

B. (No. 17)

v.

EPO

133rd Session

Judgment No. 4483

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventeenth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 12 August 2020, the EPO's reply of 18 November 2020, the complainant's rejoinder of 22 January 2021 and the EPO's surrejoinder of 29 March 2021;

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 "social democracy" reform introduced by decision CA/D 2/14 insofar as it abolished the Local Advisory Committees.

The complainant was an official in the European Patent Office, the Secretariat of the EPO. At the time the Administrative Council adopted decision CA/D 2/14 on 28 March 2014, he was a full member of the Local Advisory Committee (LAC) in The Hague and an elected member of the Local Staff Committee in The Hague for the year 2014.

In June 2014 the complainant filed, in his capacity as a member of a LAC, a request for review with the Administrative Council contesting its decision to abolish the LACs pursuant to Article 16(5) of decision CA/D 2/14. The "social democracy" reform aimed at clarifying the roles and functions of staff representation bodies and streamlining the consultation process. The role of the local staff committees was clarified

and a new consultative body, the General Consultative Committee (GCC), was established. The former LACs, which inter alia gave opinions on proposals to make rules or proposals concerning staff of a relevant place of employment, were abolished as of 1 July 2014.

Pursuant to Judgments 3700 and 3796, the Administrative Council withdrew all previous decisions on requests for review filed against decision CA/D 2/14 and referred them to the President of the Office. Hence, the complainant's request for review of June 2014, which had been rejected by the Administrative Council in October 2014, was redirected to the President in early 2017. In turn the President rejected his request for review on 11 April 2017, and the complainant filed an appeal with the Appeals Committee on 22 June 2017.

The Enlarged Chamber of the Appeals Committee heard the complainant before issuing its opinion on 5 March 2020. The opinion also concerned appeals filed by other staff members against decision CA/D 2/14. The Appeals Committee was divided on various aspects of the appeals it examined, but a majority of its members concluded that no illegality had been established. However, the Appeals Committee unanimously agreed that there was room for serious doubts as to the manner in which the "social democracy" reform was enacted and implemented, taking into consideration that the reform had a far-reaching impact on the prerogatives and functions of staff representatives and the electoral rights of every staff member. With respect to the complainant, it unanimously found that the appeal was receivable, stating that those, who like him, had filed their appeal in their capacity as members of a statutory body, had a "justiciable cause of action" to challenge the lawfulness of decision CA/D 2/14 because it had a direct adverse impact on them in the discharge of their functions. The Appeals Committee unanimously recommended granting the complainant 600 euros in moral damages for undue delay in the internal appeal procedure. The majority of members recommended awarding him 2,000 euros in view of the "unjustified interference with [his] freedom of association" as a result of the premature termination of his term of office on the LAC.

By a letter of 18 May 2020 the complainant was informed of the President's decision to endorse the recommendation of the majority of the Appeals Committee for the reasons it stated. However, the President dissented with the finding that the anticipated termination of the complainant's term of office as member of a statutory body had violated

his individual rights; he rather considered that staff representation rights were violated. He therefore decided to award the complainant moral damages but to allocate them to the staff representation as a whole by crediting the amount to the budgetary line of the staff committees related to training and duty travel. In accordance with the Appeals Committee's unanimous recommendation, he awarded the complainant 600 euros for the length of the internal proceedings insofar as he had lodged his appeal in his individual capacity, and reimbursed the costs he incurred in part. This is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to declare decision CA/D 2/14 unlawful and therefore to declare it "unenforceable and intrinsically unsuitable" to be the ground for any modification of the Service Regulations for permanent employees of the European Patent Office. He also asks the Tribunal to set aside the decision to abolish the LACs as enshrined in decision CA/D 2/14 and to declare unlawful the corresponding amendments to the Service Regulations, as well as the Implementing Rules to the Service Regulations, and to restore the *status quo ante*. He seeks an award of moral damages for the violation of his prerogatives as a member of a LAC together with moral damages in an amount of not less than 10 euros per staff member as of 1 July 2014. He further seeks an award of costs, including for his "own time and trouble", and interest at the rate of 5 per cent per annum from the date of the original request for review to the date of the full and complete execution of the Tribunal's decision. He also asks the Tribunal to grant him any other relief it deems fair, just and equitable.

In his rejoinder, he further seeks an award of punitive or exemplary damages.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable for lack of a cause of action and otherwise unfounded. It stresses that the claim for punitive or exemplary damages should be rejected as it was not mentioned in the complaint.

CONSIDERATIONS

1. The complainant was, in 2014, a member of the staff of the EPO. In March 2014 the Administrative Council of the EPO adopted decision CA/D 2/14 amending the Service Regulations. In these proceedings the complainant challenges that decision and seeks consequential relief.

The internal appeal proceedings relating to the complainant's grievances about decision CA/D 2/14 (and the grievances of other staff) took several years and his complaint was not filed in the Tribunal until August 2020. His internal appeal (and his earlier request for review) which has led to this complaint concerned the abolition of LACs.

2. The Administrative Council's decision amended the Service Regulations in a number of respects as part of what was described by the Organisation as "social democracy reform". One, pursuant to Article 16(5) of the decision, was to abolish a statutory body, namely the LAC, effective 1 July 2014 as part of the reconstitution of mechanisms for consultation with staff. At the time of its abolition, the complainant was a staff representative member of the LAC in The Hague.

3. The EPO raises, as a threshold issue, whether the complaint is receivable. It can do so notwithstanding that receivability was not raised in the internal appeal, a point relied upon by the complainant in arguing that it cannot be raised now. That is because the issue raised by the EPO is whether the requirements of Article II of the Statute of the Tribunal are met. Necessarily that issue can only arise when a complainant seeks to engage the Tribunal's jurisdiction. It cannot arise at an earlier time and could not, in any meaningful way, be raised and determined in the internal appeal. In any event, the Tribunal can address the question of its own motion (Judgment 4317, considerations 2 and 3).

4. The only basis, in this case, on which the complainant can challenge decision CA/D 2/14 is that it infringed his fundamental rights.

5. The complainant contends there is a fundamental or inherent right of staff to meaningful consultation, referring to Judgments 1488 and 1062. However, these cases concerned the operation of specific provisions in the Service Regulations and do not establish the fundamental right contended for, nor has it been otherwise recognised by the Tribunal. Insofar as the complainant relies on the alleged violation of this asserted right, his complaint is unfounded.

6. The Tribunal now considers the complainant's contention that decision CA/D 2/14, by abolishing the LACs, breached the complainant's right to freely associate. The complainant in these proceedings seeks to

impugn decision CA/D 2/14 on the basis that a number of anterior procedural and allied irregularities attended the adoption of the decision and impact on its lawfulness. As noted in another judgment adopted at this session concerning another complainant (see Judgment 4482), these arguments are not available to the complainant in the present proceedings. The complainant cannot approbate and reprobate. The invocation of the right to freely associate upon which he wishes to engage the Tribunal's jurisdiction renders irrelevant the question whether the decision was legally flawed for the other reasons raised by the complainant in this case. Consequently, there is a legal boundary for arguments the complainant may maintain.

7. The abolition of the LACs by decision CA/D 2/14 was made in conjunction with the abolition or modification of two other presently relevant statutory bodies, namely the General Advisory Committee (GAC) and local staff committees (LSCs), though the latter, in name, continued to exist. The GAC was replaced by the GCC. Both the LACs and the GAC were consultative bodies established under the former Article 38 of the Service Regulations. The focus of the role of a LAC was the consideration of issues that affected local staff. That role was defined by former Article 38(4), which provided that each LAC was to provide an opinion on any proposal to make rules or any proposal which concerned solely the whole or part of the relevant local staff. Additionally, it was to give an opinion on any question of a local nature submitted by the President, by the GAC or, subject to procedural qualifications, the Staff Committee. The Staff Committee was comprised of a Central Staff Committee and local sections of the Staff Committee under former Article 33 of the Service Regulations.

8. Decision CA/D 2/14, by abolishing the LACs, effectively removed a level of consultation, by one mechanism, focusing on local issues or local opinion. The consultation process by this mechanism but not at a local level, continued under the new regime established by decision CA/D 2/14 through the GCC which, under Article 38 of the new regime, included full members of the Central Staff Committee but not LSCs. Whatever might be perceived to be the deficiencies of the GCC, the critical question, for present purposes, concerns whether the alterations to these structural arrangements compromised or denied the right of staff to freely associate particularly at a local level.

9. There can be no doubt that effective consultation with staff is a desirable objective recognised in a number of judgments of the Tribunal (see, for example, Judgment 4230). But the right to freely associate fundamentally concerns the right of staff to organise themselves, free of interference from the Administration, in order to advance their collective interests which can also involve advancing individual interests though collectively. Ordinarily that would occur through a staff union or staff association (whether recognised in the rules or not, see Judgment 2672, considerations 9 and 10) and by officials representing those bodies. Those interests will include levels of remuneration and terms and conditions of employment and embrace, without describing matters exhaustively, security of employment, safety in the workplace and post-employment income. A necessary incident of freedom of association is that the staff representatives have an opportunity to discuss staff grievances with the administration of an international organisation even if the opportunity is created by strike action (see, for example, Judgment 4435, consideration 9). While bodies such as the LACs and the GAC provided an avenue for consultation and discussion, it was an avenue outside the framework comprehended by the notion of freedom of association. That is because it was not consultation as part of a broader and integrated process of collectively advancing and protecting the interests of staff through staff unions or staff associations but rather was a singular, discrete and, in this sense, isolated process. As a result of decision CA/D 2/14, LSCs continued in name though fundamental and unlawful changes were made to the manner in which members of LSCs were elected, a matter addressed in another judgment adopted at this session (see Judgment 4482). Nonetheless LSCs were given, by operation of new Article 37 of the Service Regulations, a role at a local level to engage in discussion, on behalf of staff at the local level, about matters including those concerning conditions of employment of those staff. These arrangements are consistent with the right of staff to freely associate, and the abolition of another parallel system of consultation embodied in the LACs did not compromise or deny that right of staff at a local level. In the result, the complainant has not established the abolition of the LACs was unlawful for the reason he advanced.

10. The Tribunal is satisfied that this and all other claims should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ