

**118th Session**

**Judgment No. 3341**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr E. D. (his fourth) and by Mr W. M. against the European Patent Organisation (EPO) on 3 May 2010 and corrected on 8 July, the EPO's reply of 29 October, corrected on 22 November 2010, the complainants' rejoinder of 14 February 2011 and the EPO's surrejoinder dated 23 May 2011;

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 and the pleadings may be summed up as follows:

A. At the material time the complainants were serving officials of the European Patent Office, the secretariat of the EPO.

In January 2007 the Central Staff Committee (CSC) forwarded a document to the President of the Office for submission to the meeting of the Administrative Council in March. In this document, dated 23 January 2007, the CSC requested the Council to formally recognise the applicability of the European Convention on Human Rights, part I, and the case law of the European Court of Human Rights to the EPO and its staff. It also requested that the necessary actions be taken to

ensure that the rights guaranteed by the Convention are given equivalent protection within the EPO. It underlined the absence of a body of human rights law within the EPO and drew attention to the fact that the Tribunal has consistently refused to apply any law not explicitly referred to in the rules of an organisation.

By a letter of 26 February 2007, Mr D., who was then Chairman of the CSC, was informed of the President's decision not to submit the document of 23 January to the Administrative Council on the ground that substantive human rights principles were protected at the EPO and that the ILO Administrative Tribunal had repeatedly found that the general principles enshrined in the European Convention on Human Rights applied to relations with the staff in the EPO. However, the President had decided to set up a working group which would prepare an in-depth analysis of the legal protection of staff in the EPO, and which would assess the issues raised in the document of 23 January. He added that the CSC and the Administrative Council would be informed of the results of its assessment.

On 22 May 2007 Mr D., acting in his capacity as Chairman of the CSC, wrote to the President asking him to review his decision and to forward the CSC's document to the Council for discussion at its next meeting. He added that, in the event that his request was denied, his letter should be considered as an internal appeal, in which case he would also claim "real", moral and punitive damages as well as costs. By a letter of 21 November 2007 the complainant was informed that the President considered his request for review to be superfluous and had decided to refer the matter to the Internal Appeals Committee (IAC). On 1 February 2008 Mr D.'s legal representative notified the IAC that he was also representing Mr M., the new Chairman of the CSC, and asked that Mr M. be considered as an appellant in the internal appeal proceedings. He claimed the same relief as Mr D. but specified the claim for punitive and moral damages.

In its opinion of 7 December 2009 the IAC unanimously recommended the rejection of the appeal filed by Mr M. as irreceivable. Mr M.'s appeal was time-barred because he had filed it after the three-month time limit laid down in Article 108(2) of the

Service Regulations. According to the IAC, the legal interest of the CSC could be upheld by Mr D.

The majority of IAC members recommended that Mr D.'s appeal should be rejected as unfounded. In their view there was no obligation on the part of the President to forward the CSC's document to the Administrative Council. The majority also considered that human rights were applied within the EPO by way of a flexible approach to the European Convention on Human Rights, and that the legal protection of the staff was adequately guaranteed by the means of appeal available to them, including recourse to the Tribunal, which satisfied the requirements of Article 6(1) of that Convention. Consequently, there was no need to modify the existing rules. However, the minority considered, on the basis of Article 9 of the Council's Rules of Procedure, that the President was merely an intermediary between the CSC and the Council and that he was obliged to submit the CSC's document to the Council.

By a letter of 3 February 2010 Mr D. was informed that the President had decided to endorse the IAC majority opinion and to reject his appeal as unfounded. It was explained that the President enjoyed wide discretion under Article 10(2)(c) of the European Patent Convention in deciding whether or not a document drafted by the CSC should be submitted to the Council, and that there were no grounds to believe that this discretion had been exercised improperly, or that the decision was flawed. The President also agreed with the majority opinion that the protection of human rights within the EPO as well as the guarantees offered by the Tribunal complied with the legal standards expected of an international organisation. That is the decision impugned by Mr D. before the Tribunal.

By a letter bearing the same date Mr M. was informed that the President had decided to endorse the IAC's unanimous opinion that his appeal was irreceivable *ratione temporis*. That is the decision impugned by Mr M. before the Tribunal.

B. With respect to the receivability of their complaints, the complainants state that the complainant in this case is the CSC, and

that as successive Chairmen of that body they have standing to represent the CSC not only before the IAC but also before the Tribunal. Subsidiarily, they submit that they have standing to bring this case before the Tribunal individually and as Chairmen of the CSC.

According to the complainants, the President acted *ultra vires* and showed bad faith in refusing to submit the CSC's document to the Administrative Council. Article 9, paragraph 2.2(b), of the Council's Rules of Procedure provides that any request from the staff representatives to put items on the Council's provisional agenda and to submit documents to the Council shall be submitted via the President of the Office. This provision does not imply a right of veto on the part of the President.

They submit that the CSC's request that the Administrative Council verify that substantive human rights are applicable to the EPO and are actually applied by it was legitimate and not frivolous as alleged by the President. The matter had to be referred to the Council, given that human rights were not protected in the EPO, especially as there was no formal definition in the EPO's rules of the human rights to be protected. They also contend that the Tribunal has demonstrated serious deficiencies with respect to the protection of human rights owing to its refusal to take into account rights which are not defined in its Statute or in the staff regulations of a defendant organisation, or which do not stem from a general principle of law. The complainants add that the protection of the rights laid down in the European Convention on Human Rights is not always guaranteed by the Tribunal, as illustrated by its case law.

They further submit that the working group established to assess the legal protection granted to staff in the EPO had no formal mandate, was composed of internal staff members who had no expertise in human rights law and has not yet produced a report on its activities.

The complainants apply for public oral hearings and ask that all pleadings and documentation related to this case be made public. They explain that the issue at stake involves highly complicated political

and legal matters which are difficult to plead in writing. In addition, some aspects of the case involve a challenge to the practice of the Tribunal itself, which creates an increased need for transparency. They emphasise that the right to a fair and public hearing is guaranteed under the European Convention on Human Rights.

Each complainant asks the Tribunal to set aside the impugned decision, and to order the President of the Office to forward the document dated 23 January 2007 to the Administrative Council so that it may be examined at its next meeting. They also claim punitive and moral damages in an amount equivalent to 10 euros per staff member per year from the date on which the CSC's document could have been submitted to the Council for the first time and the date on which it will be submitted. Lastly, they claim costs.

C. In its reply the EPO submits that Mr M.'s complaint is irreceivable because his internal appeal was not filed within the prescribed time limit. It adds that the interests of the CSC can in any case be upheld by Mr D., and that its reply on the merits therefore concerns only the complaint filed by Mr D., unless the Tribunal considers that Mr M.'s complaint is receivable.

On the merits, the EPO contends that the decision to forward a CSC document to the Administrative Council lies with the President's discretion. Article 10(2)(c) of the European Patent Convention provides that the President "may place before the Administrative Council any proposal for amending this Convention and any proposal for general regulations or decisions which come within the competence of the Administrative Council". Given that the CSC urged the Council to take all necessary measures to amend the European Patent Convention, the document in dispute was a request to amend the Convention and was governed by the aforementioned provision. It adds that, by virtue of Article 9, paragraph 2.2(b), of the Council's Rules of Procedure, staff representatives have the possibility of bringing requests and documents before the Council, but the final word lies with the President.

The EPO emphasises that a discretionary decision is subject to only limited review by the Tribunal. It submits that the impugned decision involved no error of law, as the EPO is bound, to an extent commensurate with its activities, by general principles of law and the relevant customary law, including human rights. Consequently it was not necessary to list every single human right in its rules. In its view, there is no indication that human rights are not efficiently protected by the Tribunal. It argues that the means of redress open to EPO's employees before the Tribunal meet the requirement of Article 6 of the European Convention on Human Rights concerning the right to a fair trial. The Tribunal's Statute and Rules quite clearly show that it is an independent and impartial body.

According to the EPO, oral proceedings are not needed in this case because the parties' pleadings are sufficiently detailed and the case turns on matters of principle. It adds that the case law of the European Court of Human Rights itself shows that the right to public hearings is not absolute, as an exception may be made when the facts of the case are such that it is legitimate not to hear the party concerned. It contends that the complainants' claims for damages are unfounded. The complainants have not shown any unlawful behaviour on the part of the EPO or that they suffered any serious injury which would not be sufficiently redressed by the quashing of the impugned decisions.

D. In their rejoinder the complainants allege that the working group was never established and that the CSC has received no feedback on its work, contrary to the President's statement in February 2007 that the Office would report back to the Administrative Council and the CSC on the matter.

They contend that Article 10 of the European Patent Convention did not apply, because the CSC's document contained no specific proposal for amending the European Patent Convention. In fact the CSC thought that the Administrative Council would establish a procedure which would lead to an amendment of the Convention. They also point out that the letter of 26 February 2007 informing

Mr D. of the President's decision not to submit the CSC's document to the Council made no reference to that provision, in violation of Article 106 of the Service Regulations, which requires reasons to be stated in a negative decision when it is communicated to the employee concerned.

E. In its surrejoinder the EPO recalls that Article 10(1) of the European Patent Convention provides that the Office shall be directed by the President, who shall be responsible for its activities to the Administrative Council. This provision supports the EPO's interpretation of Article 9, paragraph 2.2(b), of the Council's Rules of Procedure, that the President is not compelled to submit documents to the Council. It asserts that a joint working group has been established and that the discussions on the topic of human rights protection are still ongoing.

#### CONSIDERATIONS

1. The two complainants filed the present complaints on behalf of the CSC, in their capacities as consecutive Chairmen. In January 2007, the CSC sent a request to the President to place a document (CA/xx/07) on the agenda of the Administrative Council to be held in March 2007. Following receipt of a letter from the Vice-President of Directorate-General 4 (dated 26 February 2007) stating that the President had decided not to submit the document to the Council as he disagreed with the conclusions and would forward it to the working group on legal protection for a "detailed assessment and consolidated position" instead, Mr D., as Chairman of the CSC, sent a letter to the President objecting to this refusal and requesting the President to reconsider or to treat the letter as an internal appeal. The President denied the request and forwarded the letter to the IAC.

By letter dated 3 February 2010, the first complainant (Mr D.) was notified of the President's decision to endorse the majority opinion of the IAC and to reject his appeal as unfounded in its entirety. The letter went on to state, inter alia, that "contrary to the

minority's opinion that the President act[ed] merely as an intermediary between the CSC and the [Administrative Council], it [had been] considered that the President enjoy[ed] a wide discretion under Art. 10(2)(c) [of the European Patent Convention] in deciding whether a [...] document drafted by the CSC w[ould] be submitted to the [Council] or not. As the majority extensively examined, there [were] no grounds to believe that this discretion was applied improperly neither any flaws affecting the President's decision in the present case, e.g. any procedural flaws or errors of fact or law. It [was] also underlined that the President agree[d] with the majority of the Appeals Committee that the protection of the human rights within the Office as well as the guarantees offered by the Administrative Tribunal of the ILO fulfil[led] the legal standards expected by an international organisation." Mr D. impugns this decision in his fourth complaint.

2. By letter dated 1 February 2008, Mr D.'s legal representative notified the IAC that Mr M., as successor to Mr D. as Chairman of the CSC, would also be represented by him in the pending appeal. In a letter dated 3 February 2010, the second complainant (Mr M.) was notified of the President's decision to endorse the unanimous opinion of the IAC and to reject his appeal as irreceivable *ratione temporis*. Mr M. impugns this decision in his complaint before the Tribunal.

3. As the two complainants rely on the same arguments and seek the same redress, their complaints shall be joined to form the subject of a single judgment.

4. The complainants request oral hearings on several grounds, but the Tribunal confines itself to noting that the written submissions are sufficient to render a reasoned judgment and the complainants raise "no issue that would justify the Tribunal departing from its consistent practice not to grant an oral hearing in cases which turn essentially on questions of law" (see Judgment 3059, under 9). Their request is therefore denied.



5. With respect to the receivability the two complainants state that they, as successive Chairmen of the CSC, have *locus standi* to represent the CSC before the Tribunal and, consequently, they allege a breach of the individual legitimate rights they enjoy pursuant to Article 36(1)(b) of the Service Regulations and Article 9, paragraph 2.2(b), of the Council's Rules of Procedure, which they claim allow the Chairman of the CSC to put documents before the Council. The two provisions in the relevant part read as follows.

Article 36 of the Service Regulations:

**“Competence of the Staff Committee**

- (1) The Central Committee shall be responsible for :
- [...]
- (b) examining any difficulties of a general nature relating to the interpretation and implementation of these Service Regulations or any Implementing Rules thereto and, where appropriate, requiring the President of the Office to arrange for such difficulties to be examined by the relevant joint committee.”

Article 9 of the Administrative Council's Rules of Procedure:

- “(2) Requests for inclusion of items/submissions of documents
- [...]
- (2.2) Requests to have items put on the provisional agenda and documents from:
- [...]
- (b) the staff representatives (Article 7, paragraph 4) shall be submitted via the President of the European Patent Office.”

6. Neither of the two provisions allows the Chairman of the CSC to put documents before the Administrative Council. Article 36(1) of the Service Regulations provides that the CSC can require the President of the Office to submit questions relating to the interpretation and implementation of the Service Regulations to the “relevant joint committee”. The Administrative Council is not a joint committee, which according to Article 38 of the Service Regulations, are the General Advisory Committee and the Local Advisory Committees. Consequently, Article 36(1) does not allow the Chairman of the CSC to put documents before the Administrative Council.

Neither by virtue of Article 9, paragraph 2.2(b), of the Council's Rules of Procedure is the CSC's Chairman allowed to bring requests and documents before the Council. As it is expressly provided by this Article, the staff representatives who can submit, via the EPO's President, requests to the Council's Chairperson, are the staff representatives who, in accordance with Article 7, paragraph 4, of the aforementioned Rules are allowed to take part in the Council's deliberations. Therefore, the complainants have no specific right of access to the Council in the capacities which they identify.

7. As the complainants have not established the existence of a right conferred on them in the capacity they identified, deriving from terms of appointment or the Service Regulations, the complaints will be dismissed as irreceivable.

#### DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 7 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, Mr Seydou Ba, Judge, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, Mr Michael F. Moore, Judge and Mr Hugh A. Rawlins, Judge sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO  
CLAUDE ROUILLER  
SEYDOU BA  
DOLORES HANSEN  
PATRICK FRYDMAN  
MICHAEL MOORE  
HUGH RAWLINS  
DRAZEN PETROVIC