

117th Session

Judgment No. 3325

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 11 May 2010 and corrected on 6 August, the EPO's reply of 24 November 2010, the complainant's rejoinder of 11 March 2011 and the EPO's surrejoinder of 5 May 2011;

Considering the tenth complaint filed by Mr F. B. against the EPO on 18 January 2012, the EPO's reply of 3 April, the complainant's rejoinder of 25 May and the EPO's surrejoinder of 19 June 2012;

Considering Articles II, paragraph 5, and 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 cases and the pleadings may be summed up as follows:

A. Facts relevant to these cases are to be found in Judgment 3151 delivered on 4 July 2012 concerning the first complaint filed by the complainant before the Tribunal, and in Judgment 3249 delivered on 5 February 2014 concerning his third complaint. Suffice it to recall

that the complainant filed three internal appeals (RI/91/05, RI/112/05 and RI/182/07) with the Internal Appeals Committee (IAC) challenging, inter alia, his staff report for the period 1 January 2002 to 31 January 2003 and the date of his promotion to grade A4.

On 12 February 2009 the IAC, to which the three appeals had been referred, heard the complainant, his adviser and the EPO's representative. The parties agreed to consider first the complainant's claims concerning his staff report given that his two other appeals were linked to that first issue. The IAC issued its opinion on 1 April 2009 stating that it had decided to join the three internal appeals as they were interconnected. It unanimously recommended in particular that a new version of the complainant's staff report for the period from 1 January 2002 to 31 January 2003 should be drawn up. By a letter dated 29 May 2009 the Director of Regulations and Change Management informed the complainant that the President of the European Patent Office had decided to endorse the IAC's recommendation to allow his appeals in part.

On 5 February 2010 the complainant wrote to the Chairman of the IAC asking to be provided with the minutes of the hearing of 12 February 2009. He explained that he had to "examine and check" the content of the minutes, which seemed to be of particular importance in the context of the first complaint he had filed with the Tribunal. The Chairman replied by a letter of 15 February 2010 that his request was denied on the ground that the said minutes were internal working tools which, according to Article 18 of the Rules of Procedure of the IAC, shall serve the IAC for drawing up the opinion for the President and shall remain in the IAC's file. Consequently, the minutes could not be communicated to the Administration or the appellant. That is the decision the complainant impugns in his fourth complaint.

On 4 April 2011 the IAC heard the complainant, his adviser and the EPO's representative in connection with another internal appeal (RI/74/08), which the complainant had filed against his staff report for the period 2004-2005. In its opinion of 26 July 2011 the IAC recommended rejecting the appeal as unfounded. The complainant was

informed by a letter of 19 September that the President had decided to endorse that recommendation. On 4 November the complainant wrote to the Chairman of the IAC asking to be provided with the minutes of the hearing of 4 April, explaining that he had to “check” the information contained therein.

By a letter of 9 November 2011 the Chairman of the IAC informed the complainant that his request was denied. He again explained that, according to Article 18 of the Rules of Procedure of the IAC, the requested minutes were internal working tools. That is the decision the complainant impugns in his tenth complaint.

B. The complainant contends that he had no choice but to file a complaint directly with the Tribunal, because there would have been a potential conflict of interest on the part of the Chairman of the IAC had he filed an internal appeal against the latter’s decision not to provide him with a copy of the requested minutes.

On the merits he submits that he is entitled to be provided with the minutes of the hearings, which anyway have “no secret for him” given that he attended them. He explains that he made such a request because some particularly relevant information was available only in the minutes. He adds that the internal appeal proceedings could be considered transparent and impartial only if he was allowed to consult the minutes.

In both his fourth and tenth complaints, the complainant asks the Tribunal to set aside the impugned decisions and to order the EPO to provide him with the requested minutes of the hearings or, at least, a certified copy. He also claims costs.

C. In its reply to the tenth complaint the EPO requests that the complaint be joined with the complainant’s fourth complaint as they raise similar questions of fact and law.

It submits that both complaints are irreceivable for failure to exhaust internal means of redress. Indeed, the complainant filed his complaints directly with the Tribunal instead of filing an internal

appeal against the Chairman's decisions not to grant his request for disclosure of the minutes of the hearings. The EPO argues that this would have involved no conflict of interest, as the deputy Chairman of the IAC could have examined the appeals. Indeed, Article 110(4) of the Service Regulations for Permanent Employees of the EPO provides that two deputy Chairmen shall be appointed and shall take part in the proceedings of the IAC if the Chairman is not able to act, and Article 2 of the IAC Rules of Procedure provides that when the Chairman needs to be replaced he shall inform the relevant deputy Chairman and the Committee. Moreover, Article 2 specifically provides that a deputy Chairman shall be called upon in the event of partiality, illness or unavoidable commitments.

Subsidiarily, the EPO replies on the merits, stressing that the decisions of the IAC's Chairman were well founded and substantiated. According to Article 18(3) of the IAC's Rules of Procedure, the minutes of hearings held by the IAC are internal working tools, which are used to draw up the IAC's opinion, and are not communicated to parties. It adds that the IAC's proceedings were fully transparent and adversarial, that the complainant was heard by the IAC, and that a written and substantiated recommendation was issued by the IAC with respect to each of his appeals and communicated to him.

The EPO asks the Tribunal to order the complainant to bear the costs he incurred in relation to his fourth and tenth complaints.

D. In the rejoinder concerning his tenth complaint the complainant does not object to the joinder requested by the EPO. He further indicates that his tenth complaint could equally be joined with his ninth complaint. With respect to both his fourth and tenth complaints he points out that according to Article 113(1) of the Service Regulations the "papers submitted to the [IAC] shall include all the material necessary for the investigation of the case. They shall also be transmitted to the appellant." He argues that this rule also applies to the minutes of the hearings, which should therefore be communicated to him.

E. In its surrejoinder to the fourth complaint the EPO explains that the “papers” referred to in Article 113(1) consist of the IAC file which is usually communicated to the Tribunal. However, that file is not exactly the same as the one kept by the IAC, which may include minutes of hearings, internal deliberations and the IAC’s internal correspondence. The EPO otherwise maintains its position.

CONSIDERATIONS

1. In his fourth complaint, the complainant impugns the decision of the Chairman of the IAC, dated 15 February 2010, refusing his request for disclosure of the minutes of the hearings pertaining to three of his internal appeals (RI/91/05, RI/112/05 and RI/182/07) on the basis of Article 18 of the Rules of Procedure of the IAC. In his tenth complaint, he impugns the decision of the Chairman of the IAC, dated 9 November 2011, refusing his request for disclosure of the minutes of the hearings pertaining to his internal appeal (RI/74/08), again on the basis of Article 18 of the Rules of Procedure of the IAC.

2. As the complaints contain nearly identical claims and rest on the same arguments, the Tribunal finds it appropriate that they be joined (see Judgments 2861, under 6, 2944, under 19, and 3103, under 5).

3. The two impugned decisions are not final ones in accordance with Article VII(1) of the Statute of the Tribunal, and the complaints are therefore both irreceivable. Consequently, the Tribunal finds it unnecessary to examine any other questions of receivability, or the nearly identical arguments on the merits of the two complaints.

4. As provided under Articles 107 to 109 of the Service Regulations, decisions shall be deemed final and may be impugned before the Tribunal when all the internal means of redress have been exhausted. In the present cases, the impugned decisions were adopted by the IAC Chairman, respectively, on 15 February 2010 and 9 November 2011, after the adoption of the President’s final decisions

regarding the complainant's internal appeals (President's decisions dated 29 May 2009 and 19 September 2011), which followed the delivery of the relevant IAC opinions (1 April 2009 and 26 July 2011). As such, the Chairman's decisions cannot be considered to have been encompassed in the President's final decisions and therefore the complainant had to ask the President to review those new decisions and subsequently file internal appeals with the IAC if the President refused to review the decisions, in accordance with Articles 106 to 109 of the Service Regulations.

5. The Tribunal notes that after receiving the decisions of the Chairman of the IAC, the complainant did not request a review of those decisions by the President, nor did he file internal appeals against them, nor did he receive final decisions regarding his grievances prior to bringing his complaint to the Tribunal. Consequently, the complaints are irreceivable for failure to exhaust all internal means of redress, in accordance with Article VII of the Statute of the Tribunal. The complainant argues that he could not request review by the President as the IAC's decisions should be considered independent, nor could he file an internal appeal against them as the contested decisions were taken by the Chairman of the IAC and there would thus be a conflict of interest in the appeals process. The Tribunal points out that the composition of the IAC includes alternate members precisely to deal with issues of conflict of interest and that, contrary to the complainant's assertion, the IAC is an advisory body which works independently to draft recommendations and opinions regarding internal appeals but cannot be considered competent to make a final decision. That competency resides exclusively with the President.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS
DRAŽEN PETROVIĆ