

**F. (No. 9) and B. (No. 6)**

v.

**EPO**

**140th Session**

**Judgment No. 5063**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr T. F. (his ninth) and Mr I. B. (his sixth) against the European Patent Organisation (EPO) on 16 and 18 January 2020 respectively, the EPO's single reply of 30 April 2020, the complainants' rejoinder of 10 August 2020 and the EPO's surrejoinder of 23 November 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainants challenge the amounts paid to them by way of moral damages and costs following an internal appeal that they filed as staff representatives.

The complainants are permanent employees of the European Patent Office, the EPO's secretariat. At the material time, they were members of the Central Staff Committee (CSC), and it was in that capacity that each of them pursued an internal appeal challenging a decision of the President of the Office concerning the participation of members of the EPO's Boards of Appeal and Enlarged Board of Appeal in administrative procedures within the Office. These Boards, which deal with appeals relating to patent applications, were then part of Directorate-General 3 (DG3).

In April 2014 the Enlarged Board of Appeal issued an interlocutory decision (decision R 19/12) upholding an objection to its Chairman based on concerns as to his ability to exercise his functions impartially. These concerns arose essentially because the Chairman of the Enlarged Board of Appeal was also the Vice-President of DG3 and, in that role, he was under the authority of the President and closely involved in the management of the Office.

The issue raised by decision R 19/12 was addressed by the Office in 2015 as part of a structural reform of the Boards of Appeal. In the meantime, however, the President of the Office decided, on 12 August 2014, that “with immediate effect and until further notice, members of the Boards of Appeal and members of the Enlarged Board of Appeal [could] no longer be nominated to participate in the Selection Boards for procedures external to DG3 and in the work of any other bodies under the Service Regulations [for permanent employees of the European Patent Office] unless such work concern[ed] directly the applicability of the Service Regulations to Members of the Boards of Appeal and members of the Enlarged Board of Appeal”. He explained that this was a precautionary measure to ensure that members of the Boards of Appeal and members of the Enlarged Board of Appeal would be in a position to exercise their functions independently.

The “other bodies under the Service Regulations” to which the President referred included the Disciplinary Committee. Pursuant to Articles 36 and 98 of the Service Regulations, it was the prerogative of the CSC to nominate some of the members of the Disciplinary Committee, including six at grade A6 and six at grade A5. In 2014, the six members nominated by the CSC at grade A6 were all serving in DG3 as members of the Boards of Appeal or of the Enlarged Board of Appeal. As a result of the President’s decision of 12 August 2014, their names were removed from the list of members of the Disciplinary Committee. Similarly, four of the six members nominated by the CSC at grade A5 were working in DG3. They too could no longer participate in the Disciplinary Committee.

In October 2014, acting in their capacity as members of the CSC, the complainants submitted requests for review of the President's decision of 12 August 2014. These were rejected by the President on 21 November 2014 as manifestly irreceivable and, in any event, unfounded. At various dates between 8 January 2015 and 13 February 2015, the complainants and three other staff representatives lodged internal appeals with the Appeals Committee, challenging the rejection of their requests for review. The Appeals Committee issued an opinion in August 2019, in which it found that the President's decision of 12 August 2014 was unlawful because he did not have the authority to modify, by means of an administrative decision, the prerogative of the CSC to nominate members of the statutory bodies, which was conferred on it by the Administrative Council and enshrined in the Service Regulations. The Appeals Committee unanimously recommended that the Office should acknowledge that the challenged decision was unlawful. It also unanimously recommended that each appellant be awarded 350 euros in moral damages for delay in the internal appeal procedure, and that the "reasonable legal costs incurred" by those who had been assisted by a lawyer (including the two complainants in the present proceedings) be reimbursed. Regarding the appellants' claim for moral damages for the violation of their rights as staff representatives, a majority of the Appeals Committee recommended that it be rejected in view of the case law of the Tribunal, but a minority recommended that each appellant (except for one, whose appeal was found to be irreceivable) be awarded an additional amount of at least 2,500 euros under this head.

By a letter of 29 October 2019, the Vice-President of Directorate-General 4 (DG4) informed the complainants of the final decision on their appeals, which she had taken by delegation of power from the President of the Office. The Vice-President acknowledged that the President's decision of 12 August 2014 was unlawful, as recommended unanimously by the Appeals Committee. She also agreed to grant the appellants moral damages for delay in the internal appeal proceedings. However, referring to the Tribunal's case law, she indicated that these damages would not be paid to the appellants individually, but to the staff representation as a whole, by crediting the total amount to the

budgetary line of the staff committees relating to training and duty travel. In accordance with the recommendation made by a majority of the Appeals Committee members, she rejected the appellants' claim for moral damages for violation of their rights as staff representatives, considering that the Office's acknowledgement of the unlawfulness of the challenged decision afforded them adequate redress in this respect. Lastly, the Vice-President accepted the recommendation that reasonable legal costs should be reimbursed and she invited the appellants concerned to submit a justification for their claim within one month. This is the impugned decision.

Following that decision, the complainants submitted to the EPO their lawyer's invoice for the internal appeal proceedings, totalling approximately 11,800 euros. The EPO refused to reimburse that amount, which it considered to be unreasonable. However, in the course of the proceedings before the Tribunal, it paid each complainant 500 euros in costs for the internal appeal proceedings.

The complainants ask the Tribunal to set aside the impugned decision to the extent that it denied their claims for moral damages for violation of their rights as staff representatives and for delay in the internal appeal proceedings. They each claim at least 5,000 euros in moral damages for violation of their rights as staff representatives and at least 9,500 euros for the excessive delay in the internal appeal proceedings. They also claim costs for the internal appeal proceedings, in the amount of 11,804.80 euros, and for the proceedings before the Tribunal, in the amount of 6,829.50 euros.

The EPO asks the Tribunal to dismiss the complaints as partly irreceivable and unfounded in their entirety.

#### CONSIDERATIONS

1. The complainants, who filed identical briefs to which the EPO was invited by the Tribunal to file a single reply, impugn identical decisions stemming from the same internal appeal proceedings. Their complaints will therefore be joined to form the subject of a single judgment.

2. The complainants request the Tribunal to quash the impugned decision of 29 October 2019 insofar as, while accepting the Appeals Committee's recommendation to acknowledge that the administrative decision of 12 August 2014 was legally flawed, the Vice-President of DG4 (i) rejected their claims for moral damages for the violation of their statutory rights on the basis that the EPO's acknowledgment of the flaw was "sufficient satisfaction" for the flaw, and (ii) departed from the recommendations of the majority of the Appeals Committee by awarding moral damages for delay in the internal appeal procedure to the staff representation as a whole, and not to them individually. Indeed, the Vice-President of DG4 decided that a total amount of 1,750 euros for the five appellants in the internal appeals procedure (350 euros each) should be credited to the specific budgetary line of the staff committees related to training and duty travel.

3. The complainants also raise the issue concerning the reimbursement of their legal costs in the internal appeals procedure. In the impugned decision, the Vice-President of DG4 noted that "the [Appeals] Committee [...] recommended the full reimbursement of reasonable costs incurred to 'those appellants whose appeals have been considered receivable and who were represented by an external counsel', subject to the production of the relevant justification". The Vice-President thereupon invited those appellants "to present such justification within a month from the notification of [the impugned] decision [...]". On the basis of an invoice dated 5 May 2018, the complainants request the reimbursement of their legal costs in the amount of 11,804.80 euros incurred for the assistance they (including the other appellant, Ms E.H.) received from an external legal counsel in the internal appeals procedure. The complainants further request reimbursement of reasonable costs they incur in the present proceedings in the Tribunal, subject to the production of relevant justification.

4. The EPO raises receivability as a threshold issue. With regard to the complainant Mr B., it submits that his complaint is irreceivable. It states that when he filed it in January 2020, he was no longer an elected member of the CSC – in which capacity he had filed and

pursued his underlying internal appeal – and therefore he had no standing to file the complaint. The EPO cites the Tribunal’s statement in consideration 5 of Judgment 1968, that receivability falls to be determined at the time that a complaint is filed, not at some later date. It also cites the statement in consideration 8 of Judgment 4194, observing that in that case, the Tribunal considered that the complaints filed by former members of the Munich Staff Committee were irreceivable because at the time they filed them, each complainant had ceased being a member of that Committee even if one or a number may have held another office as a staff representative. It also noted the Tribunal concluded that for that reason, when they commenced the proceedings in the Tribunal, the foundation of their cause of action had been removed and their complaints were therefore irreceivable.

5. Mr B. however states that he was a member of the CSC at the time when he filed his request for review and the subsequent internal appeal. He points out that he was elected as a full member of the CSC from July 2014 for a three-year term, but could not stand for re-election in 2017 because the EPO had dismissed him with immediate effect on 15 January 2016, from which date he could not have acted as a member of the CSC, but that in Judgment 4043 the Tribunal set aside the dismissal decision and ordered the EPO to reinstate him to the position he held immediately before it dismissed him.

The Tribunal recalls that, in point 2 of the decision in that judgment, it ordered that “[t]he EPO shall reinstate the complainant to the position he held immediately before his dismissal with all legal consequences [and that] [a]ny earnings from professional employment during the period between 15 January 2016 and the date of his reinstatement shall be deducted from the amounts due”.

Mr B. further explains that although the EPO reinstated him to the position he held immediately before it had dismissed him, it refused to reinstate him as a staff representative and a member of the CSC, and although he considered that this refusal violated the Tribunal’s order in point 2 of the decision in Judgment 4043, he did not contest that violation as he thought it more important to move forward with an

amicable solution and settle the case. He waited until new elections were conducted in June 2020, in which he was elected as a staff representative and was then a member of the CSC for the subsequent three years.

6. The Tribunal cannot conclude from the foregoing statements that Mr B. was a member of the CSC at the time when he filed the present complaint, as the case law requires. It is immaterial that he was a member of the CSC at the time he filed his underlying request for review and internal appeal. In his complaint which culminated in Judgment 4043, he did not request an order to be reinstated as an elected member of the CSC and none was issued. It is merely speculative that he would have been re-elected as a member of the CSC in 2017. Moreover, as the EPO submits, he could have authorized another (serving) member of the CSC to file the present complaint on his behalf, but he did not do so. It is also immaterial to this issue that the flaw which occasioned him to file the complaint underlying Judgment 4043 was remedied and he was subsequently elected a CSC member. His further argument, that he also has a cause of action as a member of the Staff Union of the European Patent Office (SUEPO), which he was at all relevant times, and that SUEPO has a legitimate interest in supporting staff representatives in cases where the EPO violates their rights, is unfounded. As the EPO submits, staff unions do not have standing before the Tribunal. Additionally, there is no legal basis for the complainant's assertion that he has a cause of action in the present case because he was also individually affected by the President's flawed decision in that he was "subject to a Disciplinary Committee in December 2015 [the] composition [of which] must be considered as legally flawed [as] was confirmed by the Appeals Committee and accepted by the President of the Office". He did not file his internal appeal or the complaint in an individual capacity. It can be inferred in all the circumstances the Vice-President was proposing in the impugned decision that the reimbursement of reasonable costs was to the complainant in his capacity as a member of the CSC, and only in that capacity. Thus his right to pursue a claim in the Tribunal was conditioned on him having that capacity at the time of filing his

complaint. Based on the foregoing, Mr B.'s complaint is irreceivable. It is therefore unnecessary to consider his application for a hearing.

7. Regarding the complainant Mr F., the EPO submitted in its reply that his claim for 9,500 euros in moral damages for the delay in the internal appeals procedure was partly irreceivable, since these damages appeared to be claimed also on behalf of the three other appellants. However, the Tribunal notes that the EPO expressly withdrew this objection in its surrejoinder, in light of the explanations provided by the complainants in their rejoinder.

8. The EPO submits that Mr F.'s claim for legal costs is also partially irreceivable, to the extent that he seeks to recover legal costs on behalf of third parties. The invoice he has provided, for a total of 11,804.80 euros, shows that these fees include the costs of Ms E.H., who is not a party to these proceedings. The EPO cites the Tribunal's case law stated in Judgments 3357, considerations 13 and 14, 1979, consideration 4, and 960, consideration 4.

In consideration 4 of Judgment 1979 the Tribunal relevantly stated the consistent principle that since judgments carry the authority of *res judicata* only for the parties to a dispute, complainants may put forward claims only for themselves. The Tribunal concluded that the complaints in that case were irreceivable insofar as they addressed the position of persons who were not parties to that complaint. Accordingly, the Tribunal also holds that Mr F.'s claim for reimbursement of the costs incurred in the internal appeals proceedings is receivable only with respect to his own costs.

9. Lastly, the EPO questions the receivability of Mr F.'s claims for moral damages, noting that he does not explain why the total amount claimed before the Tribunal has increased in relation to the amount claimed in his internal appeal. It refers to Judgment 4095, consideration 3, where the Tribunal stated the following:

“In some cases the discrepancy between the amount claimed in an internal appeal and the amount claimed in the proceedings before the Tribunal sustains a conclusion that what is claimed in the latter proceedings is a new claim and irreceivable (see, for example, Judgment 3997, considerations 3 to 6). In other cases it might be difficult to characterise the claim for a larger amount in the Tribunal as a new claim. Nonetheless, in the absence of an explanation for the increased amount, the Tribunal has set its face against a complainant pursuing the larger amount (see, for example, Judgment 3419, consideration 7).”

In the present case, however, the increase in the amount of moral damages claimed is entirely based on the excessive duration of the internal appeal proceedings, which plainly could not be measured at the time when the appeal was filed. This objection to receivability is therefore unfounded.

10. Regarding the merits, whereas the Appeals Committee unanimously recommended awarding 350 euros to each appellant for the delay in the internal appeals procedure, in the impugned decision, the Vice-President expressly departed from that recommendation. She decided to credit the 350 euros for each appellant to the staff representation as a whole, specifically to the budgetary line of the staff committees related to training and duty travel.

11. Mr F. states that he is not aware of an existing and defined “staff committee budget” for training and duty travel, so such a payment cannot have the effect of settling the EPO’s “obligations”, deriving from recommendations of the Appeals Committee or from decisions of the Tribunal, to grant the individual staff representative moral damages. He argues, in effect, that it was inappropriate to pay the amount awarded into that budget line as the Office has a duty to finance the training and duty travel expenses of the staff representation for the proper functioning of the staff representation, and such financing cannot depend on appeals being won. However, as the EPO points out, the Tribunal’s recent case law makes clear, in consideration 5 of Judgment 3671, for example, that staff representatives acting in that capacity are not entitled to moral damages in their individual capacity (see also Judgment 4575, consideration 9). Moreover, the Tribunal has

held, in consideration 20 of Judgment 4550, for example, that considering the damage occasioned by the unlawful decision in that case concerned the staff representation, and not the employees themselves, the President of the Office's decision to credit the sum awarded as moral damages to the training and duty travel budgetary line of the staff committees was not inappropriate. There is nothing in the circumstances of the present case that warrants departure from that conclusion in this case.

12. The complainant contests the Vice-President's decision to reject his claim for moral damages for the violation of his statutory rights on the ground that the EPO's acknowledgment, in the impugned decision, that there was a flaw in the 12 August 2014 decision was "sufficient satisfaction" for the flaw. The complainant submits, in effect, that the Vice-President erred by not awarding the 5,000 euros he claimed as moral damages for the flawed decision and she should have paid moral damages to him (and other staff representatives) because they were personally affected by the flawed decision. The submission is unfounded. It is clear from the Tribunal's case law, as recalled in consideration 9 of Judgment 4575 and consideration 20 of Judgment 4550, for example, that moral damages are not payable to staff representatives pursuing claims in that capacity. The complainant's reliance on the case law of the European Court of Human Rights (ECHR) to justify an individual award of moral damages is not persuasive. The Tribunal is not bound to apply the case law of the ECHR. Neither is the Tribunal's case law that the complainant is not personally entitled to be awarded moral damages in this case obviated by his submissions that the staff representatives were, at the time, subjected to "massive repression" by the President of the Office for their work as staff representatives and had to fear for their jobs; that for any staff representative, it was a difficult decision to take legal action against an unlawful decision of the President; that the emotional stress triggered by the arbitrariness of the President's decision led not only to "existential fears" but also to "massive health consequences, which some staff representatives still have to struggle [with] until today". The complainant's submission that not making an award of moral damages to him (and other staff

representatives) is contrary to Article VIII of the Tribunal's Statute, which provides for an award of compensation to the complainant, misses the point that they brought their complaints in their capacity as staff representatives rather than in their individual capacity.

13. Regarding Mr F.'s request to be awarded 9,500 euros as moral damages for the delay in the internal appeals procedure, he argues that the 350 euros recommended by the Appeals Committee and awarded by the Vice-President did not take into account the extent and severity of the harm caused to the staff representation. He states that as a result of the delay, the Disciplinary Committee was composed without the participation of the members of the Boards of Appeal and Enlarged Board of Appeal for five years; that during that period, several disciplinary proceedings were heard by a flawed Disciplinary Committee and this appeal should have been given top priority. However, as the EPO submits, he has not convincingly explained how the adverse effect of the delay warrants additional compensation, over and above the 350 euros already paid to him. Moreover, the question of the "severity of the infringement" is irrelevant, as there is no justification for an award of exemplary damages.

14. Regarding legal costs in the internal appeals procedure, the complainant points out that although, in accordance with the Vice-President's invitation to present justification for the full reimbursement of the reasonable costs incurred by the appellants who were represented by an external counsel and whose appeals were receivable, the complainants submitted their counsel's invoice, dated 5 May 2018, for 11,804.80 euros to the Office, they had received nothing for costs at the time when the complaints were filed. However, in the course of the proceedings before the Tribunal, the EPO decided to pay each complainant 500 euros in respect of the costs they incurred in the internal appeal proceedings. It appends to its surrejoinder the email of 4 May 2020 informing the complainants of that decision.

It is common ground that the invoice they submitted was for legal costs for three appellants, namely, Mr F., Mr B. and Ms E.H. (whose internal appeal was found to be irreceivable and who was not entitled

to reimbursement of costs). However, as the complainant states, the legal counsel billed for 44 hours of work as she presented one common brief for the three of them. The EPO submits that the costs invoiced are not reasonable and are manifestly excessive given the limited scope of the work the legal counsel did on behalf of the appellants in the internal appeals procedure. The EPO states that the legal counsel did not assist them throughout the proceedings, but only after the Office had submitted its position paper to the Appeals Committee. The EPO submits that it is unreasonable for each complainant to seek full reimbursement of the invoiced amount. The Tribunal agrees that it would be. Given that the Vice-President's decision that only appellants whose internal appeals were receivable would be reimbursed, it is obvious that the EPO is not obliged to pay legal costs on Ms E.H.'s behalf.

15. The EPO considers that the award of 500 euros to each of the complainants was reasonable. The complainant states that the Staff Committee has no budget for legal costs and the actual fees of the lawyer were paid by SUEPO, which has a limited budget in comparison with that of the EPO, and that the non-reimbursement of actual costs incurred in staff committee cases would put the Staff Committee at a great disadvantage vis-à-vis the Organisation and would create a serious inequality of arms. He further states that the legal questions raised in the EPO's position paper needed to be answered in some detail and were of general interest to both the staff representation and the staff as a whole, and that the legal counsel's examination of the case was extensive and she represented three appellants and prepared a single rejoinder for all three. Also, that the defendant, which frequently resorts to external lawyers, is well aware that the 44 hours that she billed were reasonable. Most of these matters the complainant raises are irrelevant to the issue of costs. However, the invoiced costs seem reasonable in light of the Vice-President's invitation to present justification for the full reimbursement of the reasonable costs incurred. Given that the work involved was done for three appellants who were represented by an external counsel, the EPO should pay one-third of 11,804.80 euros, or 3,934.93 euros, in respect of the costs incurred by Mr F. in the

internal appeal proceedings, less the 500 euros already awarded to him under this head. These costs, in the total amount of 3,434.93 euros, should be credited to an appropriate budgetary line of the staff committees.

16. As Mr F. has had limited success in these proceedings, the EPO will be ordered to pay 1,000 euros in costs, which is also to be credited to an appropriate budgetary line of the staff committees.

#### DECISION

For the above reasons,

1. Mr B.'s complaint is dismissed as irreceivable.
2. The EPO shall pay Mr F. 3,434.93 euros in costs in the internal appeals procedure, to be credited to an appropriate budgetary line of the staff committees.
3. The EPO shall pay 1,000 euros costs in these proceedings, to be credited to an appropriate budgetary line of the staff committees.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 April 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

RENÉ M. VARGAS M.