Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

D. (No. 10)

v.

EPO

134th Session **Judgment No. 4556**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 5 August 2020 and corrected on 8 August, the EPO's reply of 11 November, the complainant's rejoinder of 8 December 2020 and the EPO's surrejoinder of 10 March 2021;

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

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant asks to be provided with a copy of his old medical file.

External doctors dealt with all medical matters concerning EPO employees until 2005. Dr Ki. provided occupational health services for the European Patent Office, the EPO's secretariat, at its office in Berlin, Germany, from 1992 to 2003. Pursuant to decisions CA/D 11/04 of 17 June 2004 and CA/D 23/07 of 16 February 2007, the Administrative Council inserted Articles 26a and 26c in the Service Regulations, which respectively provided for the appointment of a medical adviser for the Office and the establishment of a medical service and the appointment of occupational safety experts. On 1 January 2005 the President of the Office appointed Dr Ko. as medical adviser.

The complainant joined the Office on 1 September 1981. On 24 May 2011 he wrote to Dr S. – a doctor in the medical service – requesting a complete copy of his medical file for the period from 1996 to 2003, when he was under Dr Ki.'s care, and "until now", that is 2011. As his request went unanswered, he repeated his request to Dr Ko. on 4 October 2011. Dr Ko. informed him the same day that, owing to the requirement of doctor-patient confidentiality, old medical files kept by external doctors who had previously worked with the Office had not been transferred to him. Dr Ko. added that he did not have any file for the complainant and advised him to contact Dr Ki. directly. Later in October 2011, there was a further exchange of emails between the complainant and the medical adviser, during which Dr Ko. again stated that he did not have the medical file kept by Dr Ki. In a letter of 16 December 2011, also to Dr Ko., the complainant requested that he be sent "all the documents [comprising his] medical file" by 17 January 2012. If that were impossible, he stated that his letter should be treated as an internal appeal.

On 15 February 2012 the Employment Law Directorate informed the complainant that his request could not be granted as the Office did not have access to the medical files kept by former external doctors. His request was then registered as an internal appeal and referred to the Internal Appeals Committee (IAC).

In its opinion, which it delivered on 15 December 2014 having heard the parties, the IAC recommended that the appeal be rejected as partly irreceivable and entirely unfounded. That recommendation was endorsed by the President of the Office in a decision of 9 February 2015. The complainant impugned that decision in his third complaint to the Tribunal.

Judgments 3694 and 3785 were delivered in public on 6 July and 30 November 2016 respectively. Although these judgments concerned cases that did not involve the complainant, they found the membership of the IAC at the time when it issued its opinion of 15 December 2014 to be unlawful. The President of the Office therefore withdrew his decision of 9 February 2015 and on 1 March 2017 remitted the complainant's internal appeal to a differently composed IAC. In Judgment 4256,

delivered in public on 10 February 2020, the Tribunal noted the withdrawal of that decision and dismissed the complainant's third complaint on the grounds that it had become devoid of object.

The complainant retired with effect from 1 September 2016.

After a fresh consideration of the appeal and the provision of further explanations by the parties, the IAC delivered a unanimous opinion on 26 June 2019. Addressing the Office's submission that it was physically impossible to provide the complainant with the medical file kept by Dr Ki. – who had died in the meantime – it found that there had been a breach of the duty of care incumbent on every organisation to safeguard employees' personal data. It recommended that the complainant be awarded 5,000 euros in compensation for the moral injury resulting in particular from the Office's failure to safeguard his personal medical data and the sum of 750 euros for the undue length of the procedure. Attempts were subsequently made to reach an amicable settlement between the EPO and the complainant, without success. By a letter of 15 May 2020, the complainant was informed that the President of the Office had decided to endorse the IAC's recommendations. That is the impugned decision, which bears the reference R-RI/2017/064.

The complainant asks the Tribunal to set aside the impugned decision and the IAC's opinion and to order the EPO to provide him with his complete medical file (covering the period from 1996 to 2011) in the proper manner. In the event that proof is provided of the file's deliberate or accidental destruction or an acknowledgement of its loss, he asks that the Organisation be ordered to pay specific damages. He further claims compensation for the moral injury allegedly suffered and an award of 7,000 euros in costs.

The EPO submits that the complaint is partially irreceivable and devoid of object owing to the fact that it is physically impossible to provide a copy of the complainant's medical file. In its view, the amount of compensation is the only matter in dispute. It asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. In his tenth complaint, the complainant seeks the setting aside of the decision taken by the Principal Director of Human Resources on 15 May 2020 by delegation of power from the President of the Office and the IAC's opinion of 26 June 2019 which that decision endorsed. In that decision, the EPO accepted the IAC's recommendation to pay the complainant damages in the amount of 5,000 euros owing to the Organisation's failure in its duty to ensure the proper retention of medical files, even after the external doctor concerned had ceased to practise, and the moral injury which that failure may have caused. On the basis of the submissions before it, the IAC established that the EPO was not in possession of the medical file at issue and did not have access to the medical files kept by external doctors who worked for the Organisation before 2005. It found that the EPO was thus not able to provide the complainant with the medical file kept by Dr Ki., who had died in the meantime. The IAC also recommended that the complainant be awarded damages in the amount of 750 euros for the undue delay in the internal procedure.

2. The complainant's claims before the Tribunal take the form of a four-part alternative, namely:

(i) the Tribunal should order the Organisation to provide the complainant with his complete medical file from the period when he was under Dr Ki.'s care until 2011, and award him damages of over 80,000 euros for moral injury, affronts to his dignity, integrity and honour, damage to his health, loss of opportunity and undue delay, as well as 7,000 euros in costs "for the time and energy consumed over a difficult [ten] years"; or

(ii) the Tribunal should order the Organisation to discover and inform the complainant where the medical file is being stored, and award him the same damages and costs as set out in point (i) above; or

(iii) if the medical file has been destroyed or lost, the Tribunal should order the Organisation to produce evidence of its destruction, and award the complainant damages of over 120,000 euros on the same

grounds as stated in point (i) above, as well as costs of 7,000 euros. If it is shown that the file was destroyed deliberately and "perforce unlawfully", the Tribunal should award the complainant damages of over 130,000 euros, with the same costs; or

(iv) if the Organisation admits that the medical file has been lost, the Tribunal should order it to start searching immediately so that the file may be located and produced, and award the complainant damages totalling over 210,000 euros on the same grounds and costs in the amount of 7,000 euros as described above.

3. The complainant requests that oral proceedings be held. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow the Tribunal to be properly informed of their arguments and the evidence. That application is therefore dismissed.

4. The complainant also seeks the setting aside of the IAC's opinion. However, in itself, that opinion was merely a preparatory step in the process of reaching a final decision, which did not itself cause injury. As the Tribunal noted in Judgment 4392, consideration 5, "[a] request to declare the opinion of the [IAC] null and void is irreceivable as the [IAC] has authority to make only recommendations, not decisions". Established precedent has it that such an opinion does not in itself constitute a decision causing injury which may be impugned before the Tribunal (see, for example, Judgments 3171, consideration 13, 4118, consideration 2, and 4464, consideration 10). It follows that this request is irreceivable.

5. The complainant also requests that the EPO be ordered either to provide the medical file which it does not have, or to seek and identify a storage location unknown to it, or to provide evidence that the medical file was destroyed, or to seek the file. Again, established precedent has it that it is not within the Tribunal's competence to make orders of this kind against organisations (see, for example, Judgment 3506, consideration 18, 3835, consideration 6). These requests will thus be dismissed.

6. The EPO submits that the complaint is partly irreceivable because it is physically impossible for it to provide a copy of the medical file as the complainant requests. However, that does not render the complainant's request moot.

7. On the merits, the complainant mainly seeks to obtain his full medical file for the period from 1996 to 2003, when he was under Dr Ki.'s care, and until 2011. However, as the IAC noted and the Organisation has confirmed, the EPO simply did not have access to the medical files kept by external doctors until 2005. In fact, when he contacted Dr Ko. on 4 October 2011, the complainant was told that the service headed by Dr Ko. as medical adviser did not hold any medical file for him. Dr Ko. also explained to the complainant that the files kept by the external doctors who had previously worked with the Office had not been handed over to the medical service after 2005 and that such a handover would in any case have breached doctor-patient confidentiality. According to the submissions, Dr Ko. advised the complainant to contact Dr Ki. directly. The submissions do not show whether the complainant attempted to do so at any point.

Subsequently, in a further exchange of correspondence that occurred later in October 2011, the EPO confirmed to the complainant that it was physically impossible to provide him with the medical file, which it simply did not possess. It also appears that by 2011 Dr Ki. had already been dead for several years.

8. The Tribunal finds that it is indeed impossible to grant the complainant's main request and it must therefore be dismissed. The Tribunal adds that the complainant is wrong to submit that the IAC unduly restricted the scope of his request for the medical file to the period from 1996 to 2005. It is true that paragraphs 2 and 13 of the IAC's opinion may cause confusion in this respect. However, the Tribunal notes from the submissions and the evidence that, given the fact that the complainant's file did not contain any medical records in 2011, as Dr Ko. had told him, the IAC was correct to focus its analysis on the main element of the complainant's request at the time when it delivered its opinion, namely acquisition of a copy of the medical file in Dr Ki.'s

possession dealing with the complainant's consultations with him between 1996 and 2003.

9. In these circumstances, given that proven physical impossibility, and failing any demonstration or evidence that the impossibility is false, inaccurate or intentional, let alone a "baseless contention", as the complainant puts it in his rejoinder, his persistent requests since 2012 seeking to obtain the complete medical file from the time when Dr Ki. was in practice, to force the Organisation to search for it and to have its destruction or loss sanctioned are therefore unwarranted, however regrettable that physical impossibility might be.

10. Furthermore, in its opinion the IAC noted that, while there were no explicit legal provisions that could justify the complainant's request for the Organisation to provide or procure such a file in the circumstances of the case, the Tribunal's case law recognises that a staff member has the right to consult and be sent medical reports concerning her or him. The IAC rightly concluded that the Office had failed to ensure that files were properly retained, even after the external doctors with whom it had previously worked had ceased their activity. This obligation stems from the general duty of care and the Office's duty adequately to safeguard the personal data of its staff.

11. Although the IAC stated that it was not convinced that the Office's failure could have directly caused any damage to the complainant's career or health, it concluded that this failure had nevertheless resulted in moral injury which justified an award of compensation to the complainant in the amount of 5,000 euros. The President of the Office endorsed this recommendation in the impugned decision.

12. The Tribunal's case law states in respect of damages that the complainant bears the burden of proof and she or he must provide evidence, in particular, of the causal link between the unlawful act and the alleged injury (for example, Judgment 4156, consideration 5). On this point, in his submissions the complainant alleges affronts to his dignity, integrity and honour, damage to his health, and a lost opportunity to

receive better therapy and rehabilitation and improve his relationship with his supervisors owing to the fact that it was physically impossible for the Organisation to provide him with a medical file that it did not possess. However, this injury has not been established, nor has the necessary causal link between the alleged unlawful act and the damages claimed. In these circumstances, it was open to the IAC, in its opinion that was endorsed by the President in his final decision, to take into account only the one element of moral injury it had identified. In the Tribunal's opinion, the compensation of 5,000 euros that the IAC recommended and that the Organisation recognised was due to the complainant constitutes fair redress for that moral injury.

The complainant's request for an increase in that amount is unfounded.

13. The complainant also alleges that the IAC breached his right to be heard. However, the Tribunal observes that the internal appeal procedure followed the applicable rules, and the IAC took into consideration the complainant's arguments in his submissions and assessed his entitlement to the damages that he claimed, including damages for possible harm to his career and health. In Judgment 4408, consideration 4, the Tribunal points out that "respect for the adversarial principle and the right to be heard in the internal appeal procedure requires that the official concerned be afforded the opportunity to comment on all relevant issues relating to the contested decision". The complainant's argument that this principle was not respected in this case is unfounded.

14. Lastly, the complainant takes issue with the undue length of the internal procedure.

The IAC's opinion shows that it carried out a detailed analysis of this question before recommending an award of 750 euros under this head. The President again endorsed this recommendation in his final decision. The complainant fails to show why that award provided insufficient redress for the injury in question.

15. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ