

B. (No. 8)

v.

EPO

131st Session

Judgment No. 4389

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 19 December 2017, the EPO's reply of 30 April 2018, the complainant's rejoinder of 22 June and the EPO's surrejoinder of 4 October 2018;

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 decision not to reimburse in full the costs he incurred in the internal appeal proceedings.

At the material time, the complainant was an examiner of the European Patent Office, the EPO's secretariat, at its branch in The Hague.

The complainant lodged five internal appeals claiming full reimbursement of his children's school bus fees for the school years 2012/2013 to 2016/2017, alleging unequal treatment because the EPO applied different practices regarding reimbursement of school bus fees depending on the duty station. He also claimed moral damages and costs, specifying in his second internal appeal only that he claimed "costs, or alternatively, 500 euros for out of pocket expenses, time and trouble". As the appeals covered in substance the same subject matter, the Appeals Committee ultimately decided to consolidate the five internal appeals into a single procedure.

Having heard the parties on 15 May 2017, the Appeals Committee, in its opinion of 20 July 2017, unanimously recommended that the complainant be paid the non-reimbursed bus fees with interest, and that he be awarded 1,500 euros in moral damages for the injury suffered, 1,000 euros for the excessive length of the appeal procedure, and “costs for a reasonable amount upon submission of evidence”.

By a letter of 21 September 2017, the complainant was informed of the decision of the Principal Director Human Resources, acting by delegation of power from the President of the Office, to follow the Appeals Committee’s recommendations. As for the costs, he would be awarded 500 euros upon submission of evidence. That is the impugned decision.

On 4 October 2017 the complainant transmitted to the Principal Director Human Resources his lawyer’s invoice for “services rendered in the month of May 2017” and requested the full reimbursement thereof in the amount of 3,085.50 euros.

On 13 November 2017 the complainant was informed that, as a rule, costs incurred in the appeal procedure were borne by the staff member unless the President of the Office decided otherwise. By awarding the complainant the amount of 500 euros for costs, the EPO had not deviated from the Appeals Committee’s unanimous recommendation to award costs for a reasonable amount. Moreover, the amount was considered fully reasonable since the participation of external lawyers in the internal appeal proceedings was not mandatory.

The complainant asks the Tribunal to set aside the impugned decision insofar as it only awarded him 500 euros in costs and to order the EPO to pay the remaining amount of the costs incurred in the amount of 2,585.50 euros, with interest. In addition, he seeks compensation for “any real damage caused by the decision”, moral damages for the excessive delay in the internal appeal proceedings, as well as exemplary damages and costs.

The EPO asks the Tribunal to dismiss the complaint as entirely unfounded. It submits that the claim for costs incurred in the internal appeal procedure is irreceivable to the extent that it exceeds the amount initially claimed. The EPO also considers that the filing of this complaint amounts to an abuse of process and requests the Tribunal to order the complainant to bear all of his costs and to bear part of the EPO’s costs in the amount of 500 euros.

CONSIDERATIONS

1. This complaint arises from the complainant's internal appeals consolidated by the Appeals Committee under a single reference number in which he successfully challenged the EPO's unequal treatment in its reimbursement of school bus fees to the staff members in The Hague. In its 20 July 2017 opinion, the Appeals Committee recommended to pay the complainant for the non-reimbursed school bus fees plus 5 per cent interest per annum for the school years from 2012/2013 to 2016/2017; and to award him moral damages of 1,500 euros for the injury he suffered and 1,000 euros for the excessive length of the appeal procedure. The Appeals Committee also recommended awarding the complainant "costs for a reasonable amount upon submission of evidence".

2. On 21 September 2017, the Principal Director Human Resources (the Principal Director) informed the complainant of her decision taken by delegation of power from the President of the Office to follow the Appeals Committee's recommendations for the reasons stated in its opinion. The Principal Director also informed the complainant of her decision to award him 500 euros for costs upon the submission of evidence.

3. Subsequently, in a 4 October 2017 letter to the Principal Director, the complainant observed that capping the reimbursement of costs at 500 euros on submission of evidence departed from the recommendation of the Appeals Committee. The complainant attached a copy of his lawyer's invoice of 3,085.50 euros to the letter and requested that the EPO reimburse him for all costs incurred.

4. In the 13 November 2017 response to the complainant, the Principal Director observed that "[a]s a rule, the costs incurred in the appeal procedure are borne by the employee unless the appointing authority decides otherwise". The Principal Director noted that it was decided to follow the Appeals Committee's unanimous recommendation to award the complainant costs for a reasonable amount and observed that the decision to award the complainant 500 euros for costs did not deviate from the Appeals Committee's recommendation. The Principal Director added that the amount awarded was fully reasonable given that the participation of external lawyers in the appeal proceedings was not

mandatory. The Principal Director also asked the complainant to submit evidence of the payment of his lawyer's invoice so that the EPO could reimburse him for the legal costs in the amount of 500 euros.

5. In his complaint, the complainant only impugns the 21 September 2017 decision to award him 500 euros for costs. Before considering the parties' submissions, for ease of reference it is useful to set out the provisions in Article 113(7) of the Service Regulations for permanent employees of the European Patent Office regarding costs incurred in the internal appeal process. It states:

“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 appointing authority acting on a recommendation of the Appeals Committee decides otherwise.”

6. First, the complainant submits that the Principal Director disregarded the Appeals Committee's recommendation to award the complainant “costs for a reasonable amount upon submission of evidence”. Instead, without giving reasons for deviating from the Appeals Committee's recommendation, the Principal Director decided to “cap” the award of costs at 500 euros upon the submission of evidence.

7. The complainant's submission that the Principal Director deviated from the Appeals Committee's recommendation is unfounded. Pursuant to Article 113(7), the appointing authority may take a decision to award costs to an appellant provided that the appointing authority is acting on a recommendation of the Appeals Committee. In the present case, the Appeals Committee did not recommend a specific amount to award to the complainant for costs. The Appeals Committee simply recommended to award the complainant “costs for a reasonable amount”. The Principal Director acting on the Appeals Committee's recommendation arrived at the decision to award the complainant costs in the amount of 500 euros. Thus, it is clear that the Principal Director did not deviate from the Appeals Committee's recommendation to award him “costs for a reasonable amount upon submission of evidence” and complied with Article 113(7) of the Service Regulations.

8. Second, the complainant acknowledges that a decision to award costs is discretionary, however, he submits that, in the present case, the decision to award 500 euros for costs was arbitrary. It is well settled in the case law that the Tribunal will only set aside a discretionary decision if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see, for example, Judgments 1969, consideration 7, 2896, consideration 7, and 3317, consideration 5). Thus, to successfully impugn a discretionary decision, a complainant must demonstrate a fundamental flaw in the decision-making process.

9. In support of his submission, the complainant contends that the discretionary authority was wrongly exercised as all relevant facts were not taken into account in arriving at the impugned decision. In particular, the Principal Director failed to have regard to the following facts: if the EPO had acted with due diligence and dealt with the unequal treatment in the reimbursement of school bus fees, the legal expenses could have been avoided and he would not have had to fight for his rights; his lawyer's hourly rate was within the normal standards for the profession; the number of hours billed by his lawyer was proportionate with the complexity of the case, the preparation of and appearance at the hearing; and he only resorted to professional assistance towards the end of the internal appeal procedure when he could no longer cope with the increasingly complex and time-consuming procedural matters.

10. The complainant's submission that the award of costs was arbitrary is also unfounded. It is convenient to note that the complainant's assertion that the legal costs could have been avoided had the EPO acted with due diligence is conjecture and irrelevant. Based on a review of the record, the only information the Principal Director had prior to 21 September 2017 was provided in the Appeals Committee's 20 July 2017 opinion in which it stated that the complainant had replied to the EPO's position papers on 23 August 2016 and 26 April 2017 and the complainant was represented by a lawyer at the appeal hearing on 15 May 2017. As well, the Principal Director only became aware of the costs that the complainant had incurred in the internal appeal on 4 October 2017 when she was provided with the invoice from the

complainant's lawyer as an attachment to the complainant's letter of that date. Given that the Principal Director was not aware of the facts asserted by the complainant, it is not necessary to consider whether they were essential facts. Accordingly, it follows that the complainant's assertion that the Principal Director failed to take into account relevant facts is unfounded.

11. The complainant claims moral damages for the length of the internal procedure as well as punitive or exemplary damages for disregarding the recommendation of the Appeals Committee. The Tribunal notes that the complainant was awarded 1,000 euros for delay in the impugned decision. He has not substantiated his claim for additional damages under this head. Moreover, inasmuch as the Tribunal has found in consideration 7 above that the recommendation of the Appeals Committee was not disregarded, his claim for punitive or exemplary damages must also be rejected.

12. As the complainant has not established any fundamental flaw in the decision process articulated in the case law, the complaint will be dismissed. The EPO's counterclaim for costs in the amount of 500 euros is rejected as the complaint is neither abusive nor vexatious (see, for example, Judgment 3679, consideration 20).

DECISION

For the above reasons,

The complaint is dismissed, as is the EPO's counterclaim.

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