Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 13)

v.

EPO

134th Session **Judgment No. 4559**

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 29 August 2020, the EPO's reply of 9 March 2021, the complainant's rejoinder of 11 April and the EPO's surrejoinder of 12 July 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 impugns the refusal to grant him retroactively two days of annual leave as compensation for two days worked during that leave.

On 10 August 2015 the complainant – an employee of the European Patent Office, the EPO's secretariat, at its office in Berlin, Germany – signed a communication in which reference was made to oral proceedings to be held on 19 January 2016 concerning an application for which he was responsible as an examiner. On 24 November 2015 he requested annual leave from 23 December 2015 to 31 January 2016, which was approved. On 13 January 2016, during that leave, he signed a second communication that stated that the aforementioned oral proceedings would go ahead on 19 January, despite the absence of the applicant for the patent in question. The proceedings were held on the scheduled date.

In an email of 12 February 2016, the complainant – who stated that he had had to interrupt his annual leave for two complete days in order to prepare for and attend the oral proceedings – requested that his annual leave on 18 and 19 January be cancelled retroactively. He repeated his request in April. On 23 May 2016 his line manager informed him that his request had been refused on the grounds that, if the complainant intended to interrupt his annual leave, he should have informed him in advance or, in exceptional circumstances, on that day. As the complainant had not done so and had not used the electronic option enabling him to cancel his annual leave in time, his request could no longer be granted.

On 26 May 2016 the complainant submitted a request for review of that decision and requested that the two days of 18 and 19 January be credited to the balance of his annual leave for 2016. His request was rejected as unfounded on 13 July 2016 on the grounds, among others, that it was his responsibility to plan his annual leave in accordance with his professional obligations and that, in the light of the provisions of Rule 5(c) of Circular No. 22, retroactive cancellation of annual leave was possible only in exceptional cases and on the condition that the immediate superior was informed immediately. These conditions were not fulfilled in this case.

The complainant retired on 1 September 2016. On 10 October 2016 he lodged an internal appeal requesting that the two days spent dealing with the aforementioned oral proceedings be taken into account as working days, that they be remunerated in accordance with Article 64(1) of the Service Regulations or that those two working days be deducted from his annual leave balance. His appeal was forwarded to the Internal Appeals Committee (IAC), which issued an opinion on 25 March 2020 following an exclusively written procedure. It unanimously recommended that the appeal be rejected as partly irreceivable – the claim in respect of the deduction of days of annual leave having been overtaken by his retirement – and unfounded in its entirety. The IAC considered that the complainant had misunderstood the issue in dispute – which was not his entitlement to remuneration but the legal classification of the days in question – and that he had failed in his duty to inform his employer of his working hours and had not acted with sufficient diligence.

However, the majority of IAC members recommended that the complainant be awarded 200 euros in compensation for the length of the procedure. By a letter of 3 June 2020, the Vice-President of Directorate-General 4 (DG4), acting by delegation of power from the President of the Office, informed the complainant of her decision to endorse all of the IAC's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and the IAC's opinion, to "declare" the two days of annual leave on 18 and 19 January 2016 to be working days, to order the EPO to pay his salary for those two days worked and to pay him compensation in the amount of 28,000 euros for the moral injury he alleges to have suffered and the length of the procedure. He also claims 3,000 euros in costs and interest at the rate of 5 per cent per annum from 12 February 2016 on all sums paid.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part and unfounded. With regard to the claim for compensation for moral injury, it submits that the injury has not been proven and that the compensation sought is in any event excessive.

CONSIDERATIONS

1. In his thirteenth complaint, the complainant seeks the setting aside of the decision of the Vice-President of DG4, taken on 3 June 2020 by delegation of power from the President of the Office, to reject his appeal seeking that two days of annual leave that he spent working be recognised as working days and his request that he be remunerated for those two days worked or that they be deducted from his annual leave balance. The complainant asks that the Tribunal "declare" those two days to be working days and award him, in addition to his remuneration for those two days, compensation in the amount of 25,000 euros for the moral injury he alleges he suffered, the sum of 3,000 euros for the undue length of the procedure, and the sum of 3,000 euros in costs, with interest on all these amounts at the rate of 5 per cent per annum.

2. 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 all the relevant arguments and evidence. The request for oral proceedings is therefore rejected.

3. Nor is it appropriate, in the complainant's thirteenth complaint, to grant his request for the IAC's opinion to be set aside as, 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). This request is therefore irreceivable.

4. As regards the complainant's other claims, in this case, his main request is that two of his days of annual leave be considered as working days. The two days in question are 18 and 19 January 2016. His first request for retroactive cancellation of these two days of annual leave was made to the Office on 12 February 2016. His line manager informed him that this request had been rejected on 23 May. The complainant's request for review dated 26 May 2016 was rejected as unfounded on 13 July. He lodged his internal appeal on 10 October. In the meantime, he retired on 1 September 2016.

5. Article 59(1) of the Service Regulations states the following in respect of annual leave for permanent employees:

> "(1) (a) Permanent employees shall be entitled to annual leave of thirty working days per calendar year. For the purposes of this chapter, Saturdays shall not count as working days. Annual leave should normally be taken before the end of the current calendar year. If this is not possible because of the requirements of the service, it must be taken in the next following year.

(b) Permanent employees aged 65 and over having accrued 35 years of reckonable service for pension entitlement and having thus reached the maximum rate of retirement pension will benefit from 12 days' additional annual leave per calendar year."

Article 59 is supplemented by paragraphs (a) and (c) of Rule 5 of Circular No. 22 on "[g]uidelines for leave", which, concerning periods of annual leave and the procedure, provides, inter alia:

"**Rule 5**

Article 59
Annual leave

(a) Annual leave - Periods

(i) Annual leave may be taken in one or more instalments at the convenience of the permanent employee concerned and with due regard to the requirements of the service.

(ii) Newly appointed staff should normally not apply for leave during their first three months of service unless they have good grounds for doing so.

[...]

(c) Procedure

Annual leave shall be taken in units of full or half days. A permanent employee wishing to take annual leave must indicate by means of an electronic form the first and last dates of the period requested. This form is to be submitted as early as possible but at least three working days before the commencement of the leave. It is then automatically forwarded to his immediate superior for approval and then to the appropriate Personnel Department for registration.

In justified cases, the immediate superior may agree to waive the three working days limit for obtaining the authorisation.

Save in exceptional cases, a permanent employee is not permitted to depart on annual leave until his immediate superior has approved the leave. In such an exceptional case the immediate superior must be informed immediately.

At the Office's request, contact details for the leave period should be submitted to the immediate superior, as soon as they are known."

6. It is also appropriate to state the content of two other provisions of Rule 5, namely paragraph (e), which deals with leave management and the carry-forward of entitlement, and paragraph (f), which deals with the balance of entitlement in the event of cessation of employment:

"(e) Leave management and carry-forward of entitlement

(i) Annual leave should normally be taken during the year in which it is due.

(ii) Any balance of annual leave, equal to or less than twelve days, remaining at the end of the year, will be automatically carried forward to the following year.

(iii) Application may be made to carry forward any balance greater than twelve days only if the employee concerned has, for operational reasons certified by his superior or for other reasons beyond his control, been unable to take the whole of his annual leave during the year in question. In such cases, and irrespective of the reasons, the number of days of leave that may be carried forward is strictly limited to 30 days.

[...]

(f) Balance of entitlement - Cessation of employment

(i) Upon cessation of employment, the balance of leave due to a permanent employee may not exceed twelve days. The President may allow exceptions in demonstrable cases of force majeure.

[...]"

7. According to the submissions, when he retired on 1 September 2016, the complainant received a payment equivalent to 12 days of annual leave, as provided for under aforementioned Rule 5(f)(i) of Circular No. 22. Insofar as the complainant still requests, as he did in his internal appeal and his requests to the Office in February and May 2016, that he be granted two additional days of annual leave as compensation for the work done on 18 and 19 January 2016 or that those days be credited to his annual leave balance for 2016, this request is unfounded since the applicable provision specifically states that a permanent employee is normally entitled only to a balance of leave not exceeding 12 days on cessation of employment, which the complainant received. Neither the parties' submissions nor the documents in the file establish either that the complainant requested the President to make an exception to this rule or that there was a case of force majeure that would allow such an exception to be made.

8. It follows from the foregoing that, also according to the submissions, the complainant received the remuneration to which he was entitled under Article 64(1) of the Service Regulations, which provides, inter alia, that, save as otherwise expressly provided, a permanent employee who is duly appointed is entitled to the remuneration appropriate to his grade or step until he ceases employment. If the two days of annual leave on 18 and 19 January 2016 had instead been regarded as working days, the complainant would, in the best-case scenario, have found himself with a balance of 14 days of annual leave at the time of his retirement, whereas, as has already been stated, the applicable provisions specify that he could not normally claim more than 12 days of accrued annual leave in this respect.

9. With regard to the claim for material damages for those two days of work, in his rejoinders to the IAC and the Tribunal, the complainant draws attention to the Organisation's alleged breach of its duty of care in his regard and to the fact that he was thus deprived of a real opportunity to use those two additional days of annual leave before he retired on 1 September 2016.

10. In the impugned decision, the Vice-President referred to the IAC's opinion of 25 March 2020, stating that she endorsed its unanimous opinion on the grounds stated therein and its majority recommendation to award compensation of 200 euros for the length of the procedure. However, the Tribunal considers that the IAC's opinion contains mistakes that warrant setting aside the impugned decision which is based on that opinion.

First, in paragraph 53 of its opinion, the IAC states that "the [complainant] places the entire responsibility on his supervisor or at least seeks an acknowledgement that he and the Office share responsibility"[*]. However, the submissions and the documents in the file do not establish that the complainant acknowledges shared responsibility. His submissions

[*] Registry's translation.

are unambiguous on that point. He does not accept responsibility for the events in any way.

Second, in paragraph 55 of its opinion, the IAC emphasises that "the file contains no evidence that the [complainant] was present at his place of work on the two days in question"[*], which is both incorrect and does not appear to have been called into question by the Organisation itself. In its submissions and the documents in the file, the Organisation mainly criticises the complainant for failing to inform it within a reasonable time of the interruption of his annual leave, not for not having performed the work he states he performed on 18 and 19 January 2016. This statement by the IAC is all the more surprising given that the complainant explains that what he did on 18 and 19 January 2016 related to the processing of an application to the Office in which two other members of the Examining Division were involved and which led to minutes being signed on 19 January 2016. It is therefore incorrect to consider the complainant's submissions on this point as an attempt to reverse the burden of proof, as the IAC states in its opinion. The complainant is merely noting, with some fairness, that it would have been easy for the Office, which was aware of the precise details of the unsuccessful attempts that he asserted he made to contact his line manager on 18, 19 and 20 January 2016, to have ascertained the truth of his statements that he was at work in order to process the application simply by checking the content of his statements with the administrative employee of the Directorate or the chairperson and the second member of the Examining Division who had all been involved in processing the application and were present on a daily basis in the Berlin office, close to the office of the complainant's line manager, for most of the period from 15 January to 23 May 2016.

Furthermore, in paragraph 56 of its opinion, the IAC found fault with the complainant for failing in his duty to inform his line manager within a reasonable time of the interruption of his annual leave. However, while it is correct to point out that the complainant could have been more transparent and diligent in registering, interrupting or returning from annual leave, and that he is certainly not blameless in

[*] Registry's translation.

this respect, the IAC's assertion that the delay of less than one month is unreasonable in the present case at the least errs in that its assessment does not consider whether this delay could have caused any injury to the Office in the circumstances of the case. The assertion that the Office was unable to ascertain the truth of the complainant's allegations is incorrect, as is the assertion that doing so would have caused it difficulty. The Tribunal also observes that the duty to inform, which the Office and the IAC attribute to the complainant, is not specifically mentioned in the applicable provisions and that only an interpretation *a contrario* of certain passages of these provisions makes it possible to support. By contrast, the submissions show that the complainant was never informed of the content of this duty before the events in question took place.

The IAC committed a further error in its assessment in completely passing over any discussion of the Office's duty of care in the circumstances of the complainant's request and his alleged breach of his duty to inform. In his rejoinder to the IAC, however, the complainant had specifically referred to a breach of the duty of care by his line manager, in particular in respect of the criticism directed at the complainant for having failed properly to inform his line manager or inform him in a timely manner of the interruption to his annual leave. However, it is well established in the Tribunal's case law that international organisations are bound to refrain from any type of conduct that may harm the dignity or reputation of their staff members (see, for example, Judgment 3613, consideration 46) and that the general principle of good faith and the concomitant duty of care require them to treat their staff with due consideration in order to avoid causing them undue injury (see, for example, Judgment 3861, consideration 9).

In the present case, it is true that the complainant had information available to him on 13 and 15 January 2016, or even earlier, that would have enabled him to notify his line manager of the foreseeable interruption of his annual leave on 18 and 19 January, that he did not submit any tangible evidence to support his statement that he made several attempts to inform his line manager on those two days, that he did not use the available means of email or an electronic form to do so, and that he did

not immediately inform his line manager on his return on 1 February 2016, but only on 12 February in an email sent to the cluster assistant, rather than his line manager. However, the fact remains that the Organisation was officially informed of the interruption of the complainant's annual leave in February 2016 and that his line manager replied to him, albeit with some delay, on 23 May. In the Tribunal's view, the general principle of good faith and the duty of care required the Organisation to avoid causing unnecessary injury to the complainant in a case where no harm was done to the Organisation, the interruption of the complainant's annual leave was specifically intended to provide a useful service to the Organisation in processing an application before the Examining Division, and the complainant's request to be granted these two days of annual leave in compensation for the two days of work was submitted in sufficient time to enable him to use two additional days of leave before his retirement on 1 September 2016. In the present case, the breach of that principle and that duty clearly deprived the complainant of a real opportunity to benefit from these two additional days of annual leave between February 2016 and 1 September 2016.

11. Although the impugned decision is based on these various errors, the Tribunal finds that they were not such as to cause the complainant material injury.

First, it is clear from his pay slip for January 2016 that he received his salary without remuneration for these two days of annual leave being deducted.

Second, on his retirement the complainant received the highest amount of compensation envisaged under the abovementioned provisions of Rule 5 of Circular No. 22.

That claim will therefore be dismissed.

12. The complainant also seeks moral damages in the amount of 25,000 euros. In particular, he states that he perceived the actions, prevarications and abuses that marked the entire procedure as an attack on his dignity, integrity and honour.

The Tribunal notes, however, that, as already stated in consideration 10, above, the complainant is not blameless for the manner in which his request for two days of annual leave to be converted into working days had to be examined. This is all the more so as the Tribunal also observes that it was the complainant himself who, on 10 August 2015, set 19 January 2016 as the date for processing the application in question. Nevertheless, the Organisation could not have been unaware of the complainant's imminent retirement on 1 September 2016 after 35 years of service and could not reasonably call into question the fact that he had in fact worked on 18 and 19 January 2016. It would have been a simple matter to acknowledge in good time the two days of annual leave for which the complainant sought compensation so that he could use them before he retired.

In these circumstances, the Tribunal considers that the moral injury that the complainant alleges will be adequately redressed by an award of 1,000 euros.

13. Lastly, as regards moral damages for the undue length of the internal appeal procedure, the Tribunal notes that the complainant has already received an award of 200 euros under this head, pursuant to the impugned decision. The complainant does not establish convincingly in his submissions that he suffered injury warranting a greater amount in redress.

This claim will therefore be dismissed.

14. As he succeeds in part, the complainant is entitled to costs, which the Tribunal sets at 500 euros in view of the fact that he did not engage a lawyer for the purposes of his thirteenth complaint.

DECISION

For the above reasons,

1. The decision of the President of the Office of 3 June 2020 is set aside.
2. The EPO shall pay the complainant moral damages in the amount of 1,000 euros.
3. It shall also pay him costs in the amount of 500 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 4 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