Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

B. (No. 7)

v.

EPO

136th Session **Judgment No. 4727**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr J. B. against the European Patent Organisation (EPO) on 21 June 2019, the EPO's reply of 11 December 2019, the complainant's rejoinder of 27 May 2020, the EPO's surrejoinder of 29 September 2020, the complainant's further submissions of 19 February 2021, the EPO's comments thereon of 23 March 2021, the complainant's second further submissions of 8 April 2021 and the EPO's final comments of 12 July 2021;

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 asserts that the EPO failed to assist him in his attempts to obtain corrected identity cards for his children.

Relevant facts pertaining to the complainant's family situation are set out in Judgment 3510, delivered in public on 30 June 2015, concerning his first complaint. Suffice it to recall that the complainant, a Belgian national, is a permanent employee of the European Patent Office, the EPO's secretariat, serving at its branch in The Hague (Netherlands). On 16 June 2008, his wife, who is Thai, adopted S., her niece, who had been born in Thailand at the beginning of that year. She did so in accordance with the procedure applicable in that country. At the complainant's

request, the EPO recognised this adopted daughter as his dependant. On 25 June 2008, he submitted a request for "support for a visa" for S. Following a series of steps and exchanges of correspondence between the EPO Administration, the complainant and the competent authorities of the Netherlands, in November 2009 the Ministry of Justice of the Netherlands issued a legal opinion which made it possible for a visa to be issued to S. on 22 January 2010.

On her arrival in the Netherlands, S. received an identity card with reference code "ZF", which corresponded to a simple residence permit without any privileges or immunities. On 28 April 2010, the complainant, who could not understand why, as a member of his family, S. had not been given the same "BO" status that his wife, his elder daughter, P., and he himself had, affording them greater protection in terms of privileges and immunities, approached the Human Resources Administrative Services' Helpdesk for relations with the national authorities in this regard. On 3 May 2010, he was informed that the matter had been transferred to be dealt with by the Dutch Ministry of Foreign Affairs.

In March 2012, he received new identity cards for each of his two daughters, both bearing code "ZF". On 16 January 2013, he again contacted the Helpdesk and asked for this status to be corrected to avoid the risk of his daughters being deported when they turned 18. On 7 March 2013, he received the reply that discussions were ongoing with the Ministry of Foreign Affairs in this regard but that, in any event, the attribution of code "ZF" did not in any way affect his daughters' right to reside in the Netherlands.

On 3 May 2013, the complainant contacted his interlocutor in the Human Resources Administrative Services, making a principal request to have his daughters' status corrected as soon as possible and a subsidiary request to be informed of the progress of his case and of the communications between the Helpdesk and the Dutch authorities during the period from May 2010 to March 2013. On 27 May 2013, he was again informed that the matter was under discussion and that the attribution of code "ZF" did not adversely affect his children's legal situation. He was, however, invited to report any problems encountered

with the national authorities as a result of the disputed code. The complainant reiterated his requests on 21 June.

On 5 July 2013, he filed a request for a review of the implicit decision rejecting the claims set out in his letter of 3 May. That request was declared irreceivable on 4 September 2013, on the grounds that any decision to change the code on identity cards could only be made by the Dutch Ministry of Foreign Affairs. On 24 September 2013, the complainant filed an internal appeal against the "Office's decision not to assist" him with his request to correct his daughters' status and the decision "refusing to properly inform [him] of the progress of [his] case". He requested that the disputed status be corrected, that a copy of all correspondence between the EPO and the Dutch authorities be supplied to him, that moral damages for the injury he considered he had suffered and any future injury resulting from the incorrect status be awarded to him and, lastly, that his internal appeal be handled "with the utmost diligence".

On 4 November 2013, the complainant was informed that the Dutch authorities had agreed to issue new identity cards for his daughters bearing code "BO", which he was invited to collect on 31 March 2014.

By decision of the President of the Office of 20 April 2016, the complainant was informed that his internal appeal – which he had decided to pursue despite having obtained the corrected identity cards – had been rejected as clearly irreceivable, in accordance with the opinion issued by the Appeals Committee. The complainant impugned that decision in his fifth complaint, which gave rise to Judgment 4256, delivered in public on 10 February 2020.

Following the public delivery of Judgments 3694 and 3785, which concerned cases that did not involve the complainant but in which the Tribunal found the Appeals Committee to be improperly composed at the time of its opinion, the President referred the complainant's internal appeal back to a newly-constituted Committee.

The Appeals Committee, which decided to deal with the complainant's internal appeal under the summary procedure provided for in Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, delivered its opinion on 17 December 2018. The

majority of its members recommended that the internal appeal should be rejected as clearly unfounded and as moot with regard to the request for correction of the status of the complainants' daughters. However, a minority recommended the award of moral damages in the sum of 2,000 euros for procedural delays. By letter of 25 March 2019, the Vice-President of Directorate-General 4, acting by delegation of power from the President of the Office, informed the complainant of her decision to follow the majority opinion of the Appeals Committee. That is the impugned decision.

In his complaint of 21 June 2019, the complainant asks the Tribunal to order the EPO to disclose documents from the file and, in particular, a copy of all the correspondence between the EPO and the Dutch authorities in May 2010 and March 2013, to award him compensation of a total amount of 8,000 euros for the moral injury resulting from the long delay in getting the disputed status corrected and the slow handling of his internal appeal and, lastly, to award him at least 1,000 euros in costs.

The EPO considers that the complaint has become moot and, as regards the claim for the production of documents, does not challenge a decision adversely affecting the complainant within the meaning of Article 108(1) of the Service Regulations. The EPO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

In his rejoinder, the complainant – who had, in the meantime, contacted the Dutch authorities and obtained an email dated 10 May 2010 sent by the Ministry of Foreign Affairs to the EPO confirming approval of the correction of S.'s status from that date – seeks payment of at least 20,000 euros in punitive damages to sanction the conduct of the Organisation which, he claims, sought to conceal the facts.

The EPO states that it had no knowledge of that email and asks that the new claim introduced in the rejoinder be dismissed as irreceivable for failure to exhaust internal remedies and, in any event, as unfounded.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 25 March 2019 by which the Vice-President of Directorate-General 4 rejected his internal appeal challenging what he considered to be the lack of assistance provided to him by the EPO in connection with his request for the correction of the status of his two daughters on the identity cards issued to them by the Dutch authorities.

The complaint stems from the fact that the complainant's wife has an adopted daughter, S., who was born in Thailand and who, on arrival in the Netherlands in 2010, despite being recognised by the EPO as the complainant's dependant, received an identity card with reference code "ZF", corresponding to a simple residence permit without any privileges or immunities, rather than code "BO" which does confer those advantages and which is normally allocated to the family members of a member of the technical or administrative staff of an international organisation living in that member of staff's household, in the same way as it is allocated to the staff themselves.

Although the complainant approached the Office's services about this matter on 28 April 2010 and the services immediately notified the Dutch authorities of the problem, the correction requested by the complainant was not forthcoming. In fact, the problem was subsequently compounded on the renewal of both children's identity cards in 2012 when reference code "ZF" was applied not only to the new card issued to S. but also to that of the elder daughter, P. – who was also born in Thailand and was under guardianship – even though her previous card had code "BO".

It was only on 31 March 2014, following many exchanges between the parties, that the complainant was invited to collect identity cards duly bearing code "BO" for both his daughters, having been informed by the Office on 4 November 2013 – that is after the internal appeal procedure had been initiated – that the Dutch Ministry of Foreign Affairs had agreed to issue corrected cards.

Even though the principal claim he originally made had therefore been satisfied, the complainant felt compelled to pursue his internal appeal and thereafter to file the complaint giving rise to these proceedings, essentially because he wished to establish the EPO's liability for the delays in resolving the matter, which took almost four years.

2. The complainant requested oral proceedings. However, in view of the abundant and sufficiently clear submissions and evidence produced 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.

3. The EPO, which submits in its reply that "the original object of the dispute has [...] wholly ceased to exist"* as a result of the Dutch authorities finally agreeing to issue identity cards bearing code "BO" to the complainant's children, concludes therefrom that "it would have been reasonable for the complainant to withdraw his internal appeal as soon as the amended cards had been issued"*, that filing the present complaint shows a desire to "artificially preserve the dispute"* and that "such a procedural strategy should not be tolerated"*. However, assuming that the Organisation's intention is to contend that the complaint should be dismissed as moot, its argument cannot be accepted. It must be noted from a legal point of view that, since the complainant is seeking compensation before the Tribunal – as he already did under the internal appeal procedure – for the injury caused to him by the Organisation's alleged unlawful act in preventing him from obtaining corrected identity cards sooner, his claims retain their object notwithstanding the issuing of the cards.

4. The EPO maintains – attaching its arguments to its specific objection to the receivability of the request for disclosure of documents, which will be discussed below – that the complaint is irreceivable in its entirety since, in its view, the complainant "did not suffer – and could not have suffered – any injury as a result of the delay in obtaining an

* Registry's translation.

amended code on his children's identity cards"[*] and that, "consequently, he has no cause of action for damages against the Organisation"[*]. However, the question of the alleged lack of injury suffered by the complainant in fact relates to the merits of the complaint rather than to its receivability, and the objection to receivability raised must therefore be rejected. Clearly, a complainant has a cause of action when seeking compensation from an organisation for injury that she or he claims to have suffered as a result of an unlawful act on the part of that organisation.

5. According to a general principle of law which the Tribunal applies in its case law, a claim for compensation can only be granted if the complainant provides evidence of the alleged unlawful act, of the injury suffered and of the causal link between the unlawful act and the injury (see, for example, Judgments 4156, consideration 5, 3778, consideration 4, 3507, considerations 14 and 15, 2471, consideration 5, and 1942, consideration 6).

6. As regards the particular legal context of the present dispute, it must be noted that the issuing of identity documents or visas to persons enjoying the privileges and immunities conferred by the seat agreement of an international organisation is the prerogative of the host State. The only duty on the organisation in question in that regard is to provide its officials with the necessary assistance to ensure that the rights inherent in their status as members of staff of that organisation are complied with by that State. Furthermore, the organisation is free to choose how it approaches the authorities in order to discharge that duty. As a result, the organisation can only be liable for delays in a suitable visa or identity document being issued if it has acted in bad faith, behaved inappropriately in its relations with the host State or been negligent in monitoring the progress of the case (see, in particular, on these various points, Judgment 3510, delivered in connection with a previous complaint lodged by the complainant concerning the initial

[*] Registry's translation.

refusal of the Dutch authorities to grant an entry visa to his daughter S., considerations 9, 12 to 14, 17 and 18, and the case law cited therein).

7. In the present case, it results from the submissions that the EPO can undoubtedly be criticised for unlawful act, such as to render it liable in light of the case law, in that it was negligent in monitoring the progress of the case.

The complainant annexed to his rejoinder the copy – obtained in the course of the exchanges he initiated with the Dutch authorities in 2019 – of an email dated 10 May 2010, sent by the Dutch Ministry of Foreign Affairs to the EPO, in which the Ministry, in response to a message from the Office drawing its attention to the problem raised by the complainant, acknowledged that the child S. should have been given an identity card with code "BO" (rather than "ZF"), apologised for the error and asked for the child's previous identity card to be returned so that a new one could be issued with the correction made. It is common ground that the EPO, which disputes neither the authenticity of the email nor the fact that it was received by its services, did not deal with it at the time and that, in particular, the complainant was not informed by the Organisation that he was to return the incorrect identity card, which, had he done so, would have led to the Dutch authorities immediately issuing a new corrected card. Moreover, it is clear from the submissions that the Office did not retain the email in question.

It is evident that if that email had been duly acted upon, the situation would have been regularised, at least as far as S. was concerned, in a matter of days after the complainant asked the EPO for assistance in getting the anomaly corrected, which he did on 28 April 2010, and the Office contacted the Ministry of Foreign Affairs on 3 May 2010, whereas, as already stated, the regularisation actually took almost four years. In addition, it is likely that the situation where an identity card with code "ZF" was issued in the meantime to the other child, P., would have been avoided, in which case this dispute would not have arisen. Therefore, the negligence involved is, to say the least, regrettable.

8. However, the Tribunal notes that the other allegations of unlawful acts made by the complainant against the EPO, namely that it showed ill will and bad faith in the handling of his case and breached Dutch data protection law, must fail.

Firstly, the complainant is wrong to cast doubt, as he does in his submissions, on the steps taken by the EPO with the Dutch authorities to attempt to resolve the problem he had encountered. The aforementioned email of 10 May 2010 shows that the complainant's message flagging up the problem led to the Organisation promptly contacting the Ministry of Foreign Affairs. In addition, the EPO annexed to its surrejoinder minutes of periodic meetings held between representatives of the EPO and the Ministry on 3 June and 23 September 2013, from which it is apparent that the problem created by identity cards bearing code "ZF" being issued to the family members of certain officials and, in particular, to the complainant's children, was among the matters raised at that time in the Organisation's dealings with the Dutch authorities.

Secondly, there is no evidence that the EPO deliberately attempted to conceal the existence of the email of 10 May 2010, as the complainant alleges. On the contrary, examination of the submissions leads to the conclusion that, in fact, the Office simply forgot about it, having omitted, as already stated, to deal with it at the proper time. Furthermore, the Tribunal considers the Organisation's explanation that it continued to overlook the existence of that email in the years following its receipt to be plausible, partly because code "ZF" was retained – or indeed, in P.'s case, appeared for the first time – on the new identity cards issued by the Dutch authorities in 2012 and partly because the representatives of the Ministry of Foreign Affairs omitted to mention it in the course of their dealings with the Office, notably at the aforementioned meetings of 3 June and 23 September 2013.

Lastly, the complainant's arguments based on a breach of Dutch data protection law must, in any event, be dismissed since, as an international organisation, the EPO is not bound by the national law of the host State in that regard and it is not for the Tribunal to hear disputes about the application of that law.

9. Turning to the existence of the alleged injury, the Tribunal finds, contrary to the Organisation's arguments and to the opinion of the majority of the Appeals Committee, that the fact that the complainant's children were given identity cards with code "ZF" rather than "BO" did indeed cause a certain moral injury.

Paragraph 2.6 of the Protocol Guide for International Organisations, issued by the Dutch Ministry of Foreign Affairs, lists the different types of status that may be indicated on the identity cards of staff members of those organisations. Status "BO" and status "ZF" are defined as follows:

> "BO Members of the technical and administrative staff and their families
>
> [...]
>
> ZF Private servants of staff members with BO status, interns[,] etc. A ZF card is only a residence permit and Schengen visa; it entails no privileges or immunities."

It is obvious that the first of those statuses, which acknowledges the benefit of privileges and immunities, is more favourable than the second, the holders of which are expressly excluded from that benefit. In addition, although it is incorrect to assert, as the complainant attempts to do, that status "ZF" corresponds exclusively to private servants – since, according to the text quoted above, they are only one of the categories of persons to whom that status applies – it is clear that it is inappropriate to grant that code to the family members of staff who expressly fall under "BO" status. The Tribunal therefore finds that the fact that the complainant's daughters were awarded status "ZF" was, if not exactly vexatious, as the complainant asserts, at least disparaging, and that, given that the children of other members of the technical and administrative staff were granted "BO" status, the resulting situation was also discriminatory. These findings are all the more compelling given that this particular treatment was clearly linked, in the present case, to the circumstances in which the complainant's daughters had become part of his household and could therefore be perceived as implicitly casting doubts on the validity of their belonging to his family.

The complainant is also correct in claiming injury caused by worry that the fact that his children held "ZF" identity cards might cause difficulties, particularly at border control. It should be noted that those

cards did indeed confer rights equivalent to those conferred by "BO" cards, in terms of both residence and travel abroad, and furthermore the written submissions do not indicate that the family experienced any incidents in this regard. However, as the complainant points out, the mere fact that his daughters had not been given identity cards of the same type as their parents, as is prescribed for the children of international civil servants, was likely to puzzle the police authorities and lead to checks on their part, which, as the complainant observed, meant that his wife was forced to keep S.'s adoption certificate with her at all times. The consideration of this question in the Appeal Committee's opinion, according to which the aforementioned Guide provides that "[t]he privileges and immunities to which holders of the Ministry [of Foreign Affairs]'s identity card are entitled are derived from the headquarters agreement of their specific international organisation" and that "[n]o rights can be derived from the card itself or from the status code noted on it", is of no relevance. While that observation is correct in terms of the applicable texts and principles, the fact remains that the identity card is what the police authorities rely on when they need to check an individual's situation and the fact that a legal process would prove that the individual benefited from privileges and immunities under the provisions of a seat agreement does not rule out the possibility of difficulties arising in the event of such a check.

The Tribunal notes that, although the seriousness of these various heads of moral injury must be put into perspective, especially given the age of the complainant's children at the material time, the detrimental effects of incorrect identity cards being issued nevertheless lasted nearly four years in total.

10. Lastly, the causal link between the EPO's unlawful act and the injury analysed above can also be established. Admittedly, as has already been stated, issuing identity cards is a matter for the authorities of the host State and it is clearly beyond the competence of the Tribunal to examine the conditions in which the authorities assume that responsibility. However, failure to deal with the aforementioned email of 10 May 2010, received by the Organisation in the context of its duty to assist its staff members in their dealings with the authorities, is in fact the

determining reason why the situation which led to the injury in question was prolonged for many years.

In addition, the Organisation maintains that the complainant is partly to blame for the length of time it took to regularise the situation, as he failed to diligently follow up on his request for assistance. In particular, it submits in this regard that the complainant did not inform the Office until January 2013 that the identity cards bearing code "ZF", which he received in March 2012, had been issued. However, aside from the fact that this argument shows that the EPO was unduly ignorant of its own obligations when handling administrative requests from its staff members, it is strongly disputed on a factual level by the complainant, who asserts that he remained in regular contact with the Organisation's services in order to enquire about the progress of his case and to encourage its resolution. With regard to the alleged delay in the complainant notifying the EPO that new identity cards had been issued in 2012, the Tribunal notes that the Organisation's argument is contradicted by the wording of the decision of 4 September 2013 rejecting the request for review of the decision originally disputed by the complainant, as it refers to him contacting the Organisation for the first time on receipt of the cards, in order to get them corrected, "in or around March 2012". This argument must therefore be rejected.

11. Since all the legal requirements for a finding of unlawful act, as set out above, have been met in the present case, it is appropriate for the Tribunal to set aside the impugned decision of 25 March 2019, to the extent that it rejected the complainant's claims for damages, and to order the EPO to pay compensation for its negligence in the handling of the request for assistance that the complainant had made.

In view of the various circumstances of the case, the Tribunal considers that the moral injury suffered by the complainant will be fairly redressed by awarding him damages in the amount of 4,000 euros.

12. In his rejoinder, the complainant requested the award of punitive damages for the bad faith of which he accuses the Organisation and which he claims was revealed by the discovery of the aforementioned

email of 10 May 2010 during the proceedings. However, as stated above, the accusations made by the complainant in this regard are unsubstantiated. This claim must therefore be rejected as unfounded, without there being any need to rule on the objection to receivability raised by the Organisation.

13. The complainant asked the Tribunal to order the EPO to produce a copy of the correspondence between the Organisation and the Dutch authorities after the problems arising from the identity cards issued to his daughters had been flagged up. However, although he states that this is the "principal claim" in his complaint, he justifies his request by his wish to know whether the Organisation provided him with the assistance he sought from it at the material time, in order to establish before the Tribunal the failings that can be ascribed to the EPO. As confirmed by the preceding considerations, the submissions, as supplemented by the copy of the email of 10 May 2010 and the minutes of the meetings of 3 June and 23 September 2013 added to it in the course of the proceedings, are sufficient to enable the Tribunal to rule in full knowledge of the facts of the case. There is therefore no need, in the present case, to order the production of further documents and the request to that end must be dismissed, without there being any need to examine the objection to receivability raised by the Organisation.

Furthermore, although, in his internal appeal, the complainant had already made an ancillary claim to the same effect, which was dismissed, the Tribunal considers that, for the same reason, there are no grounds to set aside the decision of 25 March 2019 on that point, particularly since the complaint does not include any express claim to this end.

14. The complainant requests that the EPO be ordered to pay him damages for the excessive delay in the internal appeal procedure.

In this regard, it should be recalled that international civil servants are entitled to expect their cases to be examined by the internal appeal bodies within a reasonable time and failure to deal with them expeditiously constitutes misconduct on the part of the organisation concerned (see, for example, aforementioned Judgment 3510, consideration 24, or

Judgment 2116, consideration 11). Under the Tribunal's case law, the amount of compensation liable to be granted under this head ordinarily depends on two essential considerations, namely the length of the delay and the effect of the delay on the employee concerned (see, for example, Judgments 4635, consideration 8, 4178, consideration 15, 4100, consideration 7, and 3160, consideration 17).

In the present case, the period of five and a half years which elapsed between the filing of the internal appeal on 24 September 2013 and the decision on that appeal issued on 25 March 2019 – partly due to the matter being referred back to a newly-constituted Appeals Committee because the one that had initially examined it was improperly composed – is, in itself, clearly excessive.

It is true that, in view of the fact that the complainant was informed on 4 November 2013 that the Dutch authorities had agreed to issue corrected identity cards for his daughters and that these cards were actually given to him on 31 March 2014, the principal head of claim initially at the centre of the complainant's appeal was satisfied shortly after the appeal was filed. Moreover, the detrimental effects, outlined above, of the incorrect code on the earlier identity cards also came to an end on that occasion. However, as already stated, the internal appeal did not lose its object since it contained claims for compensation, meaning that the delay in examining it did, in any event, cause moral injury to the complainant.

In light of these various considerations, the Tribunal finds that the injury caused to the complainant specifically under this head shall be fairly redressed by awarding him, in addition to the moral damages referred to in consideration 11 above, the sum of 1,500 euros.

15. As the complainant succeeds for the most part, he is entitled to costs, which – in view of the fact that he did not engage a lawyer – the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The decision of the Vice-President of Directorate-General 4 of 25 March 2019 is set aside to the extent that it rejected the complainant's claims for damages.

2. The EPO shall pay the complainant moral damages in the total amount of 5,500 euros.

3. It shall also pay him 1,000 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 25 April 2023, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ