

S. (No. 3)

v.

EPO

135th Session

Judgment No. 4644

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr H. S. against the European Patent Organisation (EPO) on 16 June 2014 and corrected on 25 July, the EPO's reply of 17 November 2014, the complainant's rejoinder sent on 3 March 2015 and corrected on 11 March and the EPO's surrejoinder of 12 June 2015;

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 impugns the decision of the Vice-President of Directorate-General 4 (VP4), taken on 17 March 2014 by delegation of authority from the President of the European Patent Office, to the extent that it rejected his internal appeals against the delay in paying him the education allowance in respect of his children; the reduction in his tax adjustment payments in the second half of 2007; the refusal to consider reinstating him in his prior status as a recipient of an invalidity pension, i.e. his status prior to the entry into force of decision CA/D 30/07; the refusal to reimburse him his tax adviser's fees; the alleged failure to assist him in dealing with the consequences of his invalidity status being changed and his invalidity allowance being taxed, and to obtain full

compensation therefor; the failure to award him moral damages on various counts, including for the delay in the internal appeal proceedings; and the failure to reimburse him his lawyer's fees, out-of-pocket expenses and other costs.

The complainant is a former staff member of the European Patent Office, the EPO's secretariat. He retired on invalidity grounds on 1 June 2003 and up until 31 December 2007 he received an invalidity pension. Further to the introduction of a new pension scheme, through Administrative Council decision CA/D 30/07 of 14 December 2007, his status was changed to that of a non-active employee and, effective 1 January 2008, he started receiving an invalidity allowance.

Facts underlying internal appeal RI/201/07

On 2 July 2007 the complainant requested payment of the education allowance for 2006-2007 in respect of his daughter, and on 5 October 2007 he requested payment of the education allowance for 2007-2008 in respect of his son. On 29 October 2007 the Office sought additional information with regard to his daughter's direct education costs, which the complainant provided on 27 November, and in January 2008 the Office paid the outstanding amount of 420.25 euros for his daughter's education costs. Also on 29 October 2007, the Office informed the complainant that it had not been possible to process in time the documents for the payment of his son's education allowance along with his October pension payment, but that the allowance in respect of his son would be paid to him with his November 2007 pension. Indeed, in November 2007 the complainant was paid the education allowance in respect of his son.

Between January and June 2007, the complainant, who was required to pay taxes on his invalidity pension in Germany, was paid provisional tax adjustments in the amount of 608 euros per month, based on the Office's calculation in December 2006. In June 2007, further to a recalculation of the tax adjustment payments, the complainant was paid a provisional tax adjustment of 378 euros without, however, receiving an explanation for this reduction. In November 2007 the Office calculated the final tax adjustment for 2007 and informed the complainant that he would be paid the outstanding balance of 1,170 euros in December 2007.

Later on, in December 2009, the Office recalculated the tax adjustment payments for 2007 and informed the complainant that he would receive a further payment in the amount of 1,907 euros on account of the 2007 tax adjustment calculation.

In an email of 30 December 2007, the complainant requested payment of his daughter's education allowance for 2006-2007 and sought compensation for the loss he had suffered due to the late payment of his children's education allowances and the reduction in the tax adjustment payments in the second half of 2007, both of which had created a particularly negative financial situation for him during that period. By a letter of 20 February 2008, the complainant was informed that the President of the Office had decided not to grant his request and that his appeal had been registered under reference RI/201/07. In the period between 20 May and 2 December 2011, the Office sought to communicate to the complainant the reasons for the delays and the reduction in the tax adjustment payments but the complainant maintained his internal appeal.

Facts underlying internal appeal RI/50/08

The complainant was informed by a letter of 14 January 2008 of the changes to the pension system introduced by Administrative Council decision CA/D 30/07 of 14 December 2007, including the replacement of the invalidity pension by an invalidity allowance. An annex to that letter explained the way in which the transitional compensation would be calculated. In the complainant's case, however, no compensation was paid because his net income was higher under the new rules (invalidity allowance) than under the old invalidity pension. In a letter of 14 March 2008, the complainant objected to the payment of arrears in 2008 without payment of a tax adjustment and he asked the Office to take a position on his status as a recipient of an invalidity allowance. By a letter of 13 May 2008, the Office informed the complainant that the question of payment of the tax adjustment for 2007 was part of internal appeal RI/201/07. The Office registered this internal appeal under reference RI/50/08. At the hearing held during the internal appeal procedure, the complainant also sought reinstatement to his status as a

recipient of an invalidity pension, i.e. his status prior to the entry into force of decision CA/D 30/07 on 1 January 2008.

Facts underlying internal appeal RI/62b/10

On 4 February 2010 the complainant received from the German tax authorities his 2008 tax assessment indicating that he owed a tax payment of 9,404.69 euros. On 17 February 2010 he informed the Office of this and requested legal assistance with regard to the taxation of his invalidity allowance. From then on, the complainant was assisted by a tax adviser, who was retained by the Office to assist recipients of an invalidity allowance with tax issues and who previously also was the complainant's personal tax adviser.

In a letter of 9 April 2010 the complainant noted that, despite the Office's repeated assurances that the invalidity allowance was exempted from national taxation, the tax assessment received by him on 4 February 2010 showed that the German tax authorities did not share the Office's view and that his invalidity allowance was liable for German income tax. The complainant requested the Office to inform him how it proposed to fulfil its duty to provide assistance under Article 28(1) of the Service Regulations; to take the necessary measures to protect him from the immediate threat of financial loss as per Article 28(2) of the Service Regulations; and to restore him in the position he would have been if the invalidity allowance was not subject to income tax. By a letter of 18 May 2010, he was informed that his internal appeal had been registered under reference RI/62b/10 – notwithstanding that the Office was carrying out an in-depth examination of the support it would provide to all recipients of the invalidity allowance. Around the same time, the tax adviser informed the complainant that the German tax authorities had agreed to reduce his 2008 tax assessment by 2,167 euros and to give him an extension until 15 June 2010 to pay the reduced amount of 7,237.69 euros.

On 20 May 2010 the Office advised all recipients of an invalidity allowance liable to pay income tax on their allowance to inform the responsible department and the Office's tax adviser so that necessary steps could be taken vis-à-vis national tax authorities. The Office undertook to pay the tax levied on the invalidity allowance in the form of an

advance payment to those concerned. On 16 June 2010 the Office sent the complainant an agreement offering to pay him an advance for the tax he owed in return for his entitlement to a tax refund, plus interest, from the German tax authorities. The complainant eventually signed this agreement, further to which the Office paid to the complainant's account the amount of 9,404.69 euros. By a letter of 15 January 2011 to the President of the Office, the complainant's counsel requested moral damages on behalf of the complainant for the Office's alleged breach of its duty of care. She maintained that the complainant had suffered damage due to the Office's negligence in taking advance measures to protect him from actions that could endanger his livelihood. She also requested damages for interest paid, costs and legal fees. Further to the complainant's counsel's request, the 15 January 2011 letter was registered as part of internal appeal RI/62b/10 on 10 March 2011.

Facts underlying internal appeal RI/28/11

By a letter of 15 January 2011 the complainant's counsel requested that the complainant be reimbursed the fees which the tax adviser had charged for drawing up his personal income tax return for 2009 and which were in the amount of 111.62 euros. This request was turned down by the Office in an email of 26 January 2011 on the ground that the Office did not provide individual assistance for the preparation of tax returns, that it had been made clear to the complainant that it would bear only the tax consultancy services needed to deal with the unfavourable tax decision, and that all recipients of an invalidity allowance were receiving the same support under the same conditions. The complainant's counsel wrote another letter on 10 February 2011 to rebut the assertions made in the 26 January email and to reiterate the request for the reimbursement of the tax adviser's fees in the amount of 111.62 euros. In the event that the request was denied, the complainant's counsel asked that her letter be treated as an internal appeal and also requested damages, interest and costs. By a letter of 12 April 2011, the complainant's counsel was informed that the President of the Office had decided not to grant her request and that the appeal had been registered under reference RI/28/11 to be jointly prepared with appeal RI/62b/10.

Internal Appeals Committee's report and recommendations

After having heard the parties, the Internal Appeals Committee (IAC) issued its opinion on 19 December 2013 – due to a procedural error in the constitution of the IAC, an earlier hearing held on 19 February 2013 was declared null and void. The IAC unanimously considered the appeals admissible with the exception of the complainant's request for reinstatement in his earlier status as a recipient of an invalidity pension, i.e. his status prior to the entry into force of decision CA/D 30/07, which was considered inadmissible as it was filed at the IAC's hearing. The IAC recommended that the appeals be allowed to the extent set forth here below:

- Internal appeal RI/201/07: The IAC unanimously held that the education allowance for the complainant's daughter was paid at least four months late through negligence and that the amount of 250 euros claimed as moral damages for the delay was appropriate and should be awarded. Similarly, it unanimously found that the Office had caused a one-month delay through negligence in the payment of the education allowance for the complainant's son and that moral damages should be awarded on that count. The majority considered the amount of 50 euros fitting while the minority considered the amount of 150 euros justified.

As regards the reduction in the tax adjustment payments, the IAC considered that the evidence produced by the Office clearly showed the change in the German authorities' taxation practice and that the Office duly applied the provisions in force at the time. In the IAC's unanimous opinion, the only problem was the significant reduction of the tax adjustment (nearly halved in June 2007) without providing reasons. The complainant should have been informed by means of a note attached to his salary slip explaining that the reduction was linked to the German authorities' fiscal assessment of allowances paid by the Office. The failure to observe the duty to provide and explain information justified an award of moral damages. The majority considered the amount of 300 euros as sufficient whereas the minority recommended the amount of 1,000 euros as appropriate.

As for the award of moral damages for the length of the internal appeal procedure, the majority recommended against such an award because only small amounts of moral damages were involved and the Office had made payments to the complainant before the appeal was lodged; the minority, on the other hand, recommended awarding the complainant 2,000 euros on this count. The IAC unanimously recommended that the complainant's costs be reimbursed in full upon the submission of proof thereof.

- Internal appeal RI/50/08: The IAC unanimously recommended dismissing this appeal as unfounded, because the complainant had received an advance of 9,404.69 euros to offset any disadvantage encountered in 2008 as a result of the German authorities' taxation of the invalidity allowance. The 2008 tax assessment had also taken into account pension arrears of 1,117.03 euros because this amount was received by the complainant in 2008.
- Internal appeal RI/62b/10: This appeal concerned the complainant's efforts to obtain support in dealing with the consequences of having his invalidity allowance taxed and to obtain full compensation therefor. As regards the main requests in this appeal, i.e. that the Office inform the complainant how it proposed to fulfil its duty to provide assistance under Article 28(1) of the Service Regulations; that it take the necessary measures to protect him from the immediate threat of financial loss as per Article 28(2) of the Service Regulations; and that it restore him in the position he would have been in if the invalidity allowance was not subject to income tax, the IAC recommended that they be rejected as these requests had been met. As regards the ancillary requests, i.e. for moral damages, damages for interest paid, costs and legal fees, the IAC unanimously concluded that the Office had acted negligently and was therefore responsible for the interest payable from 16 June to 30 July 2010. It thus recommended that the complainant be awarded interest for the latter period, the 250 euros claimed to cover expenses and appropriate lawyer's fees. As regards the request for moral damages, the majority recommended an award in the amount of 500 euros, because the complainant was obliged to make payments out of his

pocket due to the delays attributable to the Office but it saw no ground for awarding moral damages for the length of the procedure because no claim to this effect was expressly made. The minority, nonetheless, recommended moral damages in the amount of 1,000 euros for the Office's failure to fulfil its duty of care and an additional amount of 3,000 euros for the length of the internal appeal procedure. The IAC unanimously recommended fully reimbursing the complainant for the cost of the appeal proceedings subject to proof thereof.

- Internal appeal RI/28/11: The IAC unanimously recommended rejecting the complainant's request for reimbursement of the tax adviser's fee for the complainant's tax return for 2009, because it bore no direct relation to the events of 2008 but rather related to the drawing up of a regular tax return, which is an employee's own responsibility.

By a letter of 17 March 2014, which constitutes the impugned decision taken by delegation of authority from the President, VP4 informed the complainant of the final decision on his internal appeals. VP4 allowed the complainant's internal appeals to the extent outlined here below:

- Internal appeal RI/201/07: VP4 accepted that the complainant's daughter's school fees, in the amount of 420.25 euros, had been paid with delay. However, contrary to the IAC's opinion, VP4 considered that this delay was "justifiably compensated by payment of interest" and thus awarded the complainant interest at the rate of 5 per cent per annum from 26 July 2007 (the earliest date on which payment could have been made) to 25 January 2008 (the date before actual payment). The remainder of internal appeal RI/201/07 was rejected.
- Internal appeal RI/50/08: VP4 rejected this appeal as partially inadmissible and unfounded.
- Internal appeal RI/62b/10: VP4 rejected the complainant's request for re-establishment in his *status quo ante* as an irreceivable extension of his original appeal and he also rejected the complainant's other main requests on the ground that they had been met. VP4 allowed appeal RI/62b/10 to the extent that he decided (i) to reimburse the

complainant the sum of 71.46 euros as compensation for the loss of interest arising from the delay in paying him the advance for national taxation; (ii) to pay the complainant reasonable counsel's fees for the checking of the tax reimbursement agreement. The complainant was asked to provide a revised calculation of those costs for the Office's consideration.

- Internal appeal RI/28/11: VP4 rejected this appeal as unfounded.

Having allowed in part appeals RI/201/07 and RI/62b/10, VP4 decided to award the complainant legal costs in those two appeals on receipt of proof. VP4 invited the complainant to provide evidence of the costs he had incurred noting that the "value of the dispute (Streitwert) must be verified".

The complainant asks the Tribunal to set aside the impugned decision, dated 17 March 2014, to the extent that it rejected (i) appeal RI/28/11; (ii) appeal RI/201/07 and the request for the payment of moral damages and damages for the length of the procedure in that appeal; (iii) the request for the payment of moral damages and damages for the length of the procedure in appeal RI/62b/10. He claims moral damages in appeal RI/201/07 in the amount of at least 1,400 euros, as well as damages for the length of the procedure in that appeal in the amount of at least 2,000 euros. He also claims moral damages in appeal RI/62b/10 in the amount of at least 1,000 euros, as well as damages for the length of the procedure in that appeal in the amount of 3,000 euros. Lastly, he claims a lump sum of 250 euros for out-of-pocket expenses. He requests that the EPO be ordered to pay: (i) his counsel's fees for out-of-court services in the amount of 2,337.16 euros; (ii) his counsel's fees for appeal RI/201/07 in the amount of 1,512.01 euros; (iii) his counsel's fees for appeal RI/62b/10 in the amount of 855.97 euros. He seeks interest at the rate of 5 per cent per annum on the amounts awarded hereunder from the date of filing of this complaint until the date those amounts are paid in full and he also seeks reimbursement of the legal fees and costs incurred for the present proceedings.

The EPO asks the Tribunal to dismiss the complaint as unfounded on the merits. It rejects the complainant's claims for legal fees and costs on the grounds that he has not produced any evidence of the fees and costs

he allegedly incurred in the present proceedings and, in any event, he cannot succeed on the merits and is thus not entitled to an award of costs.

CONSIDERATIONS

1. The complainant is a former official of the EPO. As can be seen by the preceding account of the facts, he has pursued a number of grievances with the EPO about financial matters. As can also be seen by that account, the relief he seeks in these proceedings is, in the main and subject to four exceptions, an award of moral damages in relation to either the events underpinning his internal appeals or the conduct of the appeals themselves, as well as amounts which would be payable in the event that he was successful in these proceedings. The Tribunal returns to the question of moral damages shortly.

2. The four exceptions are the following. First, he seeks an order that the impugned decision of 17 March 2014 be set aside to the extent that it rejected appeal RI/28/11. Secondly, he seeks an order that the impugned decision be set aside to the extent that it partly rejected appeal RI/201/07. Thirdly, he seeks counsel's fees for appeal RI/201/07. Fourthly, he seeks counsel's fees for appeal RI/62b/10.

3. As to these last two matters, the Tribunal will not award costs for internal appeals subject to a proviso that it may do so in exceptional cases (see, for example, Judgments 4392, consideration 13, 4217, consideration 12, and 4157, consideration 14). Nothing is pointed to by the complainant in his pleas which would support a conclusion that the circumstances concerning either appeal engaged the proviso. Accordingly, the complaint should, in this respect, be dismissed.

4. As to the first matter referred to in consideration 2 above, it is necessary to consider whether the rejection of appeal RI/28/11 was tainted by legal error warranting setting aside, in this respect, the impugned decision. The subject matter of that appeal was a decision to reject a claim by the complainant that the EPO reimburse him for his tax adviser's fees in drawing up his 2009 tax return. In its opinion of

19 December 2013, the IAC recommended that this appeal be dismissed as unfounded on the merits. In the impugned decision, VP4 accepted and acted on this recommendation.

5. The claim for reimbursement was founded on the alleged fact that the complainant had been given an assurance, which was legally binding, that these costs would be reimbursed. The conclusion of the IAC was based on the failure of the complainant to prove such an assurance had been given either in writing or orally. Its opinion in this regard, and more generally, is balanced and considered, and its findings and conclusions must be given considerable deference (see, for example, Judgments 4488, consideration 7, 4407, consideration 3, and 3858, consideration 8). In his pleas in these proceedings, the complainant singularly fails to come to grips with this evidentiary deficiency in his case and focuses on why he perceived it was necessary to obtain this professional assistance concerning his tax. There was no legal error in the approach of the IAC and the adoption in the impugned decision of its recommendation on the appeal. Accordingly, the complaint, in this respect, should be dismissed.

6. As to the second matter referred to in consideration 2 above, it is necessary to consider whether the partial rejection of appeal RI/201/07 was tainted by legal error warranting the setting aside, in this respect, of the impugned decision. Broadly described, the subject matter of that appeal was the payment of an education allowance in relation to the complainant's daughter and son, and also the reduction of a tax adjustment in 2007. However, the specific issue raised in these proceedings is whether the complainant was entitled to moral damages as had been sought, unsuccessfully, in appeal RI/201/07.

7. This leads to a consideration of the basis for awarding moral damages, both specifically in relation to appeal RI/201/07 and as more generally sought in these proceedings. 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, then, without more,

an entitlement to moral damages arises. 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 a 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 in respect of any of the events for which he seeks moral damages caused by the conduct of the EPO, even if unlawful. Accordingly, his complaint should, insofar as he seeks moral damages, be dismissed.

8. The result of this conclusion, together with conclusions to similar effect in considerations 3 and 5 above, is that the complaint should be dismissed. Necessarily, the complainant's claim to amounts which might be payable in the event that he was successful in these proceedings should be rejected.

9. In the result, the complaint should be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, 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

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ