which are interconnected, the legal issues raised are partially discrete. Accordingly, the complaints will not be joined.

2. The complainant applies for oral proceedings and lists witnesses. The Tribunal observes that the parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Thus, the request is rejected.

3. Firstly, the Tribunal addresses the receivability issue raised by the EPO concerning the challenge of the 16 October 2015 individual decision. This was only a preliminary step in the complainant's reassignment to a different technical area and not an act adversely affecting him within the meaning of Article 108(1) of the Service Regulations for permanent employees of the Office. The decision was not final given that the whole issue of the administrative arrangements was still under review. The challengeable decision was adopted only on 9 December 2015. Therefore, the claims against the 16 October 2015 decision are irreceivable. Since the complaint is unfounded on the merits, there is no need to address the other receivability issues raised by the Organisation, concerning the challenge to the decision to close the area of competence G01R in Berlin, Germany.

4. In his first and second pleas, the complainant alleges, in brief, that his transfer was decided by the Principal Director 150 (PD150) and the Vice-President of Directorate-General 1 (VPDG1), who were biased

against him, as it can be inferred from their past undue interference in the work of the Examining Division. He alleges that they interfered with the work of the Examining Division, as shown by the comments of the PD150 in the complainant's staff reports for the years 2012-2013 and 2014. Other directors also interfered with the examiners' work by asking them to "rewrite the summons". The complainant also refers to a 31 July 2012 order of the VPDG1 to the Examining Division.

5. The Tribunal's firm case law holds that the party asserting abuse of authority, bias, and improper motive must prove it (see, for example, Judgments 4524, consideration 15, 4467, consideration 17, 4146, consideration 10, 3939, consideration 10, 2264, consideration 7(a), and 2163, consideration 11). Mere suspicion and unsupported allegations are clearly not enough, the less so where the actions of the organisation, which are alleged to have been tainted by personal prejudice, are shown to have a verifiable objective justification (see Judgment 4688, consideration 10). The Tribunal observes that the complainant has not provided persuasive evidence of his allegations. He refers to past episodes of alleged interference in his work by officers in the Examining Division and to comments contained in his performance appraisal reports (PARs) for the years 2012-2013 and 2014. The Tribunal recalls that in a judgment regarding the issue of alleged undue interference in the work of the Examining Division, the Tribunal held that decisions with respect to the law and/or procedures applicable to patent applications do not "adversely affect" staff members and, thus, cannot be the subject of an internal appeal. In short, such decisions are not appealable and do not create a cause of action (see Judgment 4417, considerations 7 and 8).

6. The Tribunal observes that the former decisions mentioned by the complainant concerned the law and/or procedures applicable to patent applications and did not "adversely affect" him. The adoption of such lawful decisions cannot substantiate by itself a suspicion of partiality, either with regard to the restructuring decision to close an area of competence or to the subsequent individual decision to reassign the staff member. Nor does the complainant offer the Tribunal further

material to substantiate his suspicions of partiality. The Tribunal will consider the complainant's arguments concerning his suspicion of partiality against three specific officers, namely Mr P.B. (PD150), Mr R.S. (D1504) and Mr G.M. (VPDG1), who played a role in the closure of the area of competence and in the complainant's transfer, and who also adopted former decisions concerning the complainant. The Tribunal will not address the complainant's arguments concerning other officers (for example, Mr K.L.), who adopted past decisions concerning the complainant, as the complainant has not offered the Tribunal sufficient elements to demonstrate the role they played in the decisions at stake in the present complaint. It is useful to recall that:

(i) Mr R.S. (D1504) was the reporting officer who made some negative remarks concerning the complainant's productivity and attitude in the PAR for the years 2012-2013;

(ii) Mr P.B. (PD150) was the countersigning officer who made some negative remarks concerning the complainant's productivity and attitude in the PARs for the years 2012-2013 and 2014; and

(iii) Mr G.M. (VPDG1) endorsed the complainant's PAR for the years 2012-2013, containing negative remarks about the complainant's productivity and attitude, made by the reporting officer, Mr K.L., and by the countersigning officer, Mr P.B.; in addition, he signed the 31 July 2012 order addressed to the Examining Division.

The Tribunal notes that there is no evidence that the PARs for the years 2012-2013 and 2014, and the 31 July 2012 order were unlawful. The mere fact that they were unfavourable to the complainant does not imply that they were unlawful or biased against the complainant. In addition, the mere fact that an officer has lawfully adopted decisions unfavourable to a staff member does not by itself compel the officer to not adopt further decisions concerning the same staff member and does not by itself prove that the officer is biased against the staff member. According to the Tribunal's case law, the mere fact that a staff member casts doubt on the impartiality of managers who have participated in taking a decision unfavourable to her or him is not sufficient, if the accusation is unwarranted, to prove that a conflict of interest exists (see Judgment 4584, consideration 17).

The Tribunal further notes that Mr R.S. (D1504) and Mr P.B. (PD150) are not the authors of the decision to close the area of competence G01R in Berlin or of the decision to transfer the complainant to a different technical area, they only participated in the preliminary steps in the process, and the complainant has not established to the Tribunal's satisfaction that they may have influenced the decisions adopted by the VPDG1, in bias against the complainant. As to the role of the VPDG1, Mr G.M., the fact that in 2012 he adopted an order concerning the Examining Division and that he endorsed the opinions of the reporting officer and of the countersigning officer in the complainant's PAR for the years 2012-2013, does not prove that he was biased against the Examining Division and specifically against the complainant. In conclusion, the complainant's first and second pleas are unfounded.

7. In his third plea, the complainant alleges that his forced transfer, and the closure of the area of competence G01R in Berlin, constituted a hidden disciplinary action and an attack on his dignity and status as an examiner. He grounds this plea on a number of arguments as follows:

– the PD150 revealed to a colleague the true reason for closing the area of competence: the problems that had existed for years in the G01R team in Berlin created a lot of work for him (PD150) and others;
– the reason given for the closure of the area of competence, that is increased efficiency, is untenable;
– the complainant was given the choice to remain in his technical field of G01R (applied physics) and move to Munich, Germany, or move to a completely different technical field (audio video media) and stay in Berlin. However, in both cases, he would remain under the supervision of the PD150 and thus "in danger of further arbitrary treatment by the very same hierarchy";
– he did not express a wish but indicated that a transfer to Munich would involve further damage for him in view of his family situation and that it would thus be "preferable" to stay in Berlin;

– he was put under "undue time pressure" by the rapid finalisation of the closure process of the area of competence. It took a little over a year when the original proposed transition was announced to be in five years;

– the swiftness of the closure (against the transitional period for other areas of competence, which was up to ten years) confirms his suspicion that the closure was a hidden disciplinary measure rather than a "due managerial decision" taken in the Organisation's interests. All staff in G01R in Berlin, who were forced to move, had received "unlawful personal orders, and threats" from the VPDG1, Mr G.M.

This plea is unfounded.

The Tribunal recalls its well-established case law that decisions regarding restructuring, reassignment of staff members to different posts, and changes in the duties assigned to staff members involve the exercise of a wide discretionary power, and are therefore subject to limited judicial review by the Tribunal (see Judgments 4084, consideration 13, 3488, consideration 3, and 2562, consideration 12). The Tribunal may interfere only on the limited grounds that the decision was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, if some material fact was overlooked, if there was misuse of authority or if there was an obviously wrong inference from the evidence. However, the organisation must show due regard, in both form and substance, for the dignity of the officials concerned, particularly by providing them with work of the same level of responsibility as that which they performed in their previous post and matching their qualifications (see Judgments 4240, consideration 5, and 3488, consideration 3).

The Tribunal observes that the complainant has not provided convincing evidence of his allegations that the closure of the area of competence and his reassignment amounted to a hidden disciplinary sanction and stemmed from bias against him. The closure of the area of competence was a managerial decision which concerned all examiners assigned to that area of competence and aimed at increasing efficiency by concentrating in a single office all the work related to a specific type of patent. The complainant relies on an internal document, namely the

minutes of a personnel meeting held on 11 March 2015, which, in his view, reveals the true reasons hidden behind the closure of the area of competence. The Tribunal notes that during this meeting in the context of a discussion concerning the closure of the area of competence already adopted, the PD150, Mr P.B., said that "there had been problems with the G01R team for years. A certain team dynamic had emerged that created a lot of work for both him and [another staff member]." In the Tribunal's view, the reasons grounding the 10 October 2014 decision cannot be inferred by a meeting which took place well after the decision itself was adopted. Furthermore, there is no evidence that the decisions at stake in the present complaint disregarded the complainant's dignity or that he was not provided with work matching his qualifications and of the same level of responsibility as that he had performed before his reassignment. Moreover, he was offered the option to move to Munich or remain in Berlin in a different office, and his wish to remain in Berlin was satisfied. The complainant further contends that the closure of the area of competence G01R in Berlin did not increase efficiency as indicated by the EPO. However, the complainant does not establish procedural or substantive errors in this decision, which is organisational in nature, and thus involves the exercise of a wide discretionary power. The Tribunal does not have the authority to decide which of the many possible restructuring options should have been chosen by the Organisation. Lastly, the fact that the closure process was swift, whilst the transitional period for the closure of other areas of competence lasted allegedly up to ten years, does not prove, by itself, that the closure of the area of competence G01R in Berlin was not a managerial decision taken in the Organisation's interests.

8. A number of the arguments supporting the complainant's third plea concern procedural flaws in the process leading to the adoption of the decision to close the area of competence. Namely, the complainant contends that:

– he was informed in October 2015 of his transfer to a new technical field in violation of the decision of 9 November 2011 entitled "A procedure to support implementation of Areas of Competence in DG1". Indeed, an Area of Competence Implementation Resolution

Process was established, but the Area of Competence Implementation Support Committee, which dealt with his internal complaint, was in fact responsible for dealing with conflicts concerning the creation and implementation of the area of competence. But in his case, the implementation of the area of competence closure had already been finalized;

- the decision to close G01R was taken and the new cluster area of competence plan was published without consultation of the examiners directly involved in breach of the abovementioned decision of 9 November 2011;
- contrary to “common legal principles”, the VPDG1 refused to share the Area of Competence Implementation Support Committee’s recommendation with the examiners concerned, including the complainant.

These arguments are unfounded. Having examined the documents in the file, the Tribunal is satisfied that no such flaws exist as the complainant was duly and properly informed of the closure decision before its definitive adoption, and was given the opportunity to comment on it. Moreover, the Tribunal does not accept that the operation of the Implementation Support Committee was affected by substantive flaws that impeded a proper consultation with the examiners directly affected (see Judgment 4798, consideration 4).

9. In his fourth plea, the complainant alleges that the transfer caused him damage, considering that a number of the files concerning patent applications that he had started to work on were transferred to Munich and counted as “products” for the Munich examiners’ objectives and appraisal reports. Hence, his work in the search phase was not acknowledged. The transfer of these files had a direct adverse effect on his salary, since, in the new reward system, a step advancement was linked to the fulfilment of set objectives. He has not been granted any step advancement since February 2014. The new files he inherited took longer to deal with than the old ones, which were transferred to Munich. He further contends that his forced transfer to the new technical field deprived him of his former competences, which

he considers to be “another attack on his professional status and personal dignity”. He adds that he is not aware of colleagues who were forced to make a radical change in their technical field. He also refers to episodes which occurred after his transfer.

10. Some of the complainant’s arguments are immaterial and outside the scope of the present complaint, namely the questions related to his performance appraisal and his step advancement subsequent to his transfer, and more generally, the arguments concerning episodes which occurred after his transfer. The Tribunal cannot address any elements contested in the present complaint regarding the complainant’s PARs or step advancements as he has not demonstrated that he has exhausted all internal remedies regarding those issues. In the remainder, the plea is unfounded. On the one hand, there is no evidence that he was not provided with work matching his qualifications and of the same level of responsibility as that which he had performed before his reassignment. On the other hand, there is no evidence that he was not granted a smooth transition into the new technical area; in the 9 December 2015 decision to transfer him, the VPDG1 suggested that he “discuss with [his] new director how many dossiers of [his] current stock in G01R [could] be retained, considering [his] current yearly production capacity, in order to allow [him] to work on enough dossiers in [his] new technical field so as to ensure a smooth transition to this new technical field in the coming years”.

11. In his fifth plea, the complainant alleges that the internal appeal process was flawed. The complainant lists a number of mistakes allegedly perpetrated by the Appeals Committee, as follows:

– the Appeals Committee’s opinion was not substantiated on all essential points, in particular regarding his allegations of bias against the D1504, the PD150, and the VPDG1, and the decision to transfer examination files to the examining divisions in Munich;

– the true reasons for the contested decisions were not investigated as the Appeals Committee failed to take into consideration essential elements, in particular patent-related matters, and did not hear witnesses on the ground that the facts were clear;
– in so acting, the Appeals Committee disregarded its role as a fact-finding body.

These arguments are unfounded. The Appeals Committee examined all relevant facts and arguments in an appropriate, albeit concise, manner, and was well aware that its role differs from the role of the Tribunal (see paragraph 39 of the Appeals Committee's opinion). The hearing of witnesses is at the discretion of the Appeals Committee (see Rule 12(1) of the Rules of Procedure). There was no rationale for hearing patent law experts given that the appeal concerned the complainant's reassignment following the closure of an area of competence and there were no elements supporting the allegation that the closure of the area of competence was a hidden disciplinary sanction.

12. In his sixth plea, the complainant contends that the composition of the Appeals Committee was flawed. He submits that general decision CA/D 7/17 adopted in 2017, unlawfully provided that:

(a) the Chair and two Vice-Chairs of the Appeals Committee were appointed by the President without consulting the staff representatives and the General Consultative Committee (GCC); and
(b) the members of the Appeals Committee appointed by the Central Staff Committee (CSC) could previously be selected from among all staff members and not just from elected Staff Committee members; being a member of a Staff Committee and a member of the Appeals Committee at the same time might lead to a conflict of interest.

One of the issues submitted by the complainant, namely the one concerning the appointment of members of the Appeals Committee by the CSC, has been dealt with by the Tribunal in Judgment 4550 with regard to general decision CA/D 2/14. The Tribunal quashed the relevant Staff Rule to the extent it obliged the CSC to choose the members of

the Appeals Committee from among its members, rather than from all staff members (see Judgment 4550, considerations 1, 7 and 15). The same reasoning applies regarding general decision CA/D 7/17. This flaw in the appeal process is, in principle, decisive, and renders it unnecessary to address the further detailed arguments concerning the composition of the Appeals Committee and the internal appeal proceedings (in this vein, see Judgment 4797, consideration 13).

As to the legal consequences of the flawed composition of the Appeals Committee, the Tribunal notes that, even though in the present case the composition of the Appeals Committee must be considered unlawful, consistent with the outcome of Judgment 4550, such a finding does not affect the outcome of this judgment, for the following reasons. Firstly, the complainant does not specifically ask that the case be referred back to the EPO; he asks that the Tribunal decide the case on the merits, which it does. In any event, the Tribunal's case law holds that when complaints are judged by the Tribunal as devoid of merit – as in the present case – no useful purpose would be served by sending the case back to the EPO (see Judgment 3890, consideration 4). Secondly, when the Tribunal judges that an organisation denied a staff member the right to an effective internal appeal, the case is not necessarily sent back to the organisation; the Tribunal can directly address it, having regard to the circumstances of the case (see Judgment 4841, consideration 3). In the present case, since the complaint is being judged by the Tribunal as devoid of merit, no different result for the complainant could be obtained by renewing the consultation process before the Appeals Committee (see Judgments 4798, consideration 6, and 3890, consideration 6). Moreover, the complainant does not specifically request moral damages stemming from the alleged unlawful composition of the Appeals Committee, and thus there is no need to assess the unlawful composition to this extent. In addition, the Tribunal notes that, by letter of 12 January 2023, the EPO informed the Registry of the Tribunal that, following Judgment 4550, it had paid 100 euros in moral damages to several complainants, including the present complainant; therefore, the complainant has already received compensation for the unlawful composition of the Appeals Committee. It was adequate.

13. Since the complainant's pleas are unfounded, his claims to annul the impugned decision and the related initial decisions are rejected, as well as his claim for moral damages stemming from such decisions.

14. With regard to the complainant's claim for moral damages stemming from the undue delay in the examination of his internal appeals, the Tribunal recalls that the amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations: the length of the delay and the effect of the delay. Recent case law holds that an unreasonable delay in an internal appeal is not sufficient to award moral damages. It is also required that the complainant articulate the adverse effects which the delay has caused (see Judgments 4799, consideration 7, and 4563, consideration 14). The Tribunal also notes that the EPO, by the 15 April 2019 decision, impugned in the complainant's seventh complaint, adjudicated by Judgment 4987, delivered in public on the same day as the present judgment, has already awarded him 300 euros in moral damages for the length of the procedure. The complainant does not provide the Tribunal with evidence of any adverse effects of the delay warranting additional redress. The claim is, thus, rejected.

15. In light of the considerations above, the complainant's request for disclosure of the patent files EP07251146.2, EP08011999.3, EP03002991.2, EP04004244.2, and EP08018427.8 is immaterial and is, thus, rejected.

16. As the complaint fails, the complainant is not entitled to costs for the present proceedings.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

JACQUES JAUMOTTE

ROSANNA DE NICTOLIS

MIRKA DREGER