J.

v.

EPO

131st Session **Judgment No. 4395**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. F. G. J. against the European Patent Organisation (EPO) on 17 March 2018, the EPO's reply of 26 June and the email of 27 July 2018 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

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 challenges the amount of compensation awarded to him for the cessation of his shift work activities following a reorganisation.

The complainant joined the European Patent Office – the EPO's secretariat – in 1989. Until 1 January 2014, he worked in the Department NSOC and Data Centre Management in The Hague where he regularly performed shift work.

In mid-April 2013 the complainant was informed that, in light of the upcoming institutional changes which meant the cessation of shift work, he would be transferred to a post not requiring shift work. In October he was informed that, in order to facilitate the transition, he could either be transferred to a department in Munich where he would receive an expatriation allowance, or remain in The Hague and agree to the progressive reduction of shift work over three years. He rejected

the first proposal. Following a series of meetings, in November 2013, a concrete offer was made to him regarding the second proposal. Besides determining the progressive reduction, the offer entailed an obligation of confidentiality and a commitment not to challenge the agreement with an appeal. The complainant rejected this offer due to the conditions laid out therein.

On 13 December 2013 the complainant was informed of the decision to transfer him to the Department Infrastructure and Operations effective 1 January 2014. By letter of 19 December the EPO confirmed the complainant's decision to reject the offer made with regard to a progressive reduction of his shift work.

The complainant filed a request for review on 20 December 2013, which was rejected as unfounded by a decision of 19 February 2014. He lodged an internal appeal on 3 March 2014 against that decision.

In March 2017, the EPO re-initiated discussions with the complainant in order to reach an amicable settlement. While these efforts failed, on 26 April the complainant was informed that the EPO had nevertheless decided to grant him an *ex gratia* payment of 45,000 euros, which was made in May.

Following a hearing held on 19 September 2017, the Appeals Committee, in its opinion of 28 November 2017, unanimously recommended to pay the complainant interest in the amount of 2,500 euros, on the ground that the *ex gratia* payment was adequate compensation and fulfilled the EPO's duty of care for the cessation of shift work, but that it had been made too late. It recommended rejecting the complainant's request for moral damages and costs.

On 31 January 2018 the Principal Director of Human Resources, acting by delegation of power from the President of the Office, informed the complainant that she had decided to follow the recommendation of the Appeals Committee. That is the impugned decision.

The complainant asks the Tribunal to order the payment of 2.25 times the average amount paid as shift allowance over the years 2011, 2012 and 2013, namely 69,086.25 euros, with interest of 5 per cent per annum, less the sums of 45,000 euros and 2,500 euros that he has already received. He also claims moral damages in the amount of 20,000 euros, including for the delay in obtaining compensation for the cessation of his shift work, as well as 1,000 euros in costs.

The EPO submits that the complaint is entirely unfounded.

CONSIDERATIONS

1. The complainant impugns the decision dated 31 January 2018, which accepted the Appeals Committee's recommendation to pay him 2,500 euros in interest on account of the EPO's delay in paying him 45,000 euros compensation in May 2017. The EPO had paid him the compensation for the cessation of his shift work pattern of work which he did for over 20 years in its Department NSOC and Data Centre Management until he was redeployed or transferred to the Department Infrastructure and Operations from 1 January 2014. On his transfer, he retained his grade and step but his income was reduced because he thereafter lost his shift allowance income as he engaged in a work pattern that did not involve shift work. The impugned decision also accepted the Appeals Committee's further recommendation to dismiss the rest of the complainant's internal appeal as unfounded.

2. In his internal appeal to the Appeals Committee, the complainant had requested that the decision to terminate his shift work and to transfer him be set aside; that he be allowed to continue to engage in a similar pattern of shift work until his retirement in April 2021 and that compensation for the loss of income for shift work be calculated as the average of the shift work that he had done during the years 2011, 2012 and 2013. Alternatively, he asked that his shift work be reduced progressively until his retirement. In its opinion, the Appeals Committee correctly concluded, with reference to Judgments 2967, consideration 10, and 3373, consideration 8, that these requests were unfounded. The Tribunal had relevantly stated as follows in the latter consideration:

> "According to the consistent case law of the Tribunal, an international organisation 'necessarily has power to restructure some or all of its departments or units, including by the abolition of posts [...] and the redeployment of staff' (see Judgment 2510, under 10). The concept of redeployment must be understood as including not only the assignment of staff to different posts, but also requiring them to accept a new or different method of organising continuous service. It follows that a particular model of organising a service, such as the one previously in force in this case, cannot constitute an acquired right."

3. In his complaint brief, the complainant states that he always accepted that the EPO is entitled to transfer him to a different post even if the transfer causes him financial prejudice. However, he argues that when he accepted the second proposal, namely to stay in The Hague

with his shift work to be progressively decreased over three years (2014, 2015 and 2016), the Principal Director of Human Resources was not entitled to add any further conditions which were neither communicated to the President of the Office when he approved the proposed course of action, nor to him when he had already accepted that proposal. He thereby objected to the conditions proposed during the course of the settlement negotiations, which had ensued to mitigate the adverse financial impact on him of the termination of his shift work. The proposed conditions were that he should commit to keep the terms of the settlement confidential and not to challenge the final agreement by way of an internal appeal.

4. The foregoing contentions are unfounded. In the first place, the subject conditions are usual in negotiated settlement agreements, and, as the Tribunal stated in Judgment 3867, consideration 5, it is entirely acceptable for an official to waive a right to appeal or to file a complaint in return for the benefits gained from a settlement (see also Judgment 4161, consideration 11). Moreover, the complainant's plea that the subject conditions were at least proposed in bad faith amounting to an abuse of power because he had already accepted the second proposal is unfounded. He provides no evidence to discharge his burden to prove that the EPO's proposal of the conditions was so tainted (see, for example, Judgment 4161, consideration 9).

5. The Appeals Committee had referred to the principle stated by the Tribunal in Judgment 3373, considerations 8 and 9, that while an international organization necessarily has the power to restructure its departments, including by the redeployment of staff, when the new work arrangements have a direct financial impact on the affected official, an organization has to ensure, in accordance with the duty of care owed to its staff, that the implementation of the arrangements does not place the affected official in financial difficulty. If it does, an indemnity *ex aequo et bono* will enable the affected official to adjust to his changed financial circumstances (Judgment 3373, consideration 11). The Appeals Committee correctly stated that the EPO's obligation to compensate the complainant arose with the cessation of his shift work as of 1 January 2014. It further opined that the EPO's *ex gratia* payment of 45,000 euros to him was adequate and fulfilled its duty of care. The complainant however insists that that compensation was inadequate.

6. In consideration 11 of Judgment 3373, the Tribunal determined that the complainant in that case, who had lost the allowances which he had received for shift work, stand-by duty and overtime for over 15 years, was entitled to be paid an indemnity *ex aequo et bono* over two years corresponding to the total of the sums that he had received for those allowances, less the sums that he had already received in respect of the degressive allowance. The indemnity was to be calculated as the average of remuneration he received during the three-year period immediately prior to the termination of the work that provided the basis for the three subject allowances. The Tribunal further stated that the resulting sum was to bear interest at the rate of 5 per cent per annum from the date on which the proposal providing for the payment of the degressive allowance entered into force.

7. The EPO states that it relied on the formulation in consideration 11 of Judgment 3373 to determine the compensation to which the complainant was entitled. It provided in its Position paper before the Appeals Committee a table that supports its assertion that the compensation awarded was in accordance with this case law. The indemnity for the cessation of the complainant's shift work over two years was calculated based on the average shift income he received during the three-year period 2011, 2012 and 2013, which amounted to 61,409 euros. During each of the years 2014, 2015 and 2016 he received an average variable income of 8,922 euros and 2,225 euros, respectively, for on-call duty and overtime work, which he did not receive beforehand at the time he performed shift work. The EPO decided that it was reasonable to consider these average variable amounts as having contributed to cushioning the adverse financial consequences the complainant had sustained as a result of the cessation of his shift work, but only deducted 17,844 euros (for two years' average variable income for on-call duty at 8,922 euros) from the 61,409 indemnity, which left 43,565 euros. The EPO, however, considered it reasonable to pay the complainant 45,000 euros. The additional amount provided an element for interest. It subsequently agreed to pay him an additional 2,500 euros in interest on the Appeals Committee's recommendation, albeit that the Appeals Committee so ordered for the delay in paying the complainant.

8. The Tribunal finds that the compensation which the complainant received is consistent with the requirements which the Tribunal provided in Judgment 3373, consideration 11, for calculating *ex aequo et bono* the amount of his entitlement for the cessation of his shift work and that the EPO thereby adequately compensated him therefor. It had also thereby met the duty of care owed to the complainant for the adverse financial impact caused by its decision to end shift work. The complainant's submissions which seek to challenge the quantum of the compensation which he was paid are rejected as the issues which they raise are irrelevant to the calculation of his entitlement. The complainant's claim for 20,000 euros in moral damages, including for delay in the procedure, is also rejected. Both parties were responsible for the delay which in the main resulted from their attempts to arrive at a settlement and the complainant was already awarded 2,500 euros for the delay in awarding him compensation. Moreover, the complainant provides no evidence that the delay caused him injury (see, for example, Judgment 4229, consideration 5).

9. 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 22 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