

K. (No. 58)

v.

EPO

139th Session

Judgment No. 4993

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifty-eighth complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 12 May 2020, the EPO's reply of 28 October 2020, the complainant's rejoinder of 9 September 2021 and the EPO's surrejoinder of 14 December 2021;

Considering the letter of 12 January 2023 by which the EPO informed the Registry of the Tribunal that it had paid 100 euros in moral damages to the complainant for the irregular composition of the Appeals Committee, as was done in Judgment 4550;

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 contests the decision to reject his request for an advance payment of legal costs.

The complainant was an examiner at the European Patent Office, the secretariat of the EPO. He was placed on invalidity as from 1 July 2012 and retired for health reasons on 1 January 2016. In the context of an internal appeal, RI/2013/020, he had lodged with the Appeals Committee against the decision not to pay him the collective reward for the year 2011, the complainant requested in March 2016 an advance payment of 25,000 euros to cover his legal costs, explaining that he had

to appoint a new lawyer since his lawyer decided not to represent him anymore. On 24 June 2016, the Principal Director of Human Resources, to which the matter had been referred, rejected the request on the ground that there was no basis to depart from Article 8(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations for permanent employees of the Office. Article 8(9), provided that appellants shall carry the cost of their legal representation unless the appointing authority decided otherwise. She added that the refusal of a specific lawyer to represent the complainant in a case could not be considered as a “particularly difficult position” that would justify an advance payment under Article 87 of the Service Regulations. Article 87 provides that gifts, loans or advances may be made to employees, former employees or, where an employee has died, to his successors in title, where as a result, inter alia, of serious or protracted illness or by reason of family circumstances, they are in a particularly difficult position.

In September 2016, the complainant requested the review of the decision of 24 June 2016, which was rejected in September 2016. He lodged an appeal with the Appeals Committee on 28 February 2017 arguing that he should exceptionally be paid the requested advance payment because he was an invalid with limited work capacity, and that the EPO was responsible for his former lawyer’s decision not to represent him.

In its opinion of 12 December 2019, the Appeals Committee expressed concerns about the receivability of the appeal, which was referenced under the number RI/2017/018, because the complainant had not clearly indicated the legal basis justifying his request for advance payment of his legal costs. It also observed that his initial request for advance payment related to another appeal, and that he was expanding his request to include costs incurred in relation to cases related to his “invalidisation where [he] paid lawyer’s bills”. The Appeals Committee held that a request for payment of legal fees could only be addressed in the appeal procedure in which the costs were incurred. It noted that he had raised the issue of costs reimbursement in the context of appeal RI/2013/020, and that he could not submit the same matter for decision in more than one proceeding. In any event, the

Appeals Committee unanimously considered the appeal to be unfounded in its entirety. According to Article 8(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, any costs incurred by an appellant in the course of the appeal proceedings, in particular fees payable to a person representing her or him, shall be borne by the appellant unless the Office decides otherwise. The Appeals Committee rejected the complainant's argument that he was entitled to the advance payment because he was in a particularly difficult position as foreseen by Article 87 of the Service Regulations. It noted in particular the level of the pension for health reasons that he was receiving. On its own motion, the Appeals Committee examined the duration of the internal appeals procedure and unanimously recommended awarding the complainant 150 euros in moral damages as the proceedings lasted two and a half years. One member rendered a minority opinion addressing additional issues but reaching the same conclusions as the majority.

On 21 December 2019, the complainant filed his fifty-first complaint with the Tribunal impugning the final decision to reject his appeal RI/2013/020.

By a letter of 12 February 2020, the Chief Corporate Policies Officer, acting by delegation of authority from the President of the Office, informed the complainant that she endorsed the Appeals Committee's findings in appeal RI/2017/018 that he had not established a valid cause of action. His appeal was therefore rejected as irreceivable. She also endorsed the recommendation that the appeal was, in any event, unfounded. She awarded him 150 euros in moral damages for the length of the procedure. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to order the EPO to pay him – without delay – the requested 25,000 euros. He also seeks additional compensation for excessive delay in the internal appeal proceedings in an amount of not less than 3,000 euros together with moral damages and costs for “out of pocket expenses, time and trouble”.

The EPO asks the Tribunal to dismiss the complaint as irreceivable for lack of a cause of action, and subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant requests oral proceedings and lists witnesses. Pursuant to Article V of the Statute of the Tribunal, “[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party”. In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision. The Tribunal, therefore, rejects the request.

2. The following discussion proceeds against the background already set out in the facts described above. The complainant challenges the 12 February 2020 decision which dismissed his request for an advance payment to cover his legal fees for his internal appeals lodged against the EPO and awarded him compensation of 150 euros in moral damages for the length of the procedure.

3. The complainant advances pleas both on procedural and substantive grounds.

His pleas based on procedural grounds may be summed up as follows:

- (1) he requested that the Appeals Committee inform him in a timely manner about the composition of the panel in charge of hearing his case (“the panel”), for the purpose of raising partiality objections, but to no avail;
- (2) he raised partiality objections against the panel, specifically, against the presiding member, Mr J., and the member, Ms K., based on the fact that they had allegedly perpetrated or endorsed “criminal acts” towards him;
- (3) he also raised partiality objections against the chair and the vice-chair of the Appeals Committee (Mr M. and Mr H.), based on their appointment process; he relies, in this respect, on the dissenting opinion delivered on this issue by the minority member of the panel, Ms E.; in his view, the partiality objections were unlawfully disregarded, with reasons that were perfunctory and which demonstrate that his arguments were not even read;

- (4) he raised a general question concerning the composition of the Appeals Committee, as to its members appointed by the Staff Committee, who could be chosen only from among staff representatives;
- (5) his request for oral hearings was unlawfully dismissed by the presiding member of the panel, whilst it should have been addressed by the whole panel; he relies, in this respect, on the dissenting opinion delivered on this issue by the minority member, Ms E.;
- (6) the impugned decision of 12 February 2020 was unlawfully taken by Ms B., as she had also adopted the initial 24 June 2016 decision rejecting his request.

The complainant's pleas based on substantive grounds may be summed up as follows:

- (7) pursuant to Article 8(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations for permanent employees of the Office, the costs of the internal appeals are borne by the appellants, "unless the appointing authority decides otherwise". In addition, pursuant to Article 87 of the Service Regulations, advances may be granted to employees who are in a particularly difficult position as a result, inter alia, of serious or protracted illness. He contends that he is entitled to advancement of legal costs because:
 - (7a) he was put on invalidity status as from 1 July 2012; being an invalid, he was, by definition, in a particularly difficult position as a result of serious or protracted illness as provided for by Article 87 of the Service Regulations;
 - (7b) his treating physicians repeatedly recommended that he hire legal representation for the EPO procedures, but he could not afford the relative costs;
 - (7c) after the President of the Office withdrew a number of decisions issued pursuant to internal appeals, due to the flawed composition of the Appeals Committee, the complainant had to lodge again approximately 20 internal appeals; in any

- event, the withdrawal of decisions was unlawful, as only the Tribunal has the authority to send cases back to the EPO;
- (7d) the sum he requested was necessary to pay a new counsel after his former lawyer withdrew from the case, because he felt, allegedly, threatened by the EPO, as the EPO reported the complainant's lawyer to the Munich Bar Association for alleged professional misconduct against EPO representatives;
 - (7e) the former Appeals Committee required him to have a legal representative in order to be heard in oral hearings;
 - (7f) the initial decision of 24 June 2016 gave no reasons for the rejection of his request;
 - (7g) contrary to the EPO's allegation that the request for 25,000 euros was disproportionate, it was not, as it did not concern only one litigation, but several complex litigations before the Appeals Committee;
 - (7h) the EPO's argument that the decision to award costs for internal proceedings fell within the EPO's discretion seemed to overlook the fact that it was the Appeals Committee that required the complainant to have legal representation;
 - (7i) the EPO's argument that he might get legal assistance through less costly means was unclear and illogical;
 - (7j) the EPO has a rich budget and no financial constraints and could afford an advance payment for legal costs in favour of the complainant; and
 - (7k) the EPO's argument that he was not in a financially difficult position as he received an invalidity pension was wrongful considering that his invalidity pension was not permanent, but only paid until the statutory age of retirement (currently 65 years), subject to national taxation in Germany, and calculated as if the pension contribution of 9.7 per cent were to be deducted from the pension; in addition, he was paying a loan for the purchase of his house;

- (8) the Appeals Committee ignored most of the complainant's arguments, namely his reliance on Articles 28 and 87 of the Service Regulations;
- (9) in deciding on his request for advance payment, "criminal acts" perpetrated against him by the EPO, including acts concerning the composition of the Medical Committee, should have been taken into account.

4. Some of the complainant's arguments are immaterial, and, in any event, outside the scope of the present complaint, such as, for example, the arguments concerning:

- (i) the fact that his former lawyer withdrew from the case, and the surrounding reasons for that. In any event, the Tribunal notes that there is evidence in the file that the EPO reported the complainant's former lawyer to the competent Bar Association for alleged unprofessional conduct consisting of inappropriate expressions towards the EPO; a request for enforcement of ethics rules cannot reasonably be regarded as a "threat" against a lawyer, as it is an exercise of the right of defence;
- (ii) the healthy financial situation of the EPO against the sum he requested;
- (iii) the alleged "criminal acts" perpetrated against him by EPO officers;
- (iv) the registration fee requested for the lodging of internal appeals. The Tribunal notes that he was not requested to pay it for his internal appeal in the present case, nor to pay it for the re-registered internal appeals; and
- (v) the EPO's withdrawal of a number of decisions due to the unlawful composition of the Appeals Committee and the subsequent re-registration of the former appeals. However, with regard to this latter issue, suffice it to recall that in Judgment 4131 the Tribunal held that the President of the Office's decision to withdraw a decision that was flawed due to the unlawful composition of the Appeals Committee, and to refer the case back to a newly

composed one, while the complaint filed against the flawed decision was still pending before the Tribunal, was valid and had its legal basis in Judgment 3785, in which this Tribunal held that the composition of the Appeals Committee was flawed.

5. As to the substantive flaws alleged by the complainant, it is appropriate to recall the relevant statutory rules. According to Article 8(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations:

“Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the competent appointing authority decides otherwise.”

According to Article 87 of the Service Regulations:

“Gifts, loans or advances may be made to employees, former employees or, where an employee has died, to his successors in title, where as a result *inter alia* of serious or protracted illness or by reason of family circumstances they are in a particularly difficult position.”

Having regard to the wording of Article 8(9) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, which refers to “costs incurred”, that is, costs already identified and paid, the rule only concerns the reimbursement of sums already paid by the appellant, and not also the advance payment of future or undocumented costs. Thus, the complainant’s request for an advance payment of future or undocumented costs has no ground in this provision. As to Article 87 of the Service Regulations, it concerns advance payments in general, at the discretion of the Organisation, upon condition that the staff (or former staff, or successor in title of a deceased staff member) concerned is in a particularly difficult position. This provision confers an unfettered discretion on the Organisation, it does not confer any right on the complainant (except, perhaps a right to apply, which in fact was exercised) or duty on the Organisation in relation to the complainant. It is thus a provision which cannot engage Article II of the Tribunal’s Statute (see Judgments 4899, consideration 5, citing Judgment 4145, and 4853), save perhaps in relation to a right to apply.

6. The Tribunal will not consider, in relation to the internal appeal, the pleas that the complainant has advanced, given that the complainant has no cause of action. But, even assuming they remain issues that the Tribunal can address (which the Tribunal does not accept), they are not founded.

7. As the complaint fails on the main claims, the complainant's further ancillary claims for the payment of moral damages and costs will be dismissed.

8. The range of procedural issues and other arguments raised by the complainant and not specifically addressed by the Tribunal had no material effect on the outcome or are irrelevant. Accordingly, these other immaterial or irrelevant pleas and arguments (for example, issues concerning the tax adjustment in the pension system, the lawfulness of Articles 106 to 113 of the Service Regulations, the doubts he casts about the impartiality of the Tribunal towards the staff of the EPO) need not be addressed (see Judgment 4487, consideration 13).

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2024, 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, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER