106th Session **Judgment No. 2805**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A.H. K. against the European Patent Organisation (EPO) on 11 June 2007 and corrected on 25 June, the EPO's reply of 1 October, the complainant's rejoinder of 12 November 2007 and the Organisation's surrejoinder of 25 February 2008;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1964, joined the European Patent Office – the EPO's secretariat – in December 1986 as an administrative employee at grade B2. He was promoted to grade B3 in October 1996.

On 1 June 2005 the complainant lodged a complaint of harassment under Circular No. 286 concerning the protection of the dignity of staff, involving four managers. Upon receipt of the

complaint by the President of the Office, the formal procedure of resolution of harassment-related grievances was initiated in accordance with the aforementioned circular, and an outline of the complaint was forwarded to the Ombudsman on 1 November 2005. The latter met with the complainant on 7 November and 8 December 2005 and submitted her report to the President on 9 March 2006. In the executive summary of that report, she concluded that, although management practice had not been exemplary and the complainant's dignity had not always been respected, under the strict limitations of Circular No. 286 – which in her opinion did not reflect a sufficiently wide definition of harassment – there was no proven case of persistent or recurring harassment on the part of any of the managers involved. By letter of 19 May 2006 the President informed the complainant that, in light of the Ombudsman's conclusions, he had decided to reject his complaint. However, he would no longer report to his immediate superior, provided that the interests of the service so permitted and that the superior in question would not be adversely affected. His performance would continue to be closely monitored. He invited the complainant to avail himself of counselling services, noting that the Office's counsellor remained at his disposal and could refer him to other specialists.

In a letter to the President of 21 August 2006 the complainant indicated that he was lodging an internal appeal against that decision under Article 15 of Circular No. 286 and that further details would be provided by his counsel at a later date. The Director of the Employment Law Directorate replied on 8 September 2006 that, due to the absence of a statement in support of his appeal, the President had not been able to examine the grounds for review of the contested decision, and had thus decided to reject the appeal. The Director added that the complainant's failure to submit a statement demonstrated lack of respect towards the President, and that the opinion of the Internal Appeals Committee would be requested once he had provided sufficient reasons for his appeal.

In a letter to the President dated 6 March 2007 the complainant's counsel asserted that the above-mentioned letters of 19 May and 8 September 2006 constituted proof of "public degradation" and

"intimidation" respectively, and that therefore his client's original complaint of harassment was still relevant. He requested that his client's appeal of 21 August 2006 be referred to the Internal Appeals Committee or, alternatively, that his letter be considered as a complaint of harassment lodged by the complainant within the meaning of Article 9 of Circular No. 286. In a letter to the complainant's counsel dated 29 March 2007 the President reiterated that it had not been possible for him to review the complainant's appeal due to the absence of sufficient grounds, and stated that the letter of 6 March 2007 could not be treated as a complaint under Circular No. 286 because it did not comply with the circular's requirements. On 11 June 2007 the complainant filed the present complaint with the Tribunal, arguing that no express decision had been taken with regard to his requests of 6 March 2007.

B. The complainant submits that the complaint is receivable under Article VII, paragraph 3, of the Statute of the Tribunal, because the EPO has failed to take a final decision upon his requests of 6 March 2007. He argues that the President's decision to reject his appeal without convening the Internal Appeals Committee was not a legitimate course of action. Alternatively, he submits that the complaint is receivable under Article VII, paragraph 2, of the Tribunal's Statute. In support of his argument, he contends that, since Article 109(2) of the Service Regulations for Permanent Employees of the European Patent Office allows the President to reject an appeal implicitly, it follows that he can also reject an appeal expressly, in which case the response of 29 March 2007 constitutes a final decision.

On the merits the complainant asserts that the President's refusal to refer his appeal to the Internal Appeals Committee or to initiate the formal procedure of resolution with respect to his complaint of harassment lodged on 6 March 2007 is unlawful. Relying on Article 109 of the Service Regulations, which requires that an Appeals Committee be convened without delay to deliver an opinion if the President considers that a favourable reply cannot be given to an

internal appeal, he contends that he was denied the right to be heard and to have his case reviewed in accordance with the applicable law. Regarding the contention that he failed to substantiate sufficiently his appeal, he points out that the Administration had at its disposal the Ombudsman's 130-page report. Furthermore, under Article 113(2) of the Service Regulations the Appeals Committee may request and receive evidence on its own motion. Referring to the alternative request put forward in his letter of 6 March 2007, he argues that by failing to assign an Ombudsman to examine his complaint of harassment, the President acted contrary to the principle of equal treatment and in breach of Article 9 of Circular No. 286, which requires that upon receipt of a harassment-related grievance an Ombudsman be assigned without delay.

The complainant requests that the President's decision of 29 March 2007 be set aside and that his appeal dated 21 August 2006 be referred to the Internal Appeals Committee or, alternatively, that the formal procedure of resolution of harassment-related grievances provided for in Article 9 of Circular No. 286 be initiated in respect of his complaint of harassment lodged on 6 March 2007. He claims moral damages in the amount of 5,000 euros and costs in the amount of 3,750 euros.

C. In its reply the Organisation submits that the complaint is irreceivable and ill-founded. It points out that the complainant failed to exhaust the internal means of redress in that he challenged directly before the Tribunal the President's decision of 29 March 2007 without first having contested it internally.

On the merits the EPO asserts that the President's decision to require the complainant to submit the grounds of his appeal prior to convening the Internal Appeals Committee was in line with the applicable provisions and the Tribunal's case law and within his discretionary authority. It dismisses the allegation that it acted in breach of the Service Regulations, arguing that the complainant's failure to provide a statement in support of his appeal was the reason that the President was unable to review the grounds of the appeal and thus felt compelled to reject it. It emphasises that, contrary to the

complainant's assertion, it did not deny him a hearing before the Internal Appeals Committee, but merely requested that he submit the reasons for his appeal in order for the President to assess the grounds on which he claimed to be adversely affected. It contends that the right of the Committee to obtain evidence of its own accord applies in cases where further information or an additional investigation are required, and does not relieve the complainant from the obligation to substantiate his appeal and to prove that he suffered injury. The Organisation denies that by refusing to convene the Internal Appeals Committee the President acted in breach of the principle of equal treatment or demonstrated behaviour which constituted harassment. In its opinion, the complainant's letter of 6 March 2007 could not be considered an admissible complaint of harassment in the light of the President's decision of 6 September 2006 concerning Circular No. 286, according to which a complaint is inadmissible unless it indicates a minimum of facts, names and locations.

D. In his rejoinder the complainant presses his pleas. He reiterates that the complaint is receivable, underlining that it was the President's inactivity that obstructed the internal appeal proceedings and prevented him from exhausting the internal means of redress.

E. In its surrejoinder the EPO maintains its position in full.

CONSIDERATIONS

1. The complainant lodged a complaint of harassment under Circular No. 286 concerning the protection of the dignity of staff on 1 June 2005. The complaint was referred to the Ombudsman who submitted her report to the President of the Office on 9 March 2006. In the executive summary of that report the Ombudsman referred to the text of Circular No. 286, which defines harassment inter alia as "persistent or recurring behaviour which is inappropriate, offensive, intimidating, hostile, abusive, malicious or insulting" and "persistent

unjustified criticism". She stated that, in her view, Circular No. 286 did "not reflect a wide enough definition of harassment" and added that "under increasingly generous definitions of harassment in Europe, it may have been possible to uphold [the complainant's] belief that harassment […] occurred". She concluded that her finding with respect to the complainant's direct supervisor did "not appear to meet the threshold to demonstrate that persistent or recurring harassment occurred" and that "under the strict limitations of Circular No. 286, there [was] no proven case of persistent or recurring harassment" on the part of the other managers involved.

2. On 19 May 2006 the President informed the complainant, amongst other things, that he had decided to reject his complaint of harassment. Thereafter, on 21 August 2006, the complainant lodged an appeal against that decision saying that his counsel would provide further details at a later date. The Director of the Employment Law Directorate replied on 8 September 2006, stating that he considered it unacceptable for the complainant to say that further details would be provided at a later date, as it showed a lack of respect for the President personally and it did not permit him either to examine the grounds on which his decision was challenged or to establish their relevance. He added that the President considered that he could only register the appeal and dismiss it. However, the advice of the Internal Appeals Committee would be sought as soon as the complainant provided sufficient reasons for contesting the President's decision.

3. The complainant's counsel wrote to the President of the Office on 6 March 2007 requesting, unless corrective measures were taken, that the appeal lodged on 21 August 2006 be referred to the Internal Appeals Committee. In this regard, it was contended that grounds of appeal were not necessary. Additionally, it was claimed that aspects of the President's letters of 19 May and 8 September 2006 constituted proof of "public degradation" and "intimidation" respectively and that therefore the original complaint of harassment was still relevant. Accordingly, it was requested that, if the matter was not to be referred to the Internal Appeals Committee, the letter be

treated as a formal complaint pursuant to Article 9 of Circular No. 286 and that an Ombudsman be appointed. The President replied on 29 March 2007 giving reasons for not meeting either of those requests, but not expressly refusing them. The complainant filed his complaint to the Tribunal on 11 June 2007, challenging the implied decision constituted by the President's failure to respond expressly to the requests made in the letter of 6 March 2007. He now seeks alternative orders from the Tribunal to give effect to one or other of the requests made in that letter, together with moral damages and costs.

4. The EPO objects to the receivability of the complaint for failure to exhaust the internal means of redress. It states that the complainant should have provided grounds of appeal to allow the matter to proceed by way of internal appeal. The issue at the centre of the complaint is whether it is necessary to provide grounds of appeal. So far as concerns the request to the President that the complainant's appeal of 21 August 2006 be referred to the Internal Appeals Committee, the question whether grounds of appeal are necessary must be decided before the question of receivability can be determined. Indeed, if grounds of appeal are not required, the President's failure to meet that request – conveyed by his letter of 29 March 2007 – is properly to be viewed as a final decision rejecting the complainant's appeal with respect to his harassment complaint, with no further avenue of internal appeal open to him. That is because the earlier letter of 8 September 2006 from the Director of the Employment Law Directorate cannot be regarded as a final decision to that effect in view of the express statement that the opinion of the Internal Appeals Committee would be sought when sufficient reasons were provided.

5. Pursuant to Article 107(1) of the Service Regulations a staff member "may lodge an internal appeal […] against an act adversely affecting him" and pursuant to Article 108(1), "[a]n internal appeal shall be lodged with the appointing authority which gave the decision

appealed against". Article 109 relevantly provides:

> "(1) If the President of the Office […] considers that a favourable reply cannot be given to the internal appeal, an Appeals Committee as provided for in Article 110 shall be convened without delay to deliver an opinion on the matter […].
>
> (2) If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected […]."

There is no express provision in the Service Regulations or in Circular No. 286 requiring that grounds of appeal be specified when lodging an appeal. However, the EPO contends that that is necessarily implied by reason of Article 109(1) so that the President can decide whether to make a favourable reply. In support of this argument, it points to the requirement in Article 106(1) that "[a]ny decision adversely affecting a person shall state the grounds on which it was based", as well as observations by the Tribunal in Judgment 1369 with respect to the general duty of a decision-maker to give reasons. Additionally, it relies on Judgment 2381 where the Tribunal noted that it was the duty of a complainant to put forward specific arguments in support of his complaint.

6. The complainant argues that not only is there no express provision requiring that grounds of appeal be stated when lodging an appeal, but that Article 109(1) provides the President with only two options, that is either to give a favourable reply or to convene an Appeals Committee. It is not possible, according to the complainant, to reject simply the appeal and/or refuse to forward it to the Appeals Committee. So much may be accepted but it does not answer the question impliedly posed by the argument of the EPO, namely, whether an appeal can be instituted without specifying the grounds of appeal. Additionally, the complainant argues that, even if grounds of appeal are not specified, the Appeals Committee is able to carry out its functions because, by Article 113(1), the papers provided to it are to include all the material necessary for the investigation of the case and, by Article 113(2), it can carry out an additional investigation and the

Chairman may call for any additional document or information. He contends that the Ombudsman's report is all that is necessary for the Internal Appeals Committee to investigate the case and, if it wishes, it may call for information as to the basis on which the appeal is brought. Again, so much may be accepted but it does not deal with the issue of whether the President must be provided with grounds of appeal so that he can determine whether to give a favourable reply.

7. Where regulations and rules or other written documents are silent as to a matter, a term dealing with that matter may be implied, but only if it is so obviously comprehended within the text used in the regulations and rules or other document that its statement is unnecessary, or, if the term to be implied is necessary to give effect to some other term. The expressions "lodge an internal appeal" in Article 107 and "[a]n internal appeal shall be lodged" in Article 108 do not so obviously comprehend the formulation of grounds of appeal that the specification of that requirement is unnecessary. In this regard, it is sufficient to note that in many jurisdictions an appeal is initiated simply by a notice of appeal, with grounds being provided, if at all, in a subsequent document.

8. Although, and as the EPO points out, the specification of grounds of appeal renders the appeal process efficient, that course is not necessary to give effect to the terms of Article 109 of the Service Regulations. If no grounds are specified, the President may and, ordinarily, will reasonably conclude that he cannot give a favourable reply. The first part of the President's obligation under that Article is then satisfied and he can, and should, proceed to convene the Internal Appeals Committee. If the President wishes to ensure that, for the future, grounds for appeal are specified, he can take appropriate steps to bring that about.

9. An obligation to provide grounds of appeal is not to be implied in either Article 107 or Article 108 of the Service Regulations. Accordingly, the complaint is not irreceivable on that account.

10. The EPO also relies on Judgment 1829 to contend that the complaint is irreceivable. In that case, the Tribunal held:

> "Any challenge to administrative decisions which were rendered with regard to the complainant after the filing of the first internal appeal but which were not the subject of further internal appeals is irreceivable: such decisions are not final, the complainant not having exhausted all existing means of resisting them as Article VII(1) of the Tribunal's Statute requires."

The principle stated in that passage renders irreceivable the complainant's alternative request that the President be required to treat his counsel's letter of 6 March 2007 as a complaint of harassment in accordance with Article 9 of Circular No. 286. However, it is not relevant to the request for referral of his appeal to the Internal Appeals Committee because, as already pointed out under 4, the President's letter of 29 March 2007 constitutes a final decision rejecting that appeal. As the internal appeal lodged on 21 August 2006 must be referred to the Internal Appeals Committee, it is unnecessary to consider the further arguments relating to the alternative relief sought by reference to Article 9 of Circular No. 286.

11. With respect to the complainant's claim for moral damages, it is pertinent to note that, although the Administration's response of 8 September 2006 was, perhaps, a little precipitate, the complainant did state that further details would be provided, which, in context, could only mean grounds of appeal. They were not provided. However, at some stage, the complainant must provide some further details if he expects to succeed in his internal appeal. And it is to be presumed that the matter would have been referred to the Internal Appeals Committee in a timely manner had those details been provided as he said. In the circumstances, both sides are equally to blame for the delay that has since ensued. Accordingly, the claim for moral damages is rejected. However, the complainant is entitled to costs, which the Tribunal fixes at 500 euros.

DECISION

For the above reasons,

1. The President's decision of 29 March 2007 is set aside to the extent that it impliedly dismissed the complainant's internal appeal of 21 August 2006 and refused to refer that appeal to the Internal Appeals Committee.

2. The President of the Office is directed to transmit the complainant's internal appeal of 21 August 2006 to the Internal Appeals Committee within ten days of the delivery of this judgment.

3. The EPO shall pay the complainant's costs in the amount of 500 euros.

4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 7 November 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet