S. (No. 3)

v.

EPO

132nd Session **Judgment No. 4428**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms O. S. against the European Patent Organisation (EPO) on 14 May 2014, the EPO's reply of 9 September, the complainant's rejoinder of 6 October 2014 and the EPO's surrejoinder of 12 January 2015;

Considering the email of 4 September 2019 by which the complainant's representative informed the Registrar of the Tribunal that the complainant had died and that the complainant's son, as her sole heir and successor-in-title, had decided to pursue the complaint;

Considering Article II, paragraphs 5 and 6(a), and Article 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 refusal of her request to combine a half day of absence for strike participation with a half day of leave.

At the material time, the complainant was a permanent employee of the European Patent Office – the EPO's secretariat. In the summer of 2008 a campaign of industrial action was organised by SUEPO (the Staff Union of the European Patent Office – a trade union which is not a statutory body of the EPO). This sometimes took the form of half-day strikes on Monday afternoons or Friday mornings, which were designed to avoid salary deductions for weekends during a prolonged strike period. The complainant informed her Director that she would participate in a

half-day strike on the morning of Friday 22 August 2008. She then sought permission to take leave in the afternoon using "Kober hours". Kober hours were hours credited to an employee in respect of shortened lunch breaks. This credit could be used as free hours, half days or full days, in agreement with line management. The complainant's Director refused this request, saying that under "the new management guidelines", she could not be on strike for part of the day and on leave for the other part; she would have to either take leave for the whole day or be present at work during the afternoon. The Director was referring to a letter sent by the acting Vice-President of Directorate-General 4 (DG4) to various senior managers explaining how to deal with requests to take leave on Mondays and Fridays during the strike action, which had not been circulated amongst the staff.

In the event, the complainant decided to take leave for the whole day, using annual leave for the morning and "Kober hours" for the afternoon. However, she lodged a request for review of her Director's decision not to allow her to combine a half-day strike with a half day of leave, arguing that it "effectively prevented [her] from exercising [her] right to strike". She wanted to be recorded as having been on strike in the morning and on "Kober leave" in the afternoon. The complainant also alleged unequal treatment and discrimination, asserting that one of her colleagues had been on strike that morning and had been allowed to take leave in the afternoon.

Following an initial rejection of her request for review, the matter was referred to the Internal Appeals Committee (IAC) for an opinion. The IAC unanimously considered that the instructions issued by the acting Vice-President of DG4 did not prevent the complainant from combining a morning of strike action with an afternoon of leave. The Director merely had to ensure that the impact of the complainant's absence on the service would not be disproportionate. In this case, the Director could not validly invoke the impact on the service to justify refusing her request, as he had told her at the time that she could take leave for the whole day, thereby implicitly acknowledging that her presence at work was not essential. Moreover, having requested additional information from the Office, the IAC was able to establish that one of the complainant's colleagues, who had been on strike in the morning, had indeed taken leave in the afternoon. As the Office provided no explanation for this difference in treatment, the IAC found that the complainant's allegation of unequal treatment had not been refuted. For

these reasons, it unanimously concluded that the decision to refuse her leave request was arbitrary and should be set aside, and that the complainant should be awarded moral damages. A majority of the IAC members recommended an award of 1,000 euros. The minority, however, recommended an award of 5,000 euros as they also considered that the challenged decision had no legal basis, because the General Advisory Committee (GAC) had not been consulted regarding the instructions issued by the acting Vice-President of DG4, and that it constituted a violation of the right to strike.

By a decision of 20 February 2014, the Vice-President of DG4, by delegation of power from the President, dismissed the complainant's appeal as unfounded in its entirety. He considered that her right to strike had not been denied, and that her decision to take leave for the whole day on 22 August 2008 was her personal choice. He rejected the view of the IAC minority that the instructions issued by the acting Vice-President of DG4 required prior consultation of the GAC. Referring to the complainant's allegation of unequal treatment, he pointed out that "equality of treatment means equality in the observance of the law", and the IAC had failed to consider whether the decision to allow her colleague to combine leave with strike absence on the same day had been correct. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to treat her absence during the morning of 22 August 2008 as participation in a strike and to grant her a half day of annual leave. She also claims moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. On 20 August 2008 the complainant requested a half day of leave (using "Kober hours" that she had accumulated) for the afternoon of 22 August, following that morning's half-day strike. In his email response later that same day, the complainant's Director rejected her request, writing: "According to the new management guidelines you cannot be on strike on one part of the day and on leave/Kober at another half. Either you take a whole day leave or be present in the afternoon

on [F]riday [22 August]. Consequently at present I cannot approve that you will not be in the office on Friday afternoon."

2. The complainant felt compelled to take a full day of leave on 22 August, and later followed the procedures to challenge her Director's decision in an internal appeal. In its opinion of 10 December 2013, the Internal Appeals Committee (IAC) unanimously recommended to quash the flawed refusal, retroactively register the complainant as having been on strike for the morning of 22 August 2008, grant her a half-day annual leave, and reject her claim for material damages. The majority recommended an award of moral damages in the amount of 1,000 euros for breach of the principle of equal treatment, whereas the minority recommended an award of 5,000 euros for the breach of both the principle of equal treatment and the right to strike.

3. In the present complaint, the complainant impugns the 20 February 2014 decision, taken by the Vice-President of DG4, by delegation of the President. In that decision, contrary to the IAC's recommendations, the Vice-President of DG4 rejected the complainant's appeal as unfounded in its entirety and confirmed the 20 August 2008 decision of the complainant's Director. Specifically, he noted inter alia that "[t]he Office fully recognises the right to strike. However, it is noted that strike participation is directly derived from the principle of the freedom of association and cannot be considered a matter of personal convenience. Therefore, this right must be exercised with due care and in compliance with any reasonable requirements set by the Administration. I would like to underline that your right to strike on 22.8.2008 was never contested nor restricted by the Office. The same applies to your right to request authorisation to take leave or any other type of absence. The question under dispute concerned instead the possibility to take half a day of compensation hours in combination with strike absence. There was thus no breach of your right to strike. There was also no breach of your right to leave. As a result, taking leave on the day concerned reflected your personal choice and preference of having an entire day off."

4. The complainant challenges that decision primarily on the ground that the 20 August 2008 decision referred to the impossibility of linking a period of strike with a period of leave, allegedly emanating

from the instructions issued by the acting Vice-President of DG4 in his letter of 25 July 2008, despite no such absolute interdiction existing. That letter, with the subject line "[t]reatment of staff requesting holidays on Mondays and Fridays during the current flexistrike action in The Hague", provided in relevant part as follows. After noting that strike actions "are legal and that the right to strike must be respected", it went on to say that "[t]he Office has however the right to safeguard its functioning during strike action. This means that if the ability of the Directorate to make full use of available capacity is disproportionately impaired as a result of the cumulation of holiday and strike, measures can be taken to restore the balance. This assessment is a line management issue, not a legal one and must be performed by the director. Proportionality between the time lost to the Office and the impact on capacity, together with the need for a 'factual return to work' are the main principles to be invoked if leave is requested for Monday morning/ Friday afternoon" (original emphasis).

5. The complainant submits that the Organisation's contention that the Director rejected her request on the basis of the need to ensure the correct functioning of the Directorate, is contradicted by the fact that the Director himself (as cited above) suggested that she take a full day of leave on 22 August instead of a half day of strike and a half day of leave. This was also noted by the IAC, which cited that incongruence as the basis for its opinion. With regard to the claim of unequal treatment, the IAC found in her favour, as the evidence showed that one of her colleagues was permitted to take a half day of leave following the half day of strike and, despite requests from the IAC, the Organisation did not submit any evidence to contradict this finding. Finally, the complainant submits that the Director's 20 August 2008 decision, and its subsequent confirmation by the Vice-President of DG4's 20 February 2014 decision, impeded her right to strike. This argument was supported by the IAC's minority.

6. The complaint is well founded. The Tribunal observes that the IAC minority questioned the legality of the above-mentioned instructions from the acting Vice-President of DG4, on the basis that there had been no GAC consultation prior to their issuance. However, as the question of the lawfulness of those instructions was not explicitly raised in the complaint, the Tribunal shall not address it in this judgment. The Tribunal finds that the wording of the letter of 25 July 2008 does not prohibit the

combination of leave and strike days. It merely specifies that leave can be denied in cases where such leave would disproportionately impair the functioning of the Office as a result of the combination of holiday and strike days. By approving the complainant's full day of leave, the Organisation contradicted its assertion that the complainant could not be allowed to take a half day of leave following a half day of strike as this would negatively affect the operations of the Directorate. It must be noted that, in the 20 February 2014 decision, the Vice-President of DG4 did not justify his rejection of the IAC's recommendations, which were based on the fact that the 20 August 2008 decision was itself in contradiction with the instructions issued on 25 July 2008.

7. Moreover, the Tribunal notes that, considering there was no actual organisational need for the complainant's presence in the afternoon of 22 August 2008 (as proven by the approval of a full day of leave), making the authorisation of leave for that afternoon conditional upon the complainant's non-participation in the morning strike infringed her right to strike. The Organisation's argument that "[t]he complainant's right to strike cannot be said to have been violated if the complainant was permitted to take the entire day of the strike as leave, enabling her to participate [in the strike]" (emphasis added) is nonsensical. Taking a full day of leave explicitly removes the possibility of being counted as having participated in a strike. The complainant submits, moreover, that as she was a member of the executive committee of SUEPO, the Organisation damaged her reputation by preventing (by making it conditional) her participation in the strike on the morning of 22 August. With regard to the question of unequal treatment, the Tribunal notes that the Organisation has not provided any convincing evidence to justify the different treatment of the complainant's colleague.

8. In light of the above considerations, the impugned decision of 20 February 2014, and the original 20 August 2008 decision which it confirmed, must be set aside. The complainant's absence during the morning of 22 August 2008 shall be registered as absence due to participation in the strike and her annual leave balance shall be retroactively re-credited with a half day. Under the present circumstances, this half day shall be treated as unused leave.

The complainant is entitled to an award of moral damages for the unlawfulness of the impugned decision, which amounted to a deliberate violation of the exercise of her right to strike, and the negative effects

of this decision, including unequal treatment. The Tribunal assesses these damages in the amount of 5,000 euros.

As her complaint succeeds, the complainant is entitled to an award of costs, which the Tribunal sets in the amount of 800 euros.

DECISION

For the above reasons,

1. The decisions of 20 February 2014 and 20 August 2008 are set aside.
2. The complainant's absence during the morning of 22 August 2008 shall be registered as absence due to participation in the strike.
3. The complainant's annual leave balance shall be retroactively re-credited with a half day.
4. The EPO shall pay the complainant's heir 5,000 euros in moral damages.
5. It shall pay the complainant's heir 800 euros in costs.

In witness of this judgment, adopted on 4 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ