

K. (No. 52)

v.

EPO

140th Session

Judgment No. 5078

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifty-second complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 20 January 2020 and corrected on 11 April 2020, the EPO's reply of 2 August 2021, the complainant's rejoinder of 14 March 2022 and the EPO's surrejoinder of 19 July 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 challenges general decisions CA/D 22/09 and CA/D 2/14, as well as the individual decisions rejecting his respective requests to participate in the 2013 and 2014 Staff Committee elections.

The complainant is a former permanent employee of the European Patent Office, the EPO's secretariat. On 1 July 2012, he was assigned to non-active status for reasons of invalidity.

By decision CA/D 22/09 of 10 December 2009, the Administrative Council amended Article 35 of the Service Regulations for permanent employees of the European Patent Office, entitled "Composition of the Staff Committee". Among other things, the amendment banned permanent employees assigned to non-active status from voting in and being elected to the Staff Committee.

On 20 November 2013, the complainant asked the President of the Office to allow him to vote in the elections for the Local Staff Committee in Munich, Germany, scheduled to take place from 25 to 27 November 2013. This request was rejected on 27 November 2013 by reference to Article 35(3) of the Service Regulations, which expressly excludes from the list of voters all employees assigned to non-active status. On 22 December 2013, the complainant submitted a request for management review of the “individual decision to take away [his] right to vote” and sought the quashing of decision CA/D 22/09. Further to the rejection of his request for management review, the complainant filed, on 12 March 2014, an appeal against the decision rejecting his request of 20 November 2013 to be allowed to participate in the elections for the Local Staff Committee in Munich (appeal RI/2014/045).

By decision CA/D 2/14 of 28 March 2014, the Administrative Council amended several Articles of the Service Regulations governing the functions, composition and competence of the Staff Committee and announced that the elections for the Central and Local Staff Committees would take place in June 2014.

On 30 May 2014, the complainant asked the President to allow him to vote in the Staff Committee elections scheduled for 18 June 2014. Although he never received an express decision on his request, the complainant’s name was not included in the list of voters for said elections. On 22 October 2014, he submitted a request for management review of the implied decision to reject his request to participate in the June 2014 Staff Committee elections. Further to the rejection of his request for management review, the complainant filed, on 30 January 2015, an appeal against the decision rejecting his request of 30 May 2014 to be allowed to participate in the elections for the Staff Committee (appeal RI/2015/021).

Following a review by the Appeals Committee, the complainant’s appeals RI/2014/045 and RI/2015/021 were rejected by delegated decisions taken on behalf of the President on 24 July 2015 and on 11 April 2016, respectively. The complainant impugned these decisions in his fifteenth and twenty-third complaints, respectively filed with the Tribunal on 14 October 2015 and on 8 July 2016.

Following the public delivery of Judgments 3694 and 3785 in July 2016 and November 2016 respectively, in which the Tribunal found that the Appeals Committee was improperly composed when it issued its opinions on the complainant's appeals, the President of the Office decided to withdraw the 24 July 2015 and 11 April 2016 decisions and to remit the cases to a properly constituted Appeals Committee for a fresh consideration. The complainant was relevantly informed by letter of 1 March 2017 and was invited to withdraw his fifteenth and twenty-third complaints (then pending before the Tribunal) on the basis that they had become moot, but he chose to maintain them.

Ultimately, along with several other complaints, the complainant's fifteenth and twenty-third complaints were dismissed by the Tribunal in Judgment 4256, delivered in public on 10 February 2020, on the ground that they had become without object as a result of the withdrawal of the 24 July 2015 and 11 April 2016 decisions. In that same judgment, the Tribunal encouraged the EPO to consider in the resumed internal appeal proceedings any costs the complainant might have incurred in filing a complaint against a decision which was presented to him as a final decision that could be impugned before the Tribunal.

In the meantime, the complainant's appeals were remitted for consideration to a properly constituted Appeals Committee. By emails of 21 and 24 October 2018, the complainant objected to the President's decision to remit the cases back to the Appeals Committee, provided additional documents to be included as part of the appeals' file, and made several procedural requests, including that the Appeals Committee hold a hearing. On 30 and 31 October 2018, he was informed that his procedural requests would be put before the Appeals Committee, which would also decide whether the documents provided by him would be included in the "official appeal file". He was also informed that in the interest of procedural economy, the Appeals Committee had decided not to hold a hearing and to deal with his appeals in a summary procedure. On 9 November 2018, the complainant raised in writing partiality objections against Mr J., Vice-Chair of the Appeals Committee and presiding member of the Chamber competent to deal with the complainant's appeals. These objections were considered and rejected

as unfounded on 12 November 2018 by decision of the Chair and the other Vice-Chair of the Appeals Committee. The complainant was relevantly informed by email of 13 November 2018 and by the reasoned decision communicated to him on 23 November 2018.

Having decided to consolidate the two appeals and to deal with them in a single procedure, the reconstituted Appeals Committee submitted its opinion on 26 August 2019. A majority of its members recommended that the appeal be rejected as partly irreceivable and unfounded in the remainder, and that the complainant be awarded 450 euros in moral damages for the duration of the internal procedure. In a dissenting opinion, one member of the Appeals Committee concurred with the majority's recommendation to reject the appeal as unfounded, but recommended that the complainant be awarded 950 euros in moral damages for the duration of the internal procedure and the President's late remittal of the appeals.

By a letter of 23 October 2019, attaching a copy of the Appeals Committee's opinion, the Vice-President of Directorate-General 4 informed the complainant of her decision, taken by delegation of authority from the President, to follow the recommendation of the Appeals Committee's majority. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, along with the decisions to take away his right to participate in the Staff Committee elections, and to also set aside decisions CA/D 22/09 and CA/D 2/14. Subsidiarily, he asks the Tribunal to order the EPO to no longer apply decisions CA/D 22/09 and CA/D 2/14 but to apply instead the version of the Service Regulations applicable prior to the amendments introduced by the aforementioned decisions. He claims 10,000 euros in compensation for depriving him of the right to participate in the 2013 and 2014 Staff Committee elections (5,000 euros respectively). He also claims moral damages in the amount of 5,000 euros for the President's unlawful remittal of his appeals to a newly constituted Appeals Committee; 2,000 euros for allowing the same official to decide both his initial requests and internal appeals; 10,000 euros for the Appeals Committee's decision to make its recommendation without granting him the right to be heard;

4,000 euros for the Appeals Committee's failure to diligently treat the partiality objections he raised in the course of the internal appeal procedure; 2,000 euros for the Appeals Committee's failure to diligently treat the evidence he provided in the course of the internal appeal procedure; 2,000 euros for the Appeals Committee's violation of the principle *jura novit curia*; and 14,000 euros for the undue delay in the internal appeal procedures. Lastly, the complainant claims costs in the total amount of 7,000 euros.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part and unfounded in its entirety. As regards, in particular, the complainant's claim for moral damages for the length of the internal appeal process, the EPO notes that he has already been awarded 450 euros on that count and does not explain why this amount would not be sufficient.

CONSIDERATIONS

1. The complainant impugns the decision of 23 October 2019, in which the Vice-President of Directorate-General 4, by delegation of authority from the President of the Office, endorsed the majority recommendation of the Appeals Committee to dismiss his internal appeals against his exclusion from the Staff Committee elections of November 2013 and June 2014, as well as against his challenges of decisions CA/D 2/14 and CA/D 22/09. The impugned decision also awarded him 450 euros in moral damages due to delays in the internal appeal process.

2. The Tribunal will address at the outset two procedural issues raised by the complainant. First, the complainant requests oral proceedings and identifies a number of persons he would like the Tribunal to hear as witnesses. As the written submissions and documents produced by the parties are sufficient to enable the Tribunal to reach an informed decision, this request is refused. Second, the complainant requests that his fifteenth and twenty-third complaints be joined to the present complaint. However, those complaints were adjudicated by the Tribunal in

Judgment 4256, delivered in public on 10 February 2020. Accordingly, this request is moot.

3. The complainant mainly bases his complaint on the following grounds:

- (i) The EPO discriminated against him on the ground of his permanent invalidity and disability, violating the principles of equal treatment and non-discrimination;
- (ii) Decision CA/D 22/09 infringed upon his rights of political participation and freedom of association, as provided for in Article 30 of the Service Regulations; and
- (iii) Procedural irregularities and partiality tainted the internal appeal process.

4. The EPO contests the receivability of the complaint insofar as it aims at setting aside and ceasing to apply general decision CA/D 22/09 on the basis that the complainant has not demonstrated immediate and adverse effects on his freedom of association. It further contests the receivability of the complaint insofar as it aims at setting aside and ceasing to apply general decision CA/D 2/14, *inter alia*, for failure to exhaust internal remedies.

5. The Tribunal considers it unnecessary to deal with the EPO's objections to the receivability of the claims to set aside and to cease to apply decision CA/D 22/09 or to revert to the prior version of the Service Regulations as, for the reasons explained below, the Tribunal finds that decision CA/D 22/09 was lawful and that the complaint must be dismissed on the merits.

As for the claim to set aside and to cease to apply decision CA/D 2/14, the Tribunal notes that the complainant failed to make this claim in the internal appeals and has therefore not exhausted internal remedies, as required under Article VII, paragraph 1, of the Tribunal's Statute. Consequently, this claim is irreceivable.

6. Turning to the merits, as explained by the defendant organisation, the purpose of the amendment was explicitly to ensure the Staff Committee comprised members actively involved in the day-to-day running of the service. The exclusion of employees in non-active status directly served the legitimate organisational objective of operational effectiveness.

7. The complainant alleges a violation of the principle of equal treatment and non-discrimination, asserting discrimination based on permanent invalidity and disability. However, this argument is based on a misunderstanding of Article 35(3) of the Service Regulations, as amended by decision CA/D 22/09.

Prior to the amendment, Article 35(3) of the Service Regulations provided that:

“All permanent employees with at least three months’ service shall be entitled to vote and to be elected.”

Following the amendment introduced by decision CA/D 22/09, Article 35(3) read as follows:

“All permanent employees with at least three months’ service, **save those assigned to non-active status as provided in Article 42**, shall be entitled to vote and to be elected.” (Emphasis added.)

Electoral rights were restricted, explicitly excluding those assigned to “non-active status” pursuant to Article 42, irrespective of invalidity and/or disability.

Article 42 of the Service Regulations, in the version applicable at the relevant time, enumerated a number of reasons for which a permanent employee may be assigned to non-active status, including secondment, military or comparable service, parental leave, family leave, personal grounds, and invalidity under Article 62a.

As from 1 July 2012, the complainant was assigned to non-active status for reasons of invalidity in accordance with Article 42 and, consequently, he was excluded from electoral participation in accordance with Article 35(3).

8. The Tribunal finds no violation of the principle of equal treatment or discrimination in the present case. According to the Tribunal's well-settled case law, the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgment 4277, consideration 21, and the case law cited therein). Also, in most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved, and even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference (see, for example, Judgments 4391, consideration 11, and 4022, consideration 6). Notably, in Judgment 4487, consideration 9, the Tribunal concluded that the status of employees in active employment is materially different from that of employees assigned to non-active status and therefore warrants distinct legal treatment without this infringing the principles of equality of treatment and non-discrimination. As the Tribunal stated, "[t]he two situations differ in fact and cannot be compared". This conclusion also applies to the present case justifying the recognition of different electoral rights for employees in active employment as opposed to those assigned to non-active status.

9. The complainant further argues that former recipients of an "invalidity pension," previously classified as pensioners, automatically regained the right to vote and to be elected after the adoption of decision CA/D 30/07, as they were reclassified as employees "in service". While it is true that former recipients of an "invalidity pension" ceased to be pensioners pursuant to decision CA/D 30/07, their status was explicitly classified as "non-active". Under Article 35(3), as amended by decision CA/D 22/09, it was an employee's non-active status, rather than "pensioner status", that determined electoral exclusion and therefore the complainant's interpretation is incorrect.

10. Regarding the right to freely associate, the Tribunal has recalled on several occasions that staff members of an international organisation enjoy the right to associate freely and there is an implied clause in their contract of employment compelling the organisation to respect that right (see, for example, Judgments 4550, considerations 4 and 6, 4482, consideration 5, and 3414, consideration 4). The Appeals Committee rightly noted substantial differences between employees in active service and those assigned to non-active status, with the professional relationship being significantly altered upon entering non-active status. This supports the EPO's legitimate discretion in determining electoral eligibility for the Staff Committee. Consequently, the Tribunal finds no violation of the complainant's freedom of association.

11. The complainant also alleges that the internal appeal procedure was tainted with procedural irregularities and partiality. Specifically, he refers to the procedural choices made by the Chair of the Appeals Committee, including the adoption of a summary procedure, and the allegedly improper composition of the Appeals Committee. These allegations are unsubstantiated. The complainant has provided no evidence of his allegations of bias or irregularities in the composition of the Appeals Committee or otherwise impacting procedural fairness. The Appeals Committee was entitled to use the summary procedure in accordance with the applicable rules. Resorting to that procedure was a proper exercise of its powers and did not manifest bias (see, for example, Judgments 4318, consideration 8, and 4049, consideration 6). Moreover, the President's referral of appeals back to the Appeals Committee for a new examination has been previously upheld by the Tribunal as lawful (see, for example, Judgment 4131, consideration 5).

12. Lastly, the complainant alleges procedural unfairness due to the involvement of Ms B., Principal Director of Human Resources, in both the initial decisions and the final decision on the complainant's appeals. However, the record shows that the final decision was taken by the Vice-President of Directorate-General 4, by delegation of authority from the President, following the Appeals Committee's

majority recommendations. It follows that there was a separation of roles that ensured impartiality and independence, negating any allegations of bias.

13. The complainant seeks additional moral damages for the “undue delay” in the internal appeal procedure. As he has already received 450 euros in compensation for the length of the proceedings and he provides no further justification for additional compensation, this claim is dismissed (see, for example, Judgment 4555, consideration 12).

14. As the complainant’s main claims fail on the merits, all his ancillary claims for damages and costs are also dismissed.

15. In light of the foregoing, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is 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.