

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

P. (Nos. 3 and 4)

v.

EPO

(Application for execution)

137th Session

Judgment No. 4784

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 4051 filed by Mr G. P. P. on 17 July 2020, the reply of the European Patent Organisation (EPO) dated 20 October 2020, the complainant's rejoinder of 3 December 2020 and the EPO's surrejoinder of 12 March 2021;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

CONSIDERATIONS

1. In Judgment 4051, which is the object of this application for execution, the Tribunal set aside the decision, dated 23 June 2016, by which the President of the European Patent Office dismissed the complainant for misconduct after a disciplinary procedure. The Tribunal also set aside the impugned decision of 15 November 2016 confirming the dismissal. In point 2 of the decision in Judgment 4051, the Tribunal ordered the EPO to reinstate the complainant in accordance with consideration 14 of the judgment. In consideration 14, the Tribunal had relevantly stated that "the EPO will be ordered to reinstate the complainant with effect from 23 June 2016 with all salaries, allowances

and benefits, however, deducting the amounts which it has paid him since that date”. The critical question that arises on this application is whether the expression “all salaries, allowances and benefits” encompasses annual leave and home leave entitlements.

2. The record shows that, following the public delivery of Judgment 4051 on 26 June 2018, the EPO promptly took steps to execute the judgment. The complainant was reinstated with effect from 23 July 2018 and resumed his duties as a patent examiner on 31 July 2018 because he had been on sick leave. By the end of August 2018, the EPO had paid the complainant all the amounts it considered it owed him pursuant to the Tribunal’s orders. However, a dispute arose between the parties as to whether the complainant should be credited with annual leave and home leave entitlements for the period between his dismissal and his reinstatement. The EPO refused to grant these entitlements on the basis that, as the complainant had performed no actual service during the period in question, no annual leave or home leave entitlements had accrued.

3. At the material time, the provisions of the Service Regulations for permanent employees of the European Patent Office governing annual leave and home leave relevantly provided as follows:

**“Article 59
Annual and special leave**

- (1) (a) Permanent employees shall be entitled to annual leave of thirty working days per calendar year. [...] 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.

[...]

**Article 60
Home leave**

- (1) Employees who (i) took up service with the Office before 1 April 2018 and (ii) are nationals of a Contracting State other than that in which they are employed shall receive eight working days’ additional leave every two years to return home. Travel expenses for such leave shall be reimbursed to the employee concerned under the conditions laid down in Article 77.

[...]”

Additionally, Rule 10(a) of Circular No. 22 relevantly stated that “[...] (ii) One period of home leave will accrue in respect of each period of 24 months’ service [and that] [s]ubject to the exigencies of the service, it may be taken at any time within that period [...] (iii) Any home leave not taken during the two-year period during which it accrues will be forfeited except in cases of force majeure, when the period will be extended by three months. [...]”

4. Although the complainant had initially asked to be credited with 180 days of annual leave and 33 days of home leave (based on his entitlements going back to 2013), in his application for execution he refers only to the period from 23 June 2016 to 23 July 2018, for which he asks to be credited with 64.5 days of annual leave and 11 days of home leave. He also claims moral damages and costs.

5. In opposing the complainant’s claim to be credited for accrued home and annual leave for the subject period, the EPO recalls the Tribunal’s statement in consideration 4 of Judgment 2988 that “an organisation has a duty to calculate staff salaries and benefits in accordance with its regulations and rules [and that] [t]his applies equally to the calculation of the amount due for salary and benefits pursuant to a judgment of the Tribunal”. The EPO argues, by specific reference to the Tribunal’s case law in considerations 7 to 9 of Judgment 1985, that the complainant is not entitled to be credited for either accrued home or annual leave for the period in question as such leave “is intrinsically linked to the performance of service” and the complainant did not perform any actual service for it during that period.

6. The Tribunal notes that Judgment 1985 concerned a complaint against the EPO in which the complainant’s employment had ended on 31 May 1995, but in September 1997, she accepted another employment contract with retroactive effect from 1 June 1995 and thereupon requested annual leave and home leave for the period during which she had not worked (from June 1995 to September 1997). Having noted the rules related to annual and home leave, the Tribunal relevantly concluded, in considerations 7 and 8, that under their terms, the

complainant was not entitled to either annual leave or home leave. With respect to annual leave, the Tribunal considered that annual leave was a period of rest granted to employees each calendar year, the length of which was calculated on the basis of service completed. The right to such leave could be acquired only after a period of actual work, which might include periods, of which there was an exhaustive list in Circular No. 22, that were treated as periods of actual work. In that case, as the complainant had completed no period of service which could be treated as a period of actual work, the Tribunal held that she could not claim annual leave for the period in question.

7. In Judgment 1985, the complainant, whose contract of employment had been renewed retroactively, had indeed performed no duties for the EPO during the period in question. This was not however due to circumstances created by the EPO that prevented her from taking annual leave, which yields a contrary result in the Tribunal's case law, stated, for example, in consideration 23 of Judgment 4411. In this consideration, the Tribunal stated, in effect, that a staff member is entitled to be paid the full annual leave which she or he was unable to take due to circumstances created by the organization. In the present case, inasmuch as it was further to the EPO's unlawful decision to dismiss the complainant that he was unable to take annual leave between 23 June 2016 and his reinstatement at the end of July 2018 (pursuant to the order in Judgment 4051), he is entitled to be credited with the accrued annual leave for the subject period. For the same reason, he is also entitled to be credited with accrued home leave for the same period. There is nothing in either Articles 59 and 60 of the Service Regulations or in Rule 10(a) of Circular No. 22 that leads the Tribunal to contrary conclusions.

8. Under the relevant rules, the complainant is entitled to 30 days' accrued annual leave each year. This translates to 16 days for 2016, 30 days for 2017 and 16.5 days for 2018, since the EPO has already credited him with 13.5 days for the remaining part of 2018 following his reinstatement. He is also entitled to be credited with eight days of home leave for the period during which he was unlawfully

dismissed. By way of execution of Judgment 4051, the EPO will be ordered to credit the complainant with 62.5 additional days of annual leave and eight days' home leave days.

9. As the complainant prevails in this application, the EPO will be ordered to pay him costs in the amount of 3,000 euros. However, as he has not articulated the injury which the EPO's refusal to compensate him for his accrued annual leave has caused him, and does not show that the EPO's refusal to compensate him was actuated by ill will or bad faith, no order for moral damages will be made.

DECISION

For the above reasons,

1. The EPO shall credit the complainant with 62.5 days' annual leave and eight days' home leave for the period 23 June 2016 to 23 July 2018.
2. The EPO shall also pay him costs in the amount of 3,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER