V. (Nos. 3 and 4)

v.

EPO

135th Session **Judgment No. 4631**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J. P. G. V. against the European Patent Organisation (EPO) on 26 September 2019, the EPO's reply of 16 September 2020, the complainant's rejoinder of 27 November 2020, the EPO's surrejoinder of 1 March 2021, the EPO's further submission of 27 October 2021 and the complainant's final comments of 21 February 2022;

Considering the fourth complaint filed by Mr J. P. G. V. against the EPO on 26 September 2019, the EPO's reply of 16 September 2020, the complainant's rejoinder of 27 November 2020, the EPO's surrejoinder of 1 March 2021, the EPO's further submission of 27 October 2021 and the complainant's final comments of 21 February 2022;

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 cases may be summed up as follows:

The complainant challenges the decision to treat his participation in a strike as an unauthorised absence and the decision to issue him a reprimand for subsequent unauthorised absences on days when he was likewise participating in strikes.

Facts relevant to this case may be found in Judgment 4433, delivered in public on 7 July 2021. As explained in that judgment, in May 2013 the President of the European Patent Office, the EPO's secretariat, consulted the General Advisory Committee (GAC) on a proposal that he intended to submit to the Administrative Council for a new legal framework governing the right to strike. At this time, some employees were participating in a campaign of industrial action organised by SUEPO (the Staff Union of the European Patent Office – a trade union which is not a statutory body of the EPO), which had been running for several months. Shortly after the GAC consultation, SUEPO invited its members to vote on a resolution to pursue the industrial action. On 27 June, after a favourable ballot, SUEPO published its "action plan for the summer 2013". One of the actions planned by SUEPO was a picket strike which would take place on 2 July 2013 if the Administrative Council adopted the President's proposal.

In the event, the proposal was adopted by the Administrative Council on 27 June 2013 in decision CA/D 5/13, which was to enter into force on 1 July 2013. CA/D 5/13 created a new Article 30a of the Service Regulations concerning the right to strike and amended the existing Articles 63 and 65, concerning unauthorised absences and the payment of remuneration, to reflect the new strike rules. As a result of the amendment of Article 65, the salary deduction for absence due to participation in a strike was set at 1/20th of the monthly remuneration per day of absence, and the same deduction rate was applied to unauthorised absences. Until then, a deduction of 1/30th per day had been applied in both cases. The new Article 30a set out some basic rules concerning strikes, defining what was meant by a "strike" and indicating, amongst other things, that a call for a strike could be initiated by a staff committee, an association of employees, or a group of employees. Paragraph 10 of Article 30a authorised the President of the Office to lay down further terms and conditions for the application of Article 30a. Relying on that provision, on 28 June 2013 the President issued Circular No. 347, containing "Guidelines applicable in the event of strike", which was also to take effect on 1 July. Circular No. 347 relevantly provided that the Office was responsible for organising a strike ballot and that, if the requisite number of votes was obtained,

prior notice of a strike had to be given to the President at least five working days before the event.

Also on 28 June 2013, the Vice-President of Directorate-General 4 (DG4) issued a Communiqué drawing attention to the new legal framework and informing staff that, as from 1 July 2013, any industrial action which did not comply with the new rules would not be considered as a strike, with the result that participation in such action was liable to be considered as unauthorised absence.

On 2 July 2013 the picket strike announced by SUEPO took place and the complainant participated. On 9 July 2013 the Principal Director of Human Resources sent him a letter informing him that, as the industrial action on 2 July did not comply with the new rules, his absence on that day was considered to have been unauthorised and a deduction from his pay would be made accordingly. No disciplinary action would be taken, however, in view of the fact that the new rules had entered into force only the day before. The complainant acknowledged receipt of that letter on 19 July 2013. In the meantime, he had participated in other strikes on 3, 4, 11, 17 and 18 July, and he subsequently went on strike again on 24 and 25 July.

On 19 August 2013 the complainant received another letter from the Principal Director of Human Resources, informing him that his absences on 17, 18, 24 and 25 July would also be treated as unauthorised absences. Moreover, as he had been on unauthorised absence after having received her letter of 9 July in which he had been warned of the legal consequences of such action, the Principal Director was considering taking disciplinary action against him.

After having received the complainant's comments, the Principal Director of Human Resources informed him by letter of 25 September 2013 that she had decided to issue him a reprimand for his unauthorised absences. She also confirmed that, as the actions in which he had participated in July did not fulfil the conditions of a strike, salary deductions for unauthorised absences were warranted.

By two separate requests for review, the complainant challenged the decision contained in the letter of 9 July 2013 and the decision to issue him a reprimand. These requests for review were rejected and the complainant then lodged two internal appeals.

The Appeals Committee, which had received many other appeals from staff members whose participation in the strike on 2 July 2013 had likewise been treated as unauthorised absence, decided to consolidate those appeals and to issue a single opinion dated 3 May 2019. The Committee recommended by a majority that the appeals be rejected as unfounded, but it unanimously recommended that each appellant be awarded 450 euros in moral damages for the excessive duration of the proceedings.

By a letter of 3 July 2019, the Vice-President of DG4, acting by delegation of power from the President, informed the complainant that she had decided to reject his appeal against the decision of 9 July 2013 as unfounded, insofar as it was receivable, in accordance with the majority opinion of the Appeals Committee, but to award him 450 euros in moral damages for the length of the internal appeal proceedings. The complainant impugns that decision in his third complaint, in which he asks the Tribunal to declare that the rules introduced by CA/D 5/13 and by Circular No. 347 are not valid; to declare that his absence on 2 July 2013 was not an unauthorised absence but a day of strike; to declare that the salary deduction made in respect of his absence on that date is unlawful; to award him 30,000 euros in moral damages, including 20,000 euros for delay in the proceedings before the Appeals Committee and the Tribunal; and to award him 1,000 euros in costs.

The complainant's appeal against the decision to issue him a reprimand was the subject of a separate opinion of the Appeals Committee, also dated 3 May 2019. Although a majority of the Committee considered that the appeal was unfounded, the Committee unanimously recommended that, in the particular circumstances of the case, the EPO should consider reviewing the disciplinary measure, which appeared unduly harsh. It also unanimously recommended that the complainant be awarded 600 euros in moral damages for the delay in the internal appeal proceedings. The minority considered that the complainant should be

awarded a further 1,000 euros in moral damages on the grounds that the decision to issue a reprimand was unlawful.

By another letter also dated 3 July 2019, the Vice-President of DG4, acting by delegation of power from the President, informed the complainant that she had decided to reject his appeal against the reprimand as partly irreceivable and unfounded for the remainder, in accordance with the majority opinion of the Appeals Committee. However, after taking into consideration the Committee's unanimous recommendation to review the disciplinary measure, she had decided, "as a gesture of good will", to withdraw the reprimand issued on 25 September 2013. She also accepted the Committee's recommendation to pay him 600 euros in moral damages for the procedural delay. That is the decision impugned in the complainant's fourth complaint, in which he asks the Tribunal to declare that the rules introduced by CA/D 5/13 and by Circular No. 347 are not valid; to order the EPO to withdraw the reprimand; to award him 30,000 euros in moral damages, including 20,000 euros for delay in the proceedings before the Appeals Committee and the Tribunal; to award him 1,000 euros per month, as from the date of the reprimand, in moral damages for denying him the right to strike; and to award him 1,000 euros in costs.

On 7 July 2021 the Tribunal delivered several judgments dealing with various other complaints challenging the strike rules introduced by CA/D 5/13 and Circular No. 347. In Judgment 4430, the Tribunal found that Circular No. 347 was unlawful and set it aside on the grounds that it violated the right to strike in several respects. In Judgment 4433, the Tribunal ruled on a complaint filed by a staff member who had likewise challenged the decision to treat his participation in the strike on 2 July 2013 as an unauthorised absence. In that case the Tribunal set aside the decision to make a salary deduction for unauthorised absence and ordered the EPO to reimburse the amount so deducted. It also awarded the complainant 4,000 euros in moral damages and 800 euros in costs.

By a letter of 24 September 2021, the complainant in the present case was informed that, in view of his pending complaints related to the strike action of July 2013, the EPO had decided to apply the outcome of Judgment 4433 to him as well. The EPO therefore reimbursed the

amounts deducted from his remuneration in respect of his participation in strikes on 2, 3, 4, 11, 17, 18, 24 and 25 July 2013 and paid him 4,000 euros in moral damages and 800 euros in costs. It invited him to withdraw his complaints, but he chose not to do so.

CONSIDERATIONS

1. The following discussion proceeds against the background already set out in the facts just described. The two complaints should be joined so that one judgment can be rendered. It is convenient to focus on the relief sought. By way of general comment, the complainant's various claims for moral damages or additional moral damages should be rejected.

2. Much of the argument of the complainant in his pleas appears to proceed on the premise that if there was a legal error attending a decision, or delay in the making of a decision, or delay in the finalisation of an appeal or proceedings in the Tribunal, then, without more, an entitlement to moral damages arises. As noted in another judgment given this session (Judgment 4644, consideration 7), this premise is incorrect. Moral damages are awarded for moral injury and the complainant bears the burden of proving that injury and the causal link with the unlawful conduct of the defendant organisation (see, for example, Judgments 4157, consideration 7, 4156, consideration 5, 3778, consideration 4, and 2471, consideration 5). Delay, of itself, does not entitle a complainant to moral damages (see, for example, Judgments 4487, consideration 14, 4396, consideration 12, 4231, consideration 15, and 4147, consideration 13). Without attempting to describe, exhaustively, what might constitute moral injury, it includes emotional distress, anxiety, stress, anguish and hardship (see, for example, Judgments 4519, consideration 14, 4156, consideration 6, and 3138, considerations 8 and 14). There is no persuasive evidence of moral injury to the complainant (beyond the moral injury for a threat of the same character as compensated in Judgment 4433 and for which compensation has already been paid to the complainant) in respect of any of the events for which he seeks moral damages caused by

the conduct of the EPO, even if unlawful. Specifically, the complainant's claim for moral damages because of the apparently hypocritical nature (as he alleges) of the EPO's additional submissions in these proceedings is plainly untenable. Accordingly, his complaints should, insofar as the complainant seeks moral damages, be dismissed.

3. His claim for the withdrawal of a reprimand has already been met, as has his claim for compensation based on the erroneous premise that he was on an unauthorised absence and that salary deductions could be made on that assumption.

4. In the result, the complaints should be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 19 October 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ