

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

T. (No. 54)

v.

EPO

140th Session

Judgment No. 5088

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifty-fourth complaint filed by Mr I. H. T. against the European Patent Organisation (EPO) on 19 February 2024, the EPO's reply of 29 May 2024, the complainant's rejoinder of 12 June 2024 and the EPO's surrejoinder of 11 September 2024;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the decision rejecting the allegation that the former President of the Office made defamatory statements against staff representatives.

In November 2012, articles were published in two German newspapers concerning a proposal made by the former President of the European Patent Office, the EPO's secretariat, to pay a collective reward to staff in 2012 in light of the positive operating results. The articles highlighted some of the concerns raised by staff, through the Staff Union of the European Patent Office, experts and government officials who considered that rewarding staff for granting patents could raise concern about their independence, in particular for examiners, and would create an incentive for the mass granting of patents. On

7 November 2012, the President wrote a Communiqué to staff noting with regret that an internal working document was disclosed to the press, which was contrary to applicable rules and constituted a “serious error” and “grave misconduct”. He added that he still believed that a fruitful social dialogue remained possible and that free expression by staff representatives had a special value in the context of social dialogue.

The complainant, who was at the time Chairman of the Local Staff Committee in Munich, Germany, together with other employees who were at the time local staff representatives, wrote to the President contesting the unfounded allegations and asking for clarifications. They considered that his false accusations towards them were defamatory, insulting and injured them in their capacity as staff representatives. Having received no reply, on 21 November 2012, they wrote a letter to the Chair of the Administrative Council and to the Chair of the Appeals Committee of the Administrative Council asking the Administrative Council to confirm *inter alia*, in a public statement, that it was not aware of any evidence suggesting that staff representatives were guilty of misconduct and to ensure that the President would not issue any further defamatory statements about staff representatives. They added that, if the Administrative Council declined promptly to remedy the situation at its next meeting in December 2012, their letter should be considered as an internal appeal under Articles 106 to 108 of the Service Regulations for permanent employees of the Office; an appeal against the President’s decision to defame staff representatives. The Director of the secretariat of the Administrative Council acknowledged receipt of the letter in late November, but the Administrative Council did not consider the matter at its December meeting. Hence, on 16 April 2013, the complainant, together with other employees, filed a complaint with the Tribunal against the implied rejection of his request of 21 November 2012.

In Judgment 4429, delivered on 7 July 2021, the Tribunal considered that the Administrative Council had implicitly rejected the complainant’s request to consider his letter of 21 November 2012 as an internal appeal, thus violating its duty of care and the complainant’s right to an internal

appeal. The Tribunal ordered that the case be remitted to the EPO for the complainant's appeal to be examined in accordance with the applicable rules. Since the case was sent back to the Organisation for a proper appeal procedure to be followed, the complainant was not entitled to an award of moral damages.

On 22 July 2021, following delivery of Judgment 4429, the EPO informed the complainant that his case was remitted to the Appeals Committee to be considered in accordance with the applicable rules. In August 2021, the secretariat of the Appeals Committee informed the complainant that his appeal had been registered and would be dealt with as quickly as possible. The parties were invited to submit their views on the Appeals Committee's competence. Both parties submitted their position in December 2021.

On 13 April 2022, the complainant wrote to the Appeals Committee's secretariat arguing that it was for the Administrative Council to deal with the matter as it was vested with the disciplinary power over the President of the Office. He argued that the Appeals Committee was not competent to give an opinion because it was reporting to the President and the allegations he was facing were of a criminal nature. He also objected to the Office's decision to refer the matter to the Appeals Committee.

The Appeals Committee issued its opinion on 11 December 2023. It found that the Office's decision to refer the matter to the Appeals Committee was correct in light of the Tribunal's order in Judgment 4429. It considered that the complainant had a cause of action because he had to protect his good name and professional reputation. However, noting that he had initially contested the President's statement in his capacity as Chairman of the Local Staff Committee, and that he was no longer a staff representative, it concluded that the claim aiming at protecting the good name and reputation of the staff representation as a whole was irreceivable. The Appeals Committee also found that some claims were irreceivable as it was not competent to issue instructions to the Administrative Council or to the President of the Office. Indeed, it was not competent to ask the Administrative Council, as requested by the complainant, to make a statement to staff that

it was not aware of any evidence suggesting that staff representatives were guilty of misconduct, to ask the President not to issue any further defamatory statements about staff representatives or to ask the President to submit a document to the Administrative Council. Regarding the claims to initiate possible disciplinary proceedings against the former President or to deal with his alleged criminal responsibility, the Appeals Committee found that they fell outside its remit. On the merits, the Appeals Committee rejected the allegation that the President's statements in the Communiqué were defamatory because the Communiqué was vague and not directed at any one person, and as such did not fit within the definition of defamation. It held that the Communiqué could "[a]t best" have been directed at the staff representation, but this fell outside the scope of the appeal as the complainant was no longer a staff representative. However, the Appeals Committee recommended awarding him 2,500 euros in moral damages for the EPO's failure to reply to his initial request and for not initiating the appeal procedure upon his request thereby leaving him in a state of uncertainty on how to proceed with his appeal and how to protect his good name and reputation.

On 6 February 2024, the Office informed the complainant that it had decided to endorse the Appeals Committee's recommendations to reject his appeal as partly irreceivable and unfounded for the remainder. It nevertheless awarded him 2,500 euros in moral damages as recommended by the Appeals Committee. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision of 6 February 2024, and to find that the EPO did not comply with consideration 6 of Judgment 4429 "by the manner in which [the appeal procedure conducted pursuant to Judgment 4429] ha[d] been conducted, in that the EPO ha[d] neglected its duty of care by not allowing – anew – the Administrative Council to assess 'misconduct' by the President". He seeks 26,000 euros in moral damages, 20,000 euros in punitive damages as well as 10,000 euros in costs. In addition, he asks the Tribunal to "assess the former President's behaviour" and, if it identifies misconduct, to intervene "so that the Administrative Council takes knowledge of the occurred incidents and asks the instant President

to offer [the complainant] in a public statement some sort of apology for the moral injury caused to [him] in the materially relevant period, while performing [his] duties as chairman of the Munich staff committee”. The complainant also asks the Tribunal to order the President of the Office to submit the following documents to the Administrative Council for information: his letter of 13 April 2022 addressed to the Administrative Council via the President of the Office, and his submissions of 21 November 2012, which were unlawfully sent to the Chairman of the Administrative Council who withheld them, on his own motion, from the delegations present at the Administrative Council’s meeting held on 12 and 13 December 2012.

The EPO asks the Tribunal to reject the complaint as irreceivable for lack of cause of action insofar as his claims are related to his earlier capacity as staff representative. It also asks the Tribunal to reject as irreceivable the claims for relief that amount to injunctions as the Tribunal is not competent to make such orders. Subsidiarily, the EPO asks the Tribunal to reject the complaint as unfounded. Lastly, the EPO makes a counterclaim for costs alleging that the complaint is vexatious.

CONSIDERATIONS

1. In seeking to set aside the impugned decision of 6 February 2024, except for his claims for damages and costs, the complainant asks the Tribunal to find, in the first place, that the EPO did not comply with its instructions in consideration 6 of Judgment 4429. He states that this occurred by the manner in which the internal appeals procedure was conducted, “in that the EPO has neglected its duty of care by not allowing – anew – the Administrative Council to assess ‘misconduct’ by the President accused by the Complainant [of] defamation and potentially impose adequate disciplinary measures”.

2. In consideration 6 of Judgment 4429 the Tribunal relevantly decided that “as the Administrative Council implicitly rejected the complainants’ request to consider their 21 November letter as an internal appeal if it did not approve their initial request to sanction the

President, the implied decisions are unlawful and must be set aside. The cases will be remitted to the EPO for the complainants' appeals to be examined in accordance with the applicable rules. Considering that the cases will be sent back to the Organisation for a proper appeal procedure to be followed, the complainants are not entitled to an award of moral damages. [...]" The EPO complied with its obligation when, pursuant to this order, it remitted the case to the Appeals Committee for it to hear the matter under the applicable rules, which the Appeals Committee did and delivered its opinion to the President. The EPO also paid the complainant the costs the Tribunal ordered in Judgment 4429.

In any event, the complainant had actually brought this issue to the Tribunal by an application for the execution of that aspect of Judgment 4429, which he filed on 24 January 2023. The Tribunal noted, in consideration 3 of Judgment 4785, that apart from moral and punitive damages for delay, his application was couched in the following terms: "I respectfully ask the Tribunal to clarify its Judgment [...] 4429 in that the Administrative Council, which is the Competent Authority capable to exercise Disciplinary Power upon a President who has potentially acted with misconduct, has to examine the merits of the instant case or appoints an Appeals Committee under its control to that end." The Tribunal noted the steps the EPO had taken to execute Judgment 4429 and dismissed the application for execution of the judgment as unfounded. It concluded that it was satisfied that the appeal would be heard, as the EPO had explained in its reply. The *res judicata* principle precludes the complainant from seeking to relitigate the same issue in this complaint.

3. The complainant's request that the Tribunal itself "assess the former President's behaviour" and if it identifies misconduct, the Tribunal should intervene "so that the Administrative Council takes knowledge of the occurred incidents and asks the instant President to offer [him] in a public statement some sort of apology for the moral injury caused to [him] in the materially relevant period, while performing [his] duties as chairman of the Munich staff committee", is irreceivable. As the EPO submits, citing consideration 12 of Judgment 4579, this request constitutes relief of an injunctive nature,

which is beyond the Tribunal's competence. For the same reasons, the Tribunal will also dismiss the complainant's related requests to ask the EPO to submit to the Administrative Council, by way of the President of the Office, for information, his letter of 13 April 2022 addressed to the Council and his submissions of 21 November 2012. These, according to him, were unlawfully sent to the Chairman of the Council who concealed them, on his own motion, from the delegations present at the Council's meeting of 12 and 13 December 2012.

4. It is notable that from the outset the complainant pursued this case in his capacity as a staff representative. However, as the Appeals Committee stated in its opinion, he clarified in his submissions that he was also individually and directly affected by the President's publication, which he insists was defamatory. The Appeals Committee noted the complainant's statement that, being a chairman of the Local Staff Committee, he was particularly exposed to verbal and written attacks by staff. The Committee also noted his further statement that "[he] suffered the consequences of the President's defamation in the 2013 staff committee elections, when [he] was not elected [and that] [i]t took [him] a long time to convince staff that [he] had never undermined its financial interests by leaking improper information outside the EPO or otherwise [and that the] professional injury caused to [him] by the President's defamatory remarks ha[d] been real and painful". The Appeals Committee concluded that the complainant's internal appeal was to this extent receivable as he thereby had a cause of action. The Tribunal will proceed on this assumption. It however accepts the EPO's submission, citing consideration 8 of Judgment 4194, that the complainant had no standing to pursue this complaint to the extent that he seeks to do so in his representative capacity. This is because he was no longer a staff representative at the time when he filed this complaint on 19 February 2024. As the Tribunal in effect concluded in consideration 8 of Judgment 4194, the foundation of a complainant's cause of action is removed where she or he is no longer a member of the staff committee when the complaint was filed. The complaint is therefore irreceivable to this extent.

5. The complainant submits that the President defamed him because in his Communiqué of 7 November 2012, he expressly accused the staff representatives “for leaking Office’s Documents” to the German press and that the ordinary reader would have suspected the staff representatives in Munich, where its Chairman has “the principal political responsibility”, leaked the information. He states that on 12 November 2012, he asked the President to withdraw his unsubstantiated accusations in public, but he refused. He submits that the defamation was intentionally upheld by the President, who, together with the Chairman of the Administrative Council systematically undertook all steps to prevent the Member States’ delegations of the Council from being informed of the President’s misconduct.

6. Article 28(2) of the Service Regulations contemplates that the EPO will compensate an employee who suffers injury by reason of her or his office or duties, including where the employee suffers injury by reason of defamation.

7. The case law states, in consideration 7 of Judgment 4867, for example, that defamation consists in a publication or a communication towards a certain number of persons, of an untrue statement, which injures a person’s reputation. The Tribunal identified two crucial aspects of the law of defamation, which it stated, in consideration 9 of Judgment 3106, for example, and reiterated, in consideration 7 of Judgment 4478:

“The law of defamation is not concerned solely with the question whether a statement is defamatory in the sense that it injures a person’s reputation or tarnishes his or her good name. It is also concerned with the question whether the statement was made in circumstances that afford a defence. Broadly speaking, the defences to a claim in defamation mark out the boundaries of permissible debate and discussion. As a general rule, a statement, even if defamatory in the sense indicated, will not result in liability in defamation if it was made in response to criticism by the person claiming to have been defamed or if it was made in the course of the discussion of a matter of legitimate interest to those to whom the statement was published and, in either case, the extent of the publication was reasonable in the circumstances.”

8. The President's Communiqué of 7 November 2012 read:

"Publications in the media

Dear colleagues,

Freedom of expression is universally recognised as a precious right. Free expression by staff representatives has a special value in the context of a social dialogue and is something I have always particularly respected.

But certain elementary principles of discretion and responsibility apply. It is with profound regret that I find recent articles in the German press which show these elementary principles have not been kept. The original articles can be read in the online editions of [the two newspapers].

The disclosure of an internal working document to the mass media is not only contrary to the applicable rules. It is also a serious error which can only put into question the openness and transparency of our consultation and decision procedures.

The absurd position that patent offices grant patents for financial gain is one habitually advanced by opponents of the patent system itself.

That persons employed by the Office adopt this posture in a public forum represents grave misconduct which seriously damages the collective and individual interests of EPO staff and brings our Organisation as a whole into disrepute.

I shall do my best in the coming days to repair the damage that has been done. Nevertheless, I continue to believe that a fruitful social dialogue within the EPO remains possible."

9. In assessing whether the President defamed the complainant by these statements, the Appeals Committee recalled the definition of "defamation" in the Tribunal's case law and the Tribunal's statement, in consideration 8 of Judgment 4478, that neither intention nor malice are essential elements. It also recalled the statement, in consideration 101 of Judgment 2861, that the essence of defamation is the publication of material to third parties and not to the person claiming to be defamed. The Appeals Committee thereupon concluded that the allegation of defamation was unfounded. It reasoned, in effect, that the words contained in the President's Communiqué were vague and not directed at any one person, which did not constitute defamation; that, at best, those words could have been directed at the staff representation, but the allegation fell outside of the scope of the appeal as the complainant was no longer a staff representative.

The Tribunal holds that the foregoing conclusions, which were endorsed in the impugned decision, were open to the Appeals Committee on the evidence. The Tribunal notes that the two crucial aspects of the law of defamation, cited above, were not met. The complainant's reputation or good name was not tarnished given that the Communiqué was written in general terms not referring to any employee in particular. In addition, the contested Communiqué was made in circumstances that afforded a defence since an internal working document had been leaked to the press (see Judgments 4971, consideration 8, 4867, consideration 7, and 4478, consideration 9). In the result, the complainant's claim that he was defamed by the President's Communiqué is unfounded and he is not entitled to the moral damages.

10. Regarding the allegation of undue delay, the Appeals Committee, concluded, in effect, that because of "egregious delay" in responding to the complainant's "reasonable" request for clarification, the EPO may have breached its obligation to deal with him in good faith and to refrain from any conduct that may have harmed his dignity or reputation. The Appeals Committee also concluded that the EPO's failure to explain and respond in any way to that request constituted a violation of his rights for which he was entitled to damages. It recommended that the EPO award the complainant 2,500 euros in moral damages for its failure to respond to his request of 21 November 2012 for the clarification of the allegations contained in the President's Communiqué of 7 November 2012. This award was endorsed in the impugned decision, which stated as follows: "considering that more than ten years have elapsed and taking into account the [Appeals Committee]'s recommendation based on equity, the amount of EUR 2 500 is awarded to bring the matter to [a] close and allow the parties to move forward". The complainant suggests that the Tribunal should award him 26,000 euros instead. However, as he provides no evidence that the prejudice he suffered would warrant a higher amount of moral damages, this request will be dismissed.

11. The Tribunal also rejects the complainant's claim for punitive damages, which he bases on an allegation that the EPO repeatedly obstructed justice by concealing crucial information from the Administrative Council, which would have enabled it to assess the former President's misconduct and potentially issue a reprimand. His claim for punitive damages is rejected, as an award of such damages is only warranted in exceptional circumstances, which are not evident in this case (see, for example, Judgment 4659, consideration 14).

12. The EPO's request for an order for costs against the complainant on the basis that this complaint is vexatious and has generated unnecessary costs for the EPO, will also be dismissed. This is because, similarly to its observation in consideration 17 of Judgment 4487, the Tribunal is not satisfied this is an exceptional case warranting such an order for costs.

DECISION

For the above reasons,

The complaint is dismissed, as is the counterclaim for costs.

In witness of this judgment, adopted on 12 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, 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

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.