

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**P. (No. 3)**

**v.**

**EPO**

**139th Session**

**Judgment No. 4996**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr L. M. A. P. against the European Patent Organisation (EPO) on 22 March 2021 and corrected on 8 June, the EPO's reply of 2 November 2021, the complainant's rejoinder of 14 February 2022 and the EPO's surrejoinder of 16 May 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 filed a harassment complaint, challenges the decision to close the investigative process at the preliminary evaluation stage.

Some of the facts relevant to this complaint can be found in Judgment 4995, also delivered in public this day. Suffice it to recall that the complainant – a permanent employee of the European Patent Office, the EPO's secretariat, since 2004, and, at the material time, also a staff representative – filed on 7 July 2017 an internal appeal against, in particular, the decision of 10 April 2017 taken by Mr B., the director of Directorate 4.3.2, to reject his request for review of the decision capping the reimbursement of educational expenses for his disabled son on the basis of Article 71 of the Service Regulations.

On 14 July 2017 the complainant submitted a formal allegation of harassment against Mr B. pursuant to Circular No. 341 on the Policy on the prevention of harassment and the resolution of conflicts at the EPO. Following an initial examination of the complaint, the Investigative Unit decided to carry out a preliminary evaluation as provided for in Article 11 of the Implementing Rules for Articles 21, 21a and 93(2) of the Service Regulations to determine whether an investigation was warranted. The complainant and Mr B. were interviewed separately on 5 September 2017.

By an email of 20 October 2017, the Investigative Unit informed the complainant that it had found his allegation of harassment to be unsubstantiated and that the investigative process was therefore closed. This was confirmed on 7 November, after the complainant had expressed his disagreement and requested that the investigation be reopened and that he be interviewed again.

On 25 January 2018 the complainant filed a request for review of the decision of 7 November 2017, which was rejected on 21 March. On 20 June 2018 he lodged an appeal with the Appeals Committee. He asked to be heard in relation to certain arguments put forward by Mr B., to have the findings of the Investigative Unit annulled, to have Mr B.'s harassment of him recognised and for it to be acknowledged that the situation had deteriorated as a result of the passivity of the Investigative Unit and, finally, for the payment of a sum in respect of the injury he considered he had suffered.

The Appeals Committee decided to deal with the appeal under the written procedure provided for in Article 8(1) of the Implementing Rules for Articles 106 to 113 of the Service Regulations. In its opinion of 14 October 2020, the Committee found that the complainant's request for a declaration of harassment was inadmissible since, under Circular No. 341, such a declaration falls within the exclusive competence of the Investigative Unit and the President of the Office. It recommended that the appeal be dismissed as partly irreceivable and wholly unfounded. By a letter of 23 December 2020, the Vice-President of Directorate-General 4 informed the complainant of her decision to follow this recommendation. 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 the functioning of which is compatible with the Service Regulations. He also asks for a declaration that Mr B. took reprisals against him or, failing that, for a full harassment investigation to be conducted. Finally, he asks the Tribunal to declare his illness and inability to work to be an occupational disease and claims reimbursement of the loss of earnings resulting from his illness, together with interest at the rate of 8 per cent per annum, and compensation of at least 100,000 euros by way of damages for the moral injury he considers he has suffered.

The EPO takes the view that the complainant's claims for a declaration that Mr B. took reprisals or, alternatively, for a full harassment investigation to be ordered fall outside the Tribunal's competence. As regards the complainant's claims for his illness to be recognised as occupational and for the alleged loss of earnings resulting from that illness to be reimbursed, the Organisation asserts that these are new claims that were not raised at the stage of the internal appeal procedure. It asks the Tribunal to dismiss the complaint as partly irreceivable on these grounds and unfounded in its entirety.

#### CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 23 December 2020 by which the Vice-President of Directorate-General 4, in accordance with the unanimous recommendation of the Appeals Committee, rejected the complainant's internal appeal against the closure, at the preliminary evaluation stage, of the investigation into a harassment complaint he had lodged.

That complaint – or “formal allegation of harassment”, to use the terminology of the provisions in question – which was made against Mr B., the director of Directorate 4.3.2, was essentially based on the complainant's denouncement of the way in which the latter had handled his request for the reimbursement of education costs for his disabled child. The dispute as to the lawfulness of Mr B.'s decision rejecting that

request is the subject of the fourth complaint filed by the complainant before the Tribunal, which is addressed in Judgment 4995, also delivered in public this day.

2. The complainant, who requested that the judgment in relation to that fourth complaint be rendered before the judgment on the complaint at issue in the present proceedings – which is his third – also asked, if that request was granted, to be allowed to comment on the judgment in question. However, while legal logic has indeed led the Tribunal to examine the two complaints in that order, it nevertheless considers it appropriate to rule on them both within the same session and observes that the parties had ample opportunity to raise, in the submissions which they have already had to make, the consequences of the potential outcome of the fourth complaint for the outcome of the present case. The complainant's 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. In support of his claims, the complainant submits first of all that the impugned decision is unlawful because the Appeals Committee's opinion was delivered under irregular conditions.

5. In this regard, the complainant – who, at the material time, was himself a member of the Appeals Committee in his capacity as staff representative – firstly makes a general criticism of the way in which the Committee functioned. He claims that this did not comply with certain fundamental requirements, such as the guarantees of independence and impartiality of the Committee, provided for by Article 111(8) and Article 112(1) of the Service Regulations.

However, other than a brief assertion that “[he] [had been] able to observe”, in his time as a staff representative, “undue interference by the Office’s Human Resources department in the functioning of the secretariat of the [Appeals Committee] and therefore of the [Committee] itself”, the complainant’s only reference to this matter in his complaint is to a letter, annexed to the complaint, that he had sent to the President of the Office on 1 June 2019 to complain about this supposed interference. It should be borne in mind that this practice of referring to the arguments that appear in a document annexed to the complaint, rather than setting them out in the complaint itself as required by Article 6(1)(b) of the Rules of the Tribunal, is not admissible (see, for example, Judgments 4051, consideration 3, 3692, consideration 4, or 3434, consideration 5).

In addition, the Tribunal considers, in view of the aforementioned letter of 1 June 2019, that the observations made therein – which essentially related to the selection procedure for a new director of the secretariat of the Appeals Committee, which was at the time underway – are completely insufficient to establish that the way in which that body functioned infringed the aforementioned requirements.

6. The complainant submits, secondly, that, due to a conflict of interests, the President of the chamber of the Appeals Committee which had examined his internal appeal, Mr v.H., was likely to be biased against him.

However, the complainant’s arguments in this regard essentially revolve around the fact that, in his capacity as staff representative, he had previously approached the President of the Office to “unfreeze the payments” due to Mr v.H. for his work on the Committee. Apart from the fact that the Organisation denies any connection between the resolution of this issue and the complainant’s actions, the Tribunal does not, in any event, see how this intervention in favour of Mr v.H. could have caused the latter to be biased against the complainant.

It is true that, in his rejoinder, the complainant elaborates on these arguments, submitting, in particular, that, in the course of his duties, he had had disagreements with Mr v.H. about the way in which the

Committee functioned and differences of opinion over the handling of certain appeals submitted to the Committee, which could have given rise to such a bias. However, it must be noted that these new assertions are not accompanied by any evidence, which is contrary to the requirements of the Tribunal's case law on allegations of bias. They cannot, therefore, be accepted in any event (see, in particular, Judgments 4553, consideration 7, 4422, consideration 17, or 4097, consideration 14).

7. Lastly, although the complainant complains that the examination of his appeal did not give rise to a hearing of the parties, under Article 8 of the Implementing Rules for Articles 106 to 113 of the Service Regulations the organisation of such a hearing is at the discretion of the Committee and, according to the Tribunal's case law, it is permissible for the procedure before an internal appeals body to be entirely in writing (see, for example, Judgments 4398, consideration 4, or 3447, consideration 8).

8. The complainant's line of argument based on the alleged irregularity of the conditions of examination of his internal appeal must therefore be rejected in its entirety.

9. As regards his challenge to the decision of 20 October 2017 closing the investigation process in relation to his harassment complaint at the preliminary evaluation stage, it should be recalled that, according to the Tribunal's case law, the question as to whether harassment occurred must be determined in the light of a careful examination of all the objective circumstances surrounding the acts complained of and that an allegation of harassment must be borne out by specific facts, the burden of proof being on the person who pleads it (see, for example, Judgments 4884, consideration 5, 4820, consideration 8, 4344, consideration 3, or 3871, consideration 12). While it is also clear from this case law that harassment can be established even if the person accused has not acted intentionally, the Tribunal has made it clear that an unlawful decision or inappropriate behaviour is not enough to prove

that harassment has occurred (see, in particular, Judgments 4241, consideration 9, 3233, consideration 6, and 2861, consideration 37).

10. It follows from Article 11 of the Implementing Rules for Articles 21, 21a and 93(2) of the Service Regulations and from Article 13 of Circular No. 341 of 11 December 2012 on the policy on the prevention of harassment and the resolution of conflicts at the EPO that allegations of harassment made by an employee are subject to a preliminary evaluation to determine whether there is sufficient evidence to warrant the opening of an investigation.

In the present case, it was following this preliminary evaluation, and because the evaluation had led the Investigative Unit to conclude that the existence of the alleged harassment was not corroborated, *prima facie*, by any evidence, that the complainant's complaint was closed.

It should be recalled that, according to the Tribunal's case law, it is only in the event of manifest error that the Tribunal will interfere in the findings of an investigative body which have led to the closure of a harassment complaint at the preliminary evaluation stage on the grounds that it is unsubstantiated (see, in particular, Judgment 4344, consideration 8). This case law, which equally applies to a decision to close a matter at the end of an investigation (see, for example, Judgment 4291, consideration 12) can be explained by the fact that it is not the Tribunal's role to reweigh the evidence brought before the investigative body. As the primary trier of facts, the investigative body has had the benefit of directly hearing the persons involved and of assessing the reliability of their statements, which means that, unless a manifest error can be shown, its conclusions must be respected.

The decisions taken in this regard must, however, be adopted in accordance with the applicable procedural rules and are of course subject to full review by the Tribunal.

11. The complainant first of all challenges the decision closing the matter from the specific perspective of compliance with formal requirements, alleging that his right to be heard was breached during the contested preliminary evaluation.

This breach allegedly arose from the failure to invite him, at his interview with the Investigative Unit on 5 September 2017, to present his arguments on the lawfulness of the decision refusing to reimburse his son's educational expenses, even though this issue was closely related to his allegations of harassment.

However, as the Investigative Unit rightly pointed out in the decision of 20 October 2017, and as the complainant himself had in fact acknowledged at the aforementioned interview, it was not for that Unit to rule on the lawfulness of the refusal to reimburse the expenses in question, since the examination of a question of this nature does not fall within the mandate of an investigative body and the resolution of work-related conflicts as such is clearly the responsibility of other bodies.

12. It is true that, in an email sent to the Investigative Unit on 25 October 2017, and then again during the internal appeal procedure, the complainant had complained, more specifically, that Mr B. had been allowed, at his own interview with the Investigative Unit, to express his views on the lawfulness of the contested decision refusing reimbursement.

However, this supplementary argument, apart from being repeated before the Tribunal only very allusively, is also unfounded.

On the one hand, it is clear from the wording of the decision of 20 October 2017 that, while the Investigative Unit had indeed invited Mr B. to explain, for his part, why he had refused the reimbursement in question, this was not in order to assess whether that refusal decision was lawful, strictly speaking, but simply to verify whether it was based on credible reasons. This verification was necessary in order to assess the pertinence of the complainant's allegations of harassment.

On the other hand, even though this could be perceived as a disparity in the treatment of the two parties concerned, it should be recalled that, according to the Tribunal's case law, the adversarial principle does not apply, in the absence of a contrary provision, to the preliminary evaluation stage of a harassment complaint (see, in particular, Judgment 4101, consideration 16). None of the texts produced in evidence stipulates that the information gathered by the

Investigative Unit at this stage of an investigation into allegations of harassment must be the subject of adversarial debate.

13. On the merits, the complainant's position, as set out in his written submissions, is that the refusal to reimburse his disabled child's educational expenses was due to "malice" on the part of the director of Directorate 4.3.2 as part of a "policy of reprisals [by] the EPO against staff representatives" which, according to the complainant, was being pursued at the material time.

The Tribunal observes first of all that, while it is well known that the prevailing social climate at the Office had deteriorated considerably during the period in question, the complainant has not provided any tangible evidence to demonstrate the existence of a link between the individual decision taken against him and the general policy of reprisals against staff representatives which he denounces. Yet the case law referred to in consideration 9 above holds that the burden of proving the allegations of harassment falls on the complainant.

In addition, in the aforementioned Judgment 4995, the Tribunal dismissed the complainant's complaint challenging the decision to refuse the reimbursement in question and confirmed the lawfulness of the decision in all respects. While a finding that the decision was unlawful would, as indicated in consideration 9, have been insufficient to establish the existence of harassment, it is clear, in any event, that the fact that the Tribunal recognised the decision as being founded in law makes it highly unlikely that it was based on malice or a desire to take reprisals against the complainant.

14. It is true that, in absolute terms, harassment could still result from the conditions under which this decision was taken, notwithstanding its lawfulness.

However, none of the various arguments put forward by the complainant on this point, which largely relate to a video conference between himself and Mr B. on 16 June 2017, appears convincing to the Tribunal.

15. According to the complainant, the fact that Mr B. upheld his decision to refuse the reimbursement is completely at odds with the fact that, at that video conference, he acknowledged that the decision of 10 April 2017, which had previously confirmed that refusal, contained a factual error as regards the determination of the school to which the tuition fees in question related. However, in Judgment 4995, the Tribunal found that the inaccuracy contained in the decision of 10 April 2017 in this regard was simply a clerical error which was of no practical consequence. Mr B. was therefore right to maintain his position despite acknowledging this error.

16. Moreover, the complainant alleges that, during their meeting of 16 June 2017, Mr B. informed him, in a “threatening” manner, that he “suspected [him] of submitting false invoices” in support of his claims for the reimbursement of education costs. But it appears from the evidence and the facts recounted in Judgment 4995 that, in all likelihood, any remarks made by Mr B. in this regard were simply to indicate to the complainant that the invoices issued by the school in question for trimesters subsequent to those referred to in a declaration dated 25 April 2016 produced by him showed a different breakdown of education costs from that mentioned in that declaration. Such remarks cannot be construed as accusing the complainant of having knowingly submitted false documents or as threatening him in that regard.

17. The complainant also complains that the Office provided him with insufficient information about decisions taken in relation to the handling of his reimbursement claim. However, aside from the fact that some of the grievances raised by the complainant in this regard do not involve Mr B. personally, the Tribunal notes that the administration had numerous exchanges with the complainant in relation to this matter – the very fact that the meeting of 16 June 2017 took place being an example of this – and in particular endeavoured to respond to his various requests for explanations as to the calculation of the amount of the reimbursements that appeared on his payslips. While it is certainly regrettable that the Office does not seem to have recorded in writing the decision of 13 May 2016, by which it had initially agreed to certain

reimbursement arrangements which were subsequently revised in the light of new information, nor to have made the reasons for this revision clear to the complainant at the time, this was, at most, an administrative oversight which, in the circumstances of the case, cannot be regarded as amounting to harassment.

18. Lastly, the complainant accuses Mr B. of having treated him with “mockery” and “contempt” at the aforementioned meeting of 16 June 2017.

This last argument is not without some merit. It is apparent from the evidence on file that Mr B. admitted at his interview with the Investigative Unit that he had smiled ironically at one point in the meeting. Although he explained that he had reacted in this way because he felt abashed by the complainant’s accusation of discrimination and the lack of misunderstanding of the rules that it betrayed, it is nonetheless clear, in the Tribunal’s view, that such conduct was inappropriate, in that it could certainly be perceived by the complainant as a sign of mockery and contempt. This observation is all the more pertinent given that, from the complainant’s point of view, the meeting was not purely about finances but also had an emotional dimension, insofar as it was related to his child’s disability.

But the incident in question cannot in itself be deemed to constitute harassment.

Article 2(2) of Circular No. 341, which defines harassment for the purposes of the Circular, provides as follows:

“Harassment may be a one-off incident or a series of incidents. Even mildly offensive behaviour can rise to the level of harassment if repeated. A single incident can constitute harassment if it is so severe that it has a negative impact on the overall working environment.”

In the present case, the Tribunal considers that Mr B.’s behaviour described above was, at the very least, mildly offensive, but it was a single incident, and not a repeated act. However, this conduct can clearly not be regarded as so severe as to have a negative impact on the complainant’s overall working environment. It therefore does not constitute harassment under those provisions.

19. Therefore, the examination of the complainant's arguments on the merits of his allegations of harassment does not lead to the conclusion that the Investigative Unit committed a manifest error, within the meaning of the case law referred to in consideration 10 above, when it found that those allegations were not sufficiently substantiated to warrant the opening of an investigation.

20. It follows from the foregoing that the complaint must be dismissed in its entirety. The Tribunal observes, moreover, that, as the EPO rightly submits, some of the complainant's claims are irreceivable because they seek orders which it is not competent to make, or because they were submitted for the first time before the Tribunal in breach of the requirement to exhaust internal means of redress laid down by Article VII, paragraph 1, of its Statute.

#### DECISION

For the above reasons,

The complaint is 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