

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 15)

v.

EPO

(Application for execution)

126th Session

Judgment No. 3986

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3887 filed by Mr F. B. against the European Patent Organisation (EPO) on 13 October 2017 and the EPO's reply of 9 February 2018;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In the complaint which led to Judgment 3887, the complainant impugned the final decision of the President of the European Patent Office, the EPO's secretariat, of 21 November 2013 which confirmed the President's 6 September decision to dismiss the complainant for misconduct pursuant to Article 93(2)(f) of the Service Regulations for permanent employees of the Office, with a reduction of his pension entitlements by one third.

2. In Judgment 3887, delivered in public on 28 June 2017, the Tribunal decided in relevant part the following:

- “1. The decision of 21 November 2013 is set aside in the part regarding confirmation of dismissal for misconduct in accordance with Article 93 of the Service Regulations, as is the same part of the decision of 6 September 2013.
2. The case is sent back to the EPO in accordance with consideration 13 [...].
3. The EPO shall pay the complainant 20,000 euros in moral damages.”

3. On 13 October 2017 the complainant filed the present application for execution of Judgment 3887. The complainant requests the Tribunal to quash the implicit decision of the President to refuse to execute Judgment 3887 in full; to quash the three “summons” to attend medical appointments issued either by the Director of the Health and Safety Directorate or by the Principal Director of Human Resources; to reinstate him in the same situation as he was in on 29 July 2013, with all legal consequences; and to award him material and moral damages, and costs. He contends that orders 1 and 2 of the Tribunal’s decision in Judgment 3887 have not been executed. The sole order that the Organisation has executed is order 3, that is to say the payment of 20,000 euros for moral damages.

4. The complainant submits that:

- the decision of 21 November 2013 and the earlier decision of 6 September 2013 have been cancelled by the Tribunal and therefore no longer exist; accordingly he is to be considered an employee of the EPO with all legal consequences; and
- the same disciplinary procedure, with the same Disciplinary Committee, is to be reactivated. The Disciplinary Committee, in the original composition, which gave the majority and minority opinions on 30 July 2013, is the competent body to order the medical assessment.

5. The EPO, in its reply, asserts that it took appropriate measures to implement Judgment 3887. Specifically, not only did it pay the amount of 20,000 euros awarded to the complainant for moral damages, but it spontaneously awarded the complainant, who retired in November 2016,

an amount equivalent to the difference between the reduced amount of pension entitlements paid to him as from November 2016 and the full amount of pension entitlements, with 5 per cent interest. The EPO stresses that this additional payment was beyond the scope of execution of Judgment 3887 and was made purely out of good will. As regards the medical assessment, the EPO set a medical appointment as early as 28 July 2017 and, as the complainant refused to attend, it rescheduled the appointment twice. The complainant refused to undergo the proposed medical examinations, requiring that such examinations be carried out in the Netherlands and by a Dutch medical expert in psychiatry.

6. In addition, the EPO, taking into account the orders made by the Tribunal in Judgment 3887, the complainant's claims and the grounds on which his claims are based, makes the following five requests for clarifications:

- “1. Should Judgment No. 3887 be interpreted as imposing that the medical assessment of the [complainant] be ordered by the Disciplinary Committee, or may such assessment be ordered by the Defendant?
2. What steps must be taken by the Defendant for the implementation of Judgment No. 3887 in the event that the [complainant] refuses to cooperate and, notably, to undergo the required medical examination and/or, to provide the relevant medical background information in his possession, given that the duty to cooperate is the counterpart of the duty of care?
3. Should the medical assessment required by Judgment No. 3887 only provide an opinion on the [complainant]'s mental health at the material time of the facts – and thereby his liability for his misconduct – or should such assessment also encompass the [complainant]'s capacity to work pursuant to Article 62b [of the Service Regulations]?
4. Does the medical assessment required by Judgment No. 3887 authorise or, on the contrary, preclude the possibility for the Defendant and/or the [complainant] to seek a second medical opinion under Article 89(5) and (7) and Article 90 [of the Service Regulations]?
5. In the event that the [complainant] would be retroactively found to have been suffering from a mental illness at the material time of the facts, should a decision to dismiss him for unsatisfactory services be based on a recommendation of the Disciplinary Committee or on a new recommendation of the Joint Committee?”

These requests appear to encompass the main issues raised by the parties in the present case. Before dealing with these requests, it is useful to recall that in Judgment 3887 the Tribunal stated: “no order is made for reinstatement”. Accordingly, the complainant at the present time has ceased being an EPO employee and his request to be reinstated, raised in his application for execution, is rejected.

7. The medical assessment of the complainant must be ordered by the Disciplinary Committee as specified in Judgment 3887, under 13:

“[T]he principle of due process and the duty of care require the Disciplinary Committee, in accordance with Article 101(3) of the Service Regulations (which provides that ‘[i]f the Disciplinary Committee requires further information concerning the facts complained of or the circumstances in which they arose, it may order an inquiry in which each side can submit its case and reply to the case of the other side’) to order a medical assessment of the complainant [...]”

The specific provision under consideration 13 must be implemented, given that consideration 16 was a more generalised commentary. As the Disciplinary Committee is a stable and permanent body, and the judgment does not expressly refer to the “same composition” of the Disciplinary Committee, the reference to the Disciplinary Committee means Disciplinary Committee in the present composition (see Judgment 3896, under 4).

8. If the complainant refuses to undergo the medical examination as required and scheduled by the Disciplinary Committee, the medical assessment will be carried out by a medical expert in psychiatry only on the basis of documents, as the Tribunal decided in similar circumstances (see Judgment 3972, under 16).

9. Regarding questions 3, 4 and 5 cited in consideration 6 above, the Tribunal states that the Disciplinary Committee will issue its opinion, in accordance with its competence provided by the rules in force at the time of execution of the judgment, therefore the Disciplinary Committee may only consider the issue of misconduct if Administrative Council decision CA/D 7/17 is applicable at that time. It will be up to the President to make the final decision, taking into account the opinion

of the Disciplinary Committee, the provisions in force at the time of the new decision and the duty of care. The parties must work together in good faith to execute the judgment (see Judgment 3823, under 4).

10. In light of the above considerations, the complainant's request for material and moral damages will be dismissed and in the circumstances the Tribunal will not award costs.

DECISION

For the above reasons,

1. Judgment 3887 must be interpreted and executed in accordance with considerations 7 to 9, above.
2. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ