T. (No. 3)

v.

EPO

128th Session **Judgment No. 4197**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr B. T. against the European Patent Organisation (EPO) on 16 May 2012, corrected on 19 June, and the EPO's reply of 2 October 2012, no rejoinder having been submitted by the complainant;

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 to reject his request for payment of overtime hours performed under the terms of an informal agreement concluded within his department.

The complainant joined the European Patent Office, the secretariat of the EPO, on 26 April 1982 and held a B category post in the Operational Services (IT) Department.

After retiring in July 2009, the complainant sent an email on 30 October claiming that he had accumulated 1,060 hours under the terms of an informal agreement in place within his department since the mid-1980s to ensure coverage of operations scheduled outside the normal working hours. That informal agreement foresaw the use of overtime in parallel with a system of shift work. Operators could obtain

financial compensation for the work performed outside of the normal working hours as provided for in the Service Regulations for permanent employees of the Office or could voluntarily choose to work on Saturdays and holidays and would thus be compensated by time off to be taken by the end of the following month. He requested the payment of his overtime work hours insofar as he could not use them as time off before he retired due to heavy workload.

By a letter of 15 December 2009, the complainant was informed that the President of the Office had come to the conclusion that the relevant rules had been correctly applied and therefore had decided to refer the matter to the Internal Appeals Committee (IAC). On 10 November 2011 the IAC recommended by a majority that the internal appeal be rejected as unfounded. Taking into account the failing of the Office, which had tolerated the accumulation of such a large number of overtime hours without pointing out to the complainant that financial compensation was excluded, it recommended awarding him 5,000 euros in moral damages as well as costs. The minority recommended compensating the complainant with 80 per cent of the overtime remuneration under Article 57(3)(b) of the Service Regulations – which set the conditions for remuneration of hours of overtime work in respect of which compensatory leave could not be granted – on the grounds that the agreement concluded within the department was incompatible with the Service Regulations and had been introduced without any consultation of the appropriate bodies. As a result, the Office ought to be considered responsible and the complainant should not suffer the consequences of its failure.

By a letter of 13 January 2012, which is the impugned decision, the Principal Director of Human Resources, by delegation of power, decided to endorse the majority opinion of the IAC and to allow the internal appeal in part, by awarding the complainant 5,000 euros for moral damages. The claim for full compensation was rejected on the grounds that the complainant had shown negligence by accumulating a high number of overtime hours while knowing that the applied system did not provide for financial compensation.

By a letter of 11 June 2012, the Principal Director of Human Resources acknowledged the complainant's decision to decline the payment of 5,000 euros for moral damages.

The complainant asks the Tribunal to order full payment of the 1,060 overtime hours with interest as well as moral damages exceeding 5,000 euros and costs.

The EPO asks the Tribunal to dismiss the complaint as without merit.

CONSIDERATIONS

1. The complainant impugns the decision dated 13 January 2012 by which the Principal Director of Human Resources, by delegation of power from the President of the Office, endorsed the 10 November 2011 majority opinion of the IAC, allowed the complainant's appeal in part and rejected it for the remainder as unfounded. Specifically, the Principal Director decided to pay the complainant 5,000 euros for moral damages and to reject his request for full compensation. The decision took into consideration "that the administration d[id] not bear in full the responsibility for the cause of [the complainant's] appeal but [the complainant had] shown negligence by accumulating a high number of overtime hours although [he] knew that the applied system did not provide for a financial compensation".

2. The complainant impugns the 13 January 2012 decision endorsing the IAC majority opinion on the grounds that it was based on false and tendentious conclusions not supported by the findings of fact and that the final administrative decision was not taken by the proper authority.

3. The IAC unanimously found the complainant's appeal to be receivable. The IAC majority noted that a special voluntary system had been established in the service where the complainant worked, which only allowed for compensatory leave (as opposed to financial compensation) to be taken for voluntary overtime, at the latest, in the month following the overtime performed. The majority found that the complainant was obliged to adhere to the conditions of the informal

agreement and had not provided evidence that it was impossible to take the compensatory leave in the time scale provided or that he had made requests for compensatory leave that had been refused. The IAC majority also noted that "the [complainant] was notified that, in accordance with the non-written agreement, a large number of hours had been accumulated. Nevertheless, the [complainant] had, without the agreement of his hierarchical superior, accumulated a total number of hours corresponding to 132.5 days. If he [had] demand[ed] a financial compensation in place of compensatory leave, he could have made an arrangement with his hierarchical superior well before his going on pension." It cited Judgment 1261, under 6, which states: "It was his duty as the responsible officer to ensure that the Organization's rules were being complied with. If they were not he should have brought the matter to the notice of his supervisors." The majority found that "the attitude of the [complainant] who had accumulated a large number of overtime hours for years although he knew that the agreement made did not foresee financial compensation for this, affect[ed] the degree of the Office's responsibility" and therefore recommended that the President should reject the internal appeal as unfounded but award the complainant 5,000 euros for the moral damage suffered as a result of the failings of the Organisation. The IAC minority opinion considered that the complainant had "provided his part of the agreement in the form of hours extraordinarily worked for the [O]ffice"; the Organisation had not "at any moment giv[en the complainant] a written notification that hours risked being lost if not used within a certain time limit"; the Organisation had failed in its duty to introduce measures which were compatible with the Service Regulations and bore full responsibility for the legally flawed agreement; and the complainant should have exercised due diligence while still in service to inquire into how the accrued hours could be handled. It thus recommended that the Organisation compensate the complainant with 80 per cent of the overtime remuneration provided for under Article 57(3)(b) of the Service Regulations, in line with Judgment 632 of the Tribunal.

4. The complaint is unfounded. The complainant claims that the impugned decision was not taken by the proper authority. The Tribunal

is satisfied, having regard to the Acts of Delegation provided by the EPO, that the Principal Director of Human Resources had been properly delegated by the President of the Office to take such a decision.

5. The Tribunal finds that a practice was established based on the informal agreement, which was not contrary to the written provisions of Articles 57 and 58 of the Service Regulations. This practice, which was followed for a long time without any contestation by the parties to the agreement, became a legally binding practice, which only regarded voluntary work, thus, there was no requirement to consult the Local Advisory Committee (LAC) or the General Advisory Committee (GAC). Articles 57 and 58 of the Service Regulations address overtime and shift work. At the material time they provided in relevant part as follows:

"**Article 57**
Overtime

(1) A permanent employee may not be required to work overtime except in cases of urgency or exceptional pressure of work; overtime worked at night, on Sundays or public holidays may be authorised only in accordance with the procedure laid down by the President of the Office. The total overtime which an employee may be asked to work shall not exceed 150 hours in any six months.

(2) [...]

(3) Overtime worked by a permanent employee in Category B or C shall entitle him to compensatory leave or remuneration as follows:

(a) for each hour of overtime, he shall be entitled to one hour off as compensatory leave; if the hour of overtime is worked between 10 p.m. and 7 a.m. or on Sunday or on a public holiday, the entitlement to compensatory leave shall be one hour and a half; in the granting of compensatory leave, account shall be taken of the requirements of the service and the preference of the employee concerned;

(b) where the requirements of the service do not permit compensatory leave during the month following that during which the overtime was worked, the President of the Office shall authorise remuneration for uncompensated hours of overtime at the rate of 0.72% of the monthly basic salary for each hour of compensatory leave which it was not possible to grant;

(c) [...]."

"**Article 58**
Shift work

(1) A permanent employee who is expected to work regularly at night, on Saturdays, Sundays or public holidays when doing shift work which is required by the exigencies of the service or safety rules shall be entitled to compensation in the form of time off, or, where this cannot be granted, in the form of payment per hour of shift work performed. When such shift work is not a regular and permanent feature, it must be properly authorised by a decision of the President of the Office, valid for one month only.

(2) [...]."

In Judgment 4029, at consideration 19, the Tribunal stated:

> "It is well settled in the case law 'that a practice cannot become legally binding if it contravenes a written rule that is already in force' (Judgment 3601, under 10). In Judgment 2959, under 7, the Tribunal explained that 'a practice which is in violation of a rule cannot have the effect of modifying the rule itself'. In this case, [the organization] initiated a practice for the benefit of long-term short-term staff members to address the concern that these staff members were not given any within-grade increases. The benefit provided in the application of that practice went beyond and was in addition to the provisions in Staff Rule 320.1. The practice did not modify Staff Rule 320.1 or affect the rights of other [...] staff members. Accordingly, the Tribunal concludes that the practice was legally binding."

Similarly, in the present case, the informal agreement was set up to address a system which runs parallel to but does not modify or contravene Articles 57 and 58 of the Service Regulations. The informal agreement differs from the scheme provided for in the above-cited articles in two ways: first, it regulates voluntary overtime and shift work, and second, it does not provide for any financial compensation for overtime worked under the agreement; it only authorizes compensatory "time off in lieu".

6. As the informal agreement is lawful, the complainant had the choice not to participate in the voluntary overtime and shift work or to participate in accordance with the terms of the agreement. As he chose to participate, he should have respected the requirement to take compensatory "time off in lieu" in the month following that in which the overtime was accrued. If he found that he was unable to take that

compensatory leave within the time limit, due to illness or the exigencies of the service, he had to raise the issue with his supervisors to find a solution. In the present case, he did not do so; instead, he continued to accumulate hours until the time of his retirement with the apparent intention of requesting financial compensation. The evidence provided by the Organisation shows that the complainant was the only person in his department to accrue such a high number of hours and that other members of the service were consistently able to take their compensatory leave. The complainant has not proven that he had tried to take compensatory leave and this was denied, nor that his illness had prevented him from taking compensatory leave over the years, nor that he had made any effort whatsoever to reach an agreement with his supervisors prior to his retirement (when compensatory leave would no longer be possible).

7. The IAC minority opinion is based in part on a misinterpretation of Judgment 632. It cited the judgment as follows:

> "Secondly, paragraph 150 of the Handbook provides that compensatory leave must be taken within two months of the date of accrual. Indeed it is difficult to see how leave can be compensatory if it is taken at a time far remote from the period when the overtime was performed. Thirdly, the complainant has retired from the [organization] and it is not now possible to grant compensatory leave to him. In these circumstances the Tribunal has come to the conclusion that the only solution is for the [organization] to pay the complainant the difference in overtime rates which he claims for the period beginning 1 June 1980 and ending 31 December 1980."

That judgment addresses a different question regarding a complainant who had been retroactively promoted but was not compensated for the difference in the overtime hours that he had worked in the period of retroactivity, for which he had already received financial compensation corresponding to his previous grade. That situation involved a rule which, unlike the present case, provided for "the exercise of discretion as to the method of compensation prior to the work being done, and [t]here the choice [had been] for monetary compensation". The Tribunal found that the choice of whether to compensate a staff member, financially or through time off, was made in advance of the overtime worked, and as such, the complainant was entitled to be financially

compensated for the difference owed following his retroactive promotion in accordance with the previously decided compensation method (i.e. financial payment). The fact that he retired while his case was being processed was coincidental. In the present case, the complainant had no legitimate expectation of a financial payment for overtime performed under the informal agreement; did not contest the lack of financial compensation on the month-by-month basis of accrual, and waited until he had retired to make the request for financial compensation. The complainant does not deny that he had accumulated a high number of overtime hours although he knew that the voluntary system did not provide for monetary compensation. Accordingly, the sum offered to the complainant by the Organisation for not having given him a formal warning is sufficient. In light of the above considerations, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ