Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P. (No. 5)

v.

EPO

139th Session **Judgment No. 4994**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr L. M. A. P. against the European Patent Organisation (EPO) on 18 October 2021, the EPO's reply of 7 February 2022, the complainant's rejoinder of 17 June 2022 and the EPO's surrejoinder of 27 September 2022;

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 called to give evidence as part of an investigation into allegations of harassment, challenges the refusal to allow him to be accompanied by a colleague at his interview.

The complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 2004, and, at the material time, was a staff representative as an alternate member of the Central Staff Committee. By an email dated 11 May 2015, he was informed by the Head of the Investigative Unit that allegations concerning potential acts of harassment within the meaning of Circular No. 341 on the Policy on the prevention of harassment and the resolution of conflicts at the EPO had been brought to his attention and that an investigation was going to be carried out by a firm of external experts. In the email, the complainant was invited to meet the investigators on 13 May to be

heard as a witness in accordance with Article 17 of Circular No. 342 containing the Guidelines for investigations at the European Patent Office. On 12 May 2015 the complainant indicated that he was available for the interview in question and asked for "confirmation that [he] could be assisted by a colleague of [his] choice", a request which was refused that same day on the grounds that, under Circular No. 342, the option to be accompanied was only available to a complainant or a subject, but not to a witness, for reasons of confidentiality.

On 13 May 2015 the complainant was interviewed by the external investigators.

On 18 May 2015, citing a document from the President of the EPO entitled *"Legal considerations concerning the request for review on Circulars 341 and 342"* which allowed for witnesses to be accompanied in investigations into allegations of harassment, he sought clarification from the Head of the Investigative Unit as to the refusal he had received on 12 May. This refusal was upheld on 20 May on the grounds that there were no exceptional circumstances to warrant his being accompanied. Considering this response to be incorrect, the complainant stated on 1 June 2015 that he was "forced to lodge a complaint with the competent authorities". He asked that his interview of 13 May 2015 be considered null and void "as a precautionary measure" and that he be given confirmation that no witness in a harassment investigation had ever been accompanied. On 16 June 2015 the Head of the Investigative Unit reiterated that the presence of third parties during witness interviews was not permitted, except in exceptional circumstances, and explained that his requests could not be met.

On 11 August 2015 the complainant submitted a request for review of the decision of the Head of the Investigative Unit of 12 May 2015, and also of subsequent decisions taken on the basis of that decision. He argued that the manner in which the interview of 13 May 2015 had been conducted had left him with the impression that he was not being interviewed as a mere witness but rather as a "potential defendant", which had a significant impact on his health and resulted in his being placed on sick leave. In his claims, he sought, in particular, the annulment of the contested interview, the award of material damages

(essentially covering his medical expenses), the introduction of measures to "prevent or compensate for the negative impact that the reduction in [his] performance could have on [his] annual report" as a result of the deterioration in his health, and the award of a sum of at least 170,000 euros as compensation for the moral injury he considered he had suffered. The request for review was rejected on 8 October 2015.

On 4 November 2015 the complainant was summoned by a member of the Investigative Unit to read the transcript of the interview of 13 May 2015 and to make any observations he might have. When he found that he was not permitted to leave the said member's office with a copy of the document in question, he refused to sign it.

On 4 January 2016 he lodged an internal appeal, in which he sought, inter alia, the setting aside of the decisions taken by the Investigative Unit between 11 May and 13 July 2015, the annulment of the provisions of Circular Nos. 341 and 342 on which the Office had based its actions, the payment of damages for the moral injury allegedly suffered and the award of costs.

In its opinion of 20 May 2021, the Appeals Committee recommended that the appeal be rejected as partly irreceivable as regards the claim for the annulment of the provisions of Circular Nos. 341 and 342, since these were no longer in force from 1 November 2017 onwards. A majority of the members concluded that the appeal should be rejected in its entirety as unfounded but, finding that there had been a failure on the part of the Organisation to provide information prior to the interview on 13 May 2015, the Committee recommended that the complainant be awarded symbolic compensation of 500 euros. It also unanimously recommended paying the complainant the sum of 450 euros on account of the excessive length of the appeal proceedings. By a letter of 20 July 2021, the Vice-President of Directorate-General 4 informed the complainant of her decision to follow all these recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to hold that the opinion of the Appeals Committee is unlawful or, alternatively, to refer his case to a new committee which functions in compliance with the Service Regulations. He also asks the Tribunal to

recognise that the EPO breached its duty of care, that the investigation procedure was abusive and had a detrimental effect on his health, and to declare his illness and his inability to work to be an occupational disease. Finally, he claims the retroactive award of one step per year since 2015, the reimbursement of the loss of earnings resulting from his illness together with interest at the rate of 8 per cent per annum, moral damages of at least 300,000 euros, and any other relief that the Tribunal considers to be just.

The EPO considers most of the complainant's claims to be inadmissible on the grounds that they have lost their object, that internal remedies have not been exhausted or that they are worded too vaguely. It asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 20 July 2021 by which the Vice-President of Directorate-General 4, in accordance with the opinion of the Appeals Committee, rejected his internal appeal against the decision of the Head of the Investigative Unit of 12 May 2015 refusing to allow him to be accompanied by a colleague during his interview as a witness in an investigation into allegations of harassment.

It appears from the evidence on file, and in particular from the transcript of the interview, dated 13 May 2015, that the allegations in question had been made by a former staff representative who believed that he had been harassed by other staff representatives as a result of certain stances adopted in the course of his duties. The basis for these allegations included, inter alia, the disclosure of a communication from the Central Staff Committee in which the accuser was named and to which the complainant, who was at the time a member of the Committee, was one of the co-signatories, and certain remarks made at an informal meeting between staff representatives in which the complainant had participated.

2. The complainant has requested permission to comment on the arguments contained in the EPO's surrejoinder regarding the transcript of the interview of 13 May 2015, which had been disclosed in the proceedings at his request. However, given in particular that he already had the opportunity, in his rejoinder, to comment on the content of the document in question, which was annexed to the EPO's reply, it does not appear to be any justification for allowing further comments. The request to reopen the written submissions will therefore be rejected.

3. The complainant also requested an oral hearing, at which he wished two witnesses to be called. However, in view of the ample and sufficiently clear written submissions and evidence provided by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.

4. Circular No. 342 of 30 November 2012 containing the Guidelines for investigations at the European Patent Office, in force at the material time, provided, in Article 17(6), as follows:

> "The complainant and the subject may be accompanied during interviews by an Office employee of their choice."

It follows from these provisions that, unlike a complainant or a subject, an employee heard as a witness in an investigation is not entitled to be accompanied by a colleague during her or his interview. As is clear from various evidence on file, the reason why this guarantee is not extended to witnesses is essentially that the Office wishes to limit the number of participants in interviews in order to protect the confidentiality of investigations as closely as possible.

As reflected in Circular No. 341 of 11 December 2012 on the Policy on the prevention of harassment and the resolution of conflicts at the EPO, the above provisions also apply to investigations into allegations of harassment. Article 13(1) of the Circular states that, except where the Circular specifically provides for differences in the procedure – which, in this case, it does not – such investigations are to be governed by the aforementioned Guidelines.

5. In defence of his argument that he should nonetheless have been permitted to be accompanied by a fellow employee during his interview with the investigators, the complainant relies, in particular, on the "legal considerations" annexed to the decisions by which the President of the Office had, in 2013, rejected requests for review of Circulars Nos. 341 and 342 submitted by various employees. In those legal considerations, the purpose of which was to respond to concerns expressed by the authors of those requests for review, the President expressly stated that, by way of exception to the rule under the aforementioned provisions and in view of the specific characteristics of cases in this area, witnesses could be accompanied by a colleague in investigations into allegations of harassment.

The Tribunal finds it highly regrettable that confusion was caused by the Office's initiative to distribute – to certain employees only – a document which interpreted the relevant provisions on this point in a way that clearly differed from their actual content.

However, as the EPO rightly points out, this initiative could not actually change the state of the law in force. The document in question, which was not drawn up in the manner prescribed for the enactment of a regulatory act and, moreover, was not published in the proper way, cannot be recognised as having any normative value (see, on these points, Judgments 4254, consideration 4, 3907, consideration 26, or 3835, consideration 2). The provisions applicable to the matter thus remained those of the aforementioned Article 17 of Circular No. 342 and the complainant cannot, therefore, successfully rely on the aforementioned "legal considerations" to invoke the right to which he claims to be entitled.

6. But the impugned decision is nonetheless unlawful for the following reasons.

It is apparent from the evidence on file, and in particular from the emails sent to the complainant by the Head of the Investigative Unit on 20 May and 16 June 2015, that there was at the material time a practice, loosely based on the legal considerations of the President of the Office referred to above, whereby an individual interviewed as a witness in an

investigation could be accompanied by a colleague – referred to as an "observer" – in exceptional circumstances. Under this practice, the existence of which the EPO itself acknowledges in its written submissions, a witness could therefore, in principle, be accompanied by a third party in a situation where the witness might experience – in the words of the Head of the Investigative Unit – a "high level of stress, emotional involvement and anxiety".

It is settled case law of the Tribunal that, once an administrative practice has been established in this way within an international organisation, it acquires legal force and is therefore binding on that organisation, which is then obliged to apply it to all staff members concerned (see, for example, Judgments 4639, consideration 7, 2936, consideration 16, 2907, consideration 22, or 1053, consideration 6). The only time when this does not apply is where the practice contravenes a written rule that is already in force (see, for example, Judgments 4197, consideration 5, 4029, consideration 19, 3952, consideration 11, or 3601, consideration 10). While the aforementioned provisions of Article 17 of Circular No. 342 do not, as already stated, guarantee witnesses the right to be accompanied by a colleague during an interview with the investigating body, neither can they be regarded as precluding certain witnesses from being accompanied. The practice in question did therefore not contravene a written rule already in force and, accordingly, the competent authority was obliged to comply with it.

7. It follows that in finding, in the contested decision of 12 May 2015, that the complainant should be refused permission to be accompanied at his interview the following day on the sole ground that "Circular [No. 342] [did] not provide for this option for witnesses"[*], without examining whether there were exceptional circumstances that warranted the granting of his request pursuant to the practice described above, the Head of the Investigative Unit erred in law.

[*] Registry's translation.

8. The Tribunal notes, in addition, that there is good reason to think that such exceptional circumstances did exist in the present case.

As can be seen from consideration 1 above, some of the matters on which the allegations of harassment under investigation were based were acts in which the complainant himself had been involved. While it was correct for the complainant to be heard as a witness, since he was not formally a subject within the meaning of Circulars Nos. 341 and 342, there can be little doubt that the interview relating to those matters was liable to cause him the high level of stress, emotional involvement or anxiety indicative of exceptional circumstances which would warrant the grant of permission for him to be accompanied by a third party under the aforementioned practice.

9. It is true that, in his request for permission on 12 May 2015, the complainant did not spontaneously invoke such exceptional circumstances.

However, it should be noted that the complainant had not been informed in advance of the object of the interview in question – which, in accordance with standard protocol in investigations, was only communicated to him during the interview itself – and was therefore unaware, in particular, that he would be questioned about matters that concerned him personally.

Furthermore, it is clear from the evidence on file that the complainant did not, in any event, know of the administrative practice which would have allowed him to specifically base his request for permission on exceptional circumstances of this kind.

10. Furthermore, the Tribunal considers that the error of law thus committed is, in this respect, coupled with a breach of the duty of care.

As the Appeals Committee correctly observed, the response to the complainant's request, provided to him in the decision of 12 May 2015 – and cited in consideration 7 above – was such as to mislead him as to the extent of his rights. Although, of course, telling the complainant that Circular No. 342 did not provide for witnesses to be accompanied was not inaccurate *per se*, this nonetheless obscured the fact that witnesses

could still be accompanied in exceptional circumstances. It was only in the aforementioned email of 20 May 2015 – in other words, after the interview – that the Head of the Investigative Unit first mentioned the existence of an administrative practice along those lines. The complainant was therefore not put in a position to invoke such exceptional circumstances in good time and was thus unlawfully deprived of the opportunity to exercise his rights in full.

Contrary to what the EPO maintains, the fact that the impugned decision had already recognised in that regard that the complainant "had not received relevant information before [his] testimony" and had awarded him symbolic compensation of 500 euros for this reason does not mean that the corresponding claim raised before the Tribunal has lost its object. Those circumstances do not prevent the complainant from relying on a breach of the duty of care as a ground for the setting aside of the decision refusing to allow him to be accompanied by a colleague during his interview, or from claiming damages of a higher amount for the injury that may have resulted from this unlawfulness.

11. The complainant is right to submit that the impugned decision is also flawed in an additional respect in that it infringed the principle of equal treatment.

In this regard, the complainant submits that another employee, Mr A., who, like him, was a member of the Central Staff Committee at the material time and who, in that capacity, had also been interviewed as a witness as part of the investigation into the aforementioned allegations of harassment, was allowed to be accompanied by an observer at his interview.

The EPO has not seriously contested the accuracy of this assertion and even expressly acknowledged it during the internal appeal proceedings, in its replies to the Appeal Committee's requests for further information. When asked by the Committee to justify the difference in treatment thus displayed, the Organisation stated that it had consulted the investigation file but had been unable to identify the reason why Mr A. had been allowed to have an observer present. The Organisation recalled that the investigation in question had been

handled by external investigators and put forward what was at best a hypothesis that, being unfamiliar with the applicable rules, the investigators might simply have omitted to consider whether this witness was entitled to be accompanied by an observer.

12. According to the Tribunal's case law, the principle of equal treatment requires that officials in identical or similar situations be subject to the same rules and have those rules applied in the same way (see, for example, Judgments 4277, consideration 21, 2936, consideration 14, and 2066, consideration 8), bearing in mind that the burden of proving the existence of unequal treatment rests on the official who alleges it (see, in particular, Judgments 4623, consideration 15, 4067, consideration 10, and 2660, consideration 24).

In reliance on this case law, the EPO maintains that, in view of the potential differences in the situation of the two individuals concerned, the complainant has failed to establish that the difference in treatment of which he complains was unjustified. However, the Tribunal considers that, since it has been established that Mr A. was allowed to be accompanied by an observer during his interview, and given that he was heard as a witness in the same investigation and, indeed, in the same capacity as the complainant, it is in this case for the EPO to show that there was a relevant ground justifying the difference in treatment. This conclusion is all the more compelling given that, as already stated, the complainant could legitimately invoke exceptional circumstances entitling him to be accompanied by an observer at his own interview.

It must be noted that the Organisation has been unable to put forward any adequate explanation to justify the difference in treatment thus established, and its suggestion that the investigators may have neglected to consider the conditions under which Mr A. was interviewed clearly cannot constitute an adequate explanation.

13. In addition, the EPO is wrong to invoke the traditional case law according to which a complainant is not entitled to claim the benefit of an advantage unlawfully granted to another official. Although the Tribunal regularly reaffirms, on this subject, that "there cannot be

equality in unlawfulness" (see, for example, Judgments 3952, consideration 11, or 3450, consideration 11), allowing a witness to be accompanied by a third party during an interview cannot be regarded as unlawful simply because it is not guaranteed by the rules. That case law therefore does not apply in this particular situation.

14. It follows from the foregoing that the impugned decision of 20 July 2021, together with the decision of 12 May 2015 and the decision of 8 October 2015 rejecting the request for review thereof, must be set aside, without there being any need to rule on the complainant's other pleas directed against them.

15. Since it is clear from the evidence on file that the harassment investigation of which the complainant's interview formed part has since been closed – which is not at all surprising given the length of time that has passed – it is not practicable to organise a new interview with investigators, or indeed to draw any other practical consequence from the setting aside of those decisions.

However, the complainant should be compensated for the moral injury caused to him by the refusal to allow him to be accompanied by a colleague at his interview. The Tribunal considers that such an injury results, in this case, from the breach itself of the complainant's rights discussed above, and it is also clear from the evidence that the complainant was highly affected in psychological terms by this decision.

In the present case, the Tribunal considers that this moral injury shall be fairly redressed by ordering the EPO to pay the complainant, in addition to the sums already awarded to him under the impugned decision, compensation of 5,000 euros.

16. The complainant also puts forward various claims for compensation for material injury arising from the impact of the impugned decision on his state of health, such as loss of earnings, for which he seeks compensation with interest, or linked to a corresponding deterioration in his professional performance, such as a delay to his

career, which, in his view, warrants the award of an annual step advancement from 2015 onwards.

However, as the EPO rightly points out, the complainant did not make these claims in his internal appeal. Although the complainant submits that he had previously made similar claims when requesting a review of the contested decision, the Tribunal notes that those claims were not worded in the same way as in the complaint. Moreover, it was for the complainant, in any event, to identify in his appeal the relief sought at that stage of the proceedings, as required by Article 4(3) of the Implementing Rules for Articles 106 to 113 of the Service Regulations. Accordingly, the Tribunal considers that the claims for material damages do not satisfy the requirement to exhaust internal remedies laid down by Article VII, paragraph 1, of its Statute and are therefore irreceivable for this reason.

In addition, it should be noted, in terms of substance, that the existence of a causal link between the unlawfulness of the contested decision and the injury alleged has not been established. While it is certainly clear from the medical evidence on file that the complainant had to take a short period of sick leave, in the days following his interview with the investigators, for reasons partly linked to the conditions under which the interview took place, there is nothing to suggest that his permanent health problems or the alleged delay to his career were specifically caused by the interview in question, which is only one element in the overall context that may explain these phenomena. It is a matter of even greater conjecture that the injury in question could be specifically attributed to the refusal, as such, to allow the complainant to be accompanied by a colleague at the interview, since allowing him to do so would, in any event, have altered neither the nature nor the object of that interview.

17. While the complainant, in a similar vein, also asks that "[his] long illness and [his] inability to work" be recognised as occupational in origin, the examination of such a claim falls under specific procedures that are outside the scope of the present dispute.

18. The other claims contained in the complaint – insofar as they are not rendered moot by the setting aside of the contested decisions – must also be rejected.

The same applies to those claims seeking various declarations of law from the Tribunal. It is settled case law that such claims are irreceivable (see, for example, Judgments 4885, consideration 12, 4700, consideration 2, or 3876, consideration 2).

Lastly, although the complainant claims the award of "any other relief which the Tribunal considers to be just", a claim worded in this way is, in any event, too vague to be regarded as receivable (see, for example, Judgments 4796, consideration 16, 4719, consideration 7, or 4602, consideration 8).

DECISION

For the above reasons,

1. The impugned decision of 20 July 2021 and the decisions of 12 May 2015 and 8 October 2015 are set aside.
2. The EPO shall pay the complainant 5,000 euros in moral damages.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

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

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLEMENT GASCON

MIRKA DREGER