

**B. (No. 3)**

**v.**

**EPO**

**131st Session**

**Judgment No. 4390**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J. B. against the European Patent Organisation (EPO) on 15 April 2019, the EPO's reply of 13 September, the complainant's rejoinder of 21 October 2019 and the EPO's surrejoinder of 24 January 2020;

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 seeks compensation for alleged delays in the processing of his request to transfer previously acquired pension rights to the EPO's pension scheme.

The complainant, a British national, joined the European Patent Office, the EPO's secretariat, on 1 September 1986. Prior to that, he was affiliated to a British pension scheme, the Universities Superannuation Scheme (USS). At the material time, the EPO's Pension Scheme Regulations provided for the possibility of an inward transfer to the EPO's pension scheme of pension rights accrued by an employee under a previous pension scheme. Such a transfer was subject to various conditions and, according to the rules in force at the material time, the application for the transfer had to be made within six months of the employee's date of entry into service.

In Judgment 2768, delivered in public on 4 February 2009, the Tribunal ruled in favour of a complainant who had applied for the transfer of her USS pension rights to the EPO's pension scheme outside the time limit prescribed by the applicable rules, on the ground that the EPO had breached its duty to duly inform her of her rights.

By email of 7 September 2009, the complainant requested the transfer of his USS pension rights on the basis of Judgment 2768. After his initial request was rejected, his internal appeal was registered with the Appeals Committee as RI/2010/088 on 5 July 2010. By letter of 3 August 2011, the complainant was informed that in an effort to settle cases without further litigation and considering the exceptional circumstances of his case "without assuming any further obligation", the EPO had decided to undertake the necessary steps to examine the possibility of a transfer of his pension rights.

The complainant retired on 1 October 2011. Between September 2011 and March 2012, the Administration kept him informed of the status of his request. In May 2012, the complainant requested the reinstatement of his internal appeal due to the length of the procedure and the failure of the EPO to determine the actuarial value of his pension rights for the purpose of the transfer.

On 1 August 2012 the EPO made an offer of settlement with a provisional calculation of the complainant's pension rights, which he accepted on 16 September 2012. On 15 December 2012, the EPO provided the complainant with a final calculation which differed from the provisional one. The transfer of his pension rights took place in December 2012, based on that final calculation. After his request for review of the final calculation was rejected, the complainant filed, on 14 September 2013, a second internal appeal (RI/2013/118) challenging the confirmation of the final calculation. In its report of 25 November 2015, the Appeals Committee joined the two appeals and recommended rejecting them both. By a letter of 25 January 2016, the complainant was informed of the decision of the Vice-President, Directorate-General 4 (DG4), by delegated authority, to dismiss both appeals. On 22 April 2016 the complainant filed a complaint with the Tribunal (his second) challenging that decision.

By a letter of 1 March 2017, the complainant was informed that the President had decided to withdraw this final decision of 25 January 2016 as a result of Judgment 3785, in which the Tribunal found that the

composition of the Appeals Committee was flawed during the period from January 2015 to November 2016. The case was therefore remitted to a newly-composed Appeals Committee for a new examination. The complainant was invited to withdraw his complaint before the Tribunal. By two separate emails of 10 July 2018, he was informed of the new reference numbers assigned to his internal appeals and was given the opportunity to submit additional comments. In its position paper dated 29 March 2018, the EPO asserted that the letter of 1 March 2017 by which the President had withdrawn the final decision impugned by the complainant before the Tribunal concerned only his first internal appeal (RI/2010/088). Therefore, it considered the matter related to the final calculation of the complainant's pension rights raised in his second internal appeal closed (RI/2013/118).

In its report dated 19 November 2018, the newly-composed Appeals Committee examined the complainant's two appeals jointly. Regarding the first appeal (R-RI/2017/049, former RI/2010/088), the Committee recognized that the complainant's request could have been dealt with more rapidly but did not find that the delay had caused him any material damage. As to the second internal appeal (R-RI/2017/099, former RI/2013/118), the Committee found that the change in the calculation was due to an administrative error and was not unlawful. It unanimously recommended that the complainant be awarded 1,000 euros for the unreasonable length of the appeal procedures.

By a letter of 17 January 2019, which is the impugned decision in the present proceedings, the complainant was informed that the Vice-President DG4, by delegation of power from the President, had decided to dismiss his first internal appeal but to award him 1,000 euros for the length of the procedure. She added that she had not considered the second internal appeal since the complainant had not contested the decision taken in that respect, which had therefore become final. On 8 April 2019 the complainant withdrew his second complaint filed with the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision of 17 January 2019. He claims compensation in the amount of 16,666 euros for unnecessary delays in the transfer of his USS pension rights, as well as 50,000 euros in compensation for the three-year additional delay resulting from the flaw in the composition of the Appeals Committee. The complainant seeks exemplary damages in the

amount of 50,000 euros for the protracted procedure and the refusal to recognize relevant case law of the Tribunal. The complainant requests the award of 2,000 euros for the time spent on this during retirement as well as 10,000 euros for the time and stress involved in having to retrieve documents and to file a new complaint before the Tribunal regarding events which took place ten years ago.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and unfounded in its entirety.

### CONSIDERATIONS

1. The decision, dated 17 January 2019, which the complainant impugns, was taken on two internal appeals, which the Appeals Committee considered in one opinion. They concerned the complainant's request to transfer his pension rights from the USS. He had lodged the first internal appeal (then numbered RI/2010/088) on 3 May 2010 when the Office first declined his request to transfer those rights. He requested the Office to take immediate steps to transfer them; to award him moral damages for alleged delay in handling his request and to grant him financial compensation, including moral damages, on other grounds. He however subsequently accepted the Office's provisional offer, which included a provisional calculation of the amount of the pension rights to be transferred, to settle the matter. When, however, the Office informed him, by communication of 15 December 2012, that the final calculation of his pension rights was less than that communicated to him in the provisional calculation, the complainant lodged a second internal appeal (then numbered RI/2013/118) on 14 September 2013. In it, he challenged the decision of 26 June 2013 which confirmed the final calculation. These two appeals were rejected in a decision of 25 January 2016, in accordance with the recommendation of the Appeals Committee. After the EPO (in light of the findings of the Tribunal in Judgment 3785) withdrew the final decision of 25 January 2016 and remitted the matter to a newly-composed Appeals Committee, the Committee's Secretariat informed the complainant that his first internal appeal RI/2010/088 was re-registered as R-RI/2017/049, whilst his second internal appeal RI/2013/118 was re-registered as R-RI/2017/099. The parties were invited to make further comments on those appeals, which a reconstituted Appeals Committee considered in

accordance with Article 10(b) of the Implementing Rules for Articles 106 to 113 of the Service Regulations. The reconstituted Appeals Committee provided its opinion on those internal appeals to the President of the Office on 19 November 2018. The complainant filed the present complaint on 15 April 2019 impugning the final decision of 17 January 2019 thereon.

2. Concerning the first internal appeal R-RI/2017/049 (formerly RI/2010/088) the complainant's request for the transfer of his USS pension rights was moot when it came to be considered by the reconstituted Appeals Committee. The complainant had withdrawn that claim in his submissions of 25 September 2014 before the Appeals Committee. By extension, the complainant's alternative request that he be granted financial compensation, including aggravated damages, in the amount of 50,000 euros to the extent that the transfer of those rights became impossible due to his retirement, was also moot. Those rights were actually transferred in December 2012. The impugned decision correctly accepted the Appeals Committee's conclusion that the complainant's request for compensation for the Office's alleged unreasonable delay in transferring his USS pension rights was the only remaining issue that was receivable to be considered on his first internal appeal R-RI/2017/049.

3. The complainant seeks 16,666 euros in damages "for unnecessary delays in allowing transfer of his USS pension rights". He had originally requested 10,000 euros under this head but subsequently requested 6,666 euros additionally on the basis that had his claim for the 10,000 euros been awarded before he retired that amount would not have attracted national tax at a rate of 40 per cent. By accepting the Appeals Committee's recommendations, the impugned decision of 17 January 2019 in effect dismissed this claim as unmeritorious. The Tribunal finds that this was correct to the extent that the Appeals Committee correctly concluded that although the Office could have dealt with the request more speedily the complainant did not substantiate the effect which the delay had upon him and the consequential damages to which he was entitled (see, for example, Judgments 4031, consideration 8, and 4231, consideration 15). Having analysed the relevant time periods and the evidence presented by the complainant, with reference to Judgment 2608, consideration 11, the Appeals Committee had correctly found that there was no undue delay that caused material damage to the complainant and that, moreover, he did not suffer financial loss in the transfer value of his pension rights. This claim for damages is therefore unfounded.

4. Rejecting the EPO's contention to the contrary, the Appeals Committee correctly concluded that the second internal appeal R-RI/2017/099 (formerly RI/2013/118) was properly before it and receivable. The EPO's contention that it was irreceivable was premised on the referral letter of 1 March 2017, which had informed the complainant that, as a consequence of Judgment 3785, the President had withdrawn the final decision of 25 January 2016 taken on his internal appeal that was the subject of his second complaint pending before the Tribunal and remitted the case for consideration to an Appeals Committee constituted in accordance with the applicable rules. On the basis of that letter, the Appeals Committee's Secretariat re-registered both internal appeals and consolidated them. The EPO argued that although the former Appeals Committee dealt with both internal appeals, the complainant's second complaint was directed only against the final decision of 25 January so far as it related to the first internal appeal RI/2010/088, whilst the complainant did not pursue an appeal against the final decision in relation to the second internal appeal RI/2013/118. The EPO argued, in conclusion, that by the letter of 1 March 2017, the President withdrew the final decision related only to the first internal appeal RI/2010/088. The result, the EPO argued, was that the second internal appeal RI/2013/118 appears to be closed and may not be reopened.

5. In its written opinion, dated 19 November 2018, the Appeals Committee concluded that internal appeal RI/2013/118 (re-registered as R-RI/2017/099) was receivable because both internal appeals were considered by the prior constituted Appeals Committee in one opinion and one final decision was taken on them. This, according to the Appeals Committee, made it doubtful whether a partial withdrawal of that final decision of 25 January 2016 was legally possible. The Appeals Committee moreover opined that it was not clear enough to the complainant whether the President had withdrawn only a part of that final decision and therefore assumed that he had withdrawn the entire final decision in relation to both appeals.

6. Pursuant to Judgment 3785, the President's authority was to withdraw the final decision which was based on the recommendation of an Appeals Committee that was not lawfully constituted under the applicable rules and to remit the internal appeal or appeals considered in that final decision to a lawfully constituted Appeals Committee for

reconsideration. In the exercise of that authority, both appeals which were considered by the prior Appeals Committee were remitted to the reconstituted Appeals Committee which properly considered them, correctly rejecting the EPO's contention to the contrary. In exercising his authority to withdraw a final decision on an internal appeal or appeals and remitting the case to a reconstituted Appeals Committee, the complaint which the complainant had filed in the Tribunal was an irrelevant consideration for the President. The Vice-President DG4 therefore erred when she rejected, in the impugned decision dated 17 January 2019, the Appeals Committee's conclusion that the second internal appeal R-RI/2017/099 (formerly RI/2013/118) was properly before it and determined that in accordance with the principle of legal certainty the decision in the second internal appeal R-RI/2017/099 had become final on the expiry date of the timeline available to file a complaint, so that the said impugned decision was limited to the first internal appeal R-RI/2017/049 (formerly RI/2010/088).

7. The Tribunal further finds that the Appeals Committee had correctly concluded that the final calculation of the complainant's transfer rights and the Office's implementation thereof were lawfully effected. Notwithstanding that he had accepted the offer of 1 August 2012 with the provisional calculation of his pension rights the Office had made clear to him that that calculation was provisional. Moreover, an "important note"\* on the calculation sheet stated that the final calculation may differ from the provisional calculation as the basic salary or the amount of the pension may change. It transpired that the difference between the provisional and final calculations was due to the application of the wrong exchange rate in the provisional calculation. In the premises, the decision of 26 June 2013, which confirmed the final calculation, was a lawful administrative decision as the Appeals Committee had correctly concluded.

8. In the impugned decision, the Vice-President DG4 accepted the Appeals Committee's recommendation to award the complainant 1,000 euros for unreasonable delay in completing his two appeals in the internal procedure. The Appeals Committee had concluded that an eight-year delay in the first internal procedure for R-RI/2017/049

---

\* Registry's translation.

(formerly R/2010/088) and five years for R-RI/2017/099 (formerly R/2013/118) must be considered unreasonable and mainly attributable to the Office. The Appeals Committee recommended the award on the basis of the delay without considering the effect of the delay. This was notwithstanding that it referred to consideration 16 of Judgment 3160 in which the Tribunal relevantly stated that the amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations: the length of the delay and the effect of the delay. The complainant does not contest the decision to award him 1,000 euros for unreasonable delay, but seeks 50,000 euros exemplary damages “for [the Office’s refusal] to recognise relevant [Tribunal] case law and necessitating the protracted procedure culminating in the present [c]omplaint”. This claim will be rejected as the complainant has provided no evidence or analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose on which to base an award of exemplary damages (see, for example, Judgment 4181, consideration 11).

9. The complainant further claims 50,000 euros “for a [three]-year delay resulting solely from the illegal changes to the appeals committee made by the EPO”. Assuming that this is a claim for moral damages for unreasonable delay on that basis, the claim will also be rejected as the complainant has not articulated the adverse effects of the delay (see, for example, Judgment 4231, consideration 15).

10. The complainant claims 10,000 euros for the time, effort and stress caused to him for having to retrieve documents and information to file a further complaint in the Tribunal “relating to events which took place 10 years ago” and 2,000 euros for the time which he spent during his retirement pursuing the case. To the extent that these are claims for damages, they are rejected as there was no unlawful act by the EPO which entitles the complainant to damages. To the extent that these are requests for costs, they are rejected as the complaint is unfounded.

11. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 23 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ