Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 3) and B. (No. 3)

v.

EPO

(Application for review)

137th Session **Judgment No. 4782**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4484, filed by Mr R. B. and Mr D. B. on 24 February 2022, the reply of the European Patent Organisation (EPO) of 15 July 2022, the complainants' rejoinder of 31 August 2022 and the EPO's surrejoinder of 29 November 2022;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. The complainants apply for the review of Judgment 4484, delivered in public on 27 January 2022, in which the Tribunal dismissed their respective third complaints against the EPO. In their complaints, the complainants had centrally challenged the decision to reject their claims for reimbursement of sums the EPO deducted as from December 2015 from a compensatory allowance granted, based on Judgment 2972, following their career progression and the ensuing increases in their salary. In Judgment 4484, the Tribunal dismissed this claim as unfounded. The Tribunal also dismissed, as moot, their claims for reimbursement of deductions for salary increases for the period July 2015 to December 2017 resulting from annual salary adjustments, given

that, in March 2018, the EPO acknowledged that it had erroneously deducted from the aforesaid allowance increases in salary ensuing from annual salary adjustments and had reimbursed those amounts to the complainants, with interest.

2. Having dismissed as moot the claims made with respect to the period July 2015 to December 2017, the Tribunal stated as follows in consideration 8 of Judgment 4484 regarding the claims it concluded were unfounded:

> "8. The other element of this case is concerned with the deductions which are being made from the complainants' compensatory allowance in respect of their career progression. The Appeals Committee correctly considered that the reductions therefrom were permissible and lawful. As the Committee noted, the compensatory allowance was meant to serve as a means of mitigating the adverse financial effects that the reorganisation had had on the complainants' income in 2005 and not as a permanent financial bonus, and that moreover, ten years after the commencement of that entitlement the EPO slightly reduced the compensatory allowance, while nonetheless maintaining the complainants' income at a stable level. In the Tribunal's view, this reasoning is in line with the Tribunal's analyses in Judgments 2972 and 3109, consideration 3, particularly as the complainants no longer perform shift work outside normal working hours. As the impugned decisions accepted the Appeals Committee's reasoning on this issue, the complainants' claims to the contrary are unfounded."

3. Regarding the principles which govern an application for the review of a judgment, the Tribunal case law states that, pursuant to Article VI of its Statute, the Tribunal's judgments are "final and without appeal" and have *res judicata* authority. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. The only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts which the complainant was unable to rely on in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other

hand, afford no grounds for review (see, for example, Judgment 4736, consideration 4, and the judgments cited therein).

4. The complainants state that they wish to call the Tribunal's attention to a material error in Judgment 4484 that is likely to have a bearing on the outcome of the case, which, if corrected, could lead the Tribunal to find in their favour. They refer specifically to the following statement the Tribunal made in consideration 8 of the said judgment:

> "In the Tribunal's view, this reasoning is in line with the Tribunal's analyses in Judgments 2972 and 3109, consideration 3, particularly as the complainants no longer perform shift work outside normal working hours."

5. They provided evidence in their third complaints, underlying Judgment 4484, that they received shift work allowance from December 2015 to January 2016, and asserted in their rejoinder that they worked in shifts, while not specifying if those shifts took place within or outside normal working hours. On the material available to the Tribunal in those complaints, it was not established that the complainants worked on shifts outside working hours. They cannot now do so in their application for review, as it travels beyond the scope of review as discussed in consideration 3 above.

6. The complainants had received a flat-rate allowance (commonly known as the "Van Benthem allowance") until the end of December 2005 for work performed outside normal working hours and on non-working days. As from 1 January 2006, the Administration abolished the allowance. The complainants' challenge to that decision on the bases that it breached their acquired right and their legitimate expectation to continue to receive the allowance, as well as the EPO's duty of care, led to Judgment 2972. The Tribunal determined that in the circumstances of that case it was impossible to conclude that the complainants had an acquired right to an immutable allowance; that they had no legitimate expectation to continue to receive that allowance as it was not supported by the Service Regulations for permanent employees of the European Patent Office and was at odds with the EPO's right to assign different patterns of shift work. The Tribunal

however determined that the EPO must have known that the complainants had entered into financial obligations on the basis of the practice which was long-standing and that in a context where there was a continuing need for security work to be performed at night, the EPO had a duty of care to ensure that the new arrangements did not cause the complainants financial hardship. The Tribunal concluded that the only reasonable way the EPO could discharge its duty of care to cushion against financial hardship was to pay by way of allowance the difference between the actual amount of the Van Benthem allowance as at 31 December 2005 and the shift allowance payable in accordance with Article 58(2) of the Service Regulations until such time as the shift allowance should equal or exceed the actual amount of the Van Benthem allowance paid on 31 December 2005.

7. In Judgment 3109, in which the EPO's application for interpretation of Judgment 2972 was considered, the Tribunal explained, in consideration 2, that Judgment 2972 entitled each complainant to such sum of money by way of compensatory allowance which, when added to the Article 58(2) shift allowance, will ensure that, over and above their basic salary as adjusted from time to time, they would each receive the same amount of money as they received by way of the Van Benthem allowance on 31 December 2005. Importantly, however, the Tribunal explained that if the amount payable under Article 58(2) increased, the amount of the compensatory allowance would decrease by the corresponding amount. Concerning the period for which the compensatory allowance must be paid, the Tribunal recalled its statements in Judgment 2972 that payment should be made "to each complainant for so long as he works shifts outside normal working hours" and that it was clear from its terms that Judgment 2972 was not based on acquired rights or the working of night shifts, but on the Organisation's "duty of care to ensure that the new arrangements did not cause financial hardship to [the complainants]".

8. The foregoing analysis confirms the rationale for the Tribunal's determination, in consideration 8 of Judgment 4484, that its decision that the complainants' claims were unfounded did not depend

upon whether or not the complainants continued to work or were still engaged in performing shift work. This therefore had no substantial bearing on the decision to dismiss their complaints. Rather, as the Tribunal explained, it was satisfied that the Appeals Committee had correctly considered that the deductions the Office made from the complainants' compensatory allowances in respect of their career progression were permissible and lawful because the adverse financial effects that the reorganisation had had on their incomes in 2005 had been mitigated after some ten years during which the EPO had slightly reduced the compensatory allowance, while maintaining the complainants' income at a stable level. The EPO had thereby over that period of time discharged the duty of care it owed to the complainants.

9. It follows from the foregoing that the complainants' application for review is unmeritorious and will accordingly be dismissed.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 2 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER