

C. (No. 6)

v.

EPO

125th Session

Judgment No. 3961

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr P. C. against the European Patent Organisation (EPO) on 5 August 2016, the EPO's reply of 21 November 2016, the complainant's rejoinder of 8 February 2017 and the EPO's surrejoinder of 16 May 2017;

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, a member of an EPO Board of Appeal, impugns the Administrative Council's implied rejection of his request to order an investigation into the unauthorised public disclosure of confidential information relating to ongoing disciplinary proceedings against him, and to initiate disciplinary proceedings against those involved.

Facts relevant to this case are to be found in Judgment 3958. Suffice it to recall that on 3 December 2014 members of the Investigative Unit approached the complainant while he was using a computer located in a room in the publicly accessible area of the EPO headquarters building, and informed him that he was under investigation for alleged misconduct and subject to a "house ban" blocking his access to EPO premises, documents and resources, and that his User ID would be blocked. That

same day the President of the Office issued on the Intranet “Communiqué No. 64” entitled “Anonymous defamation: EPO staff member apparently involved”.

On 11 December 2014 the Administrative Council adopted decision CA/D 12/14 in which it decided, inter alia, to suspend the complainant on full pay with immediate effect until 31 March 2015, to maintain the house ban and the blocking of his User ID, to request him to hand over all EPO property in his possession, and to designate the Investigative Unit as the competent body to carry out the relevant investigation.

On 22 January 2015 the complainant filed a request for review of decision CA/D 12/14 but this request was rejected by a letter of 10 April 2015. That is the impugned decision in the complainant’s third complaint to the Tribunal.

On 15 October 2015, at its 145th meeting, the Administrative Council adopted decision CA/D 14/15 deciding, inter alia, to further maintain the complainant’s suspension while reducing his salary by half until a final decision had been made in his case. On 18 November 2015 the complainant filed a request for review of decision CA/D 14/15 but this request was rejected by a letter of 18 March 2016. That is the impugned decision in the complainant’s fifth complaint to the Tribunal.

Prior to that, by a letter of 26 March 2015, the complainant was informed of the Administrative Council’s decision to initiate disciplinary proceedings against him while maintaining his suspension until the end of such proceedings. The Disciplinary Committee issued its opinion on 23 June 2015, concluding that the complainant had committed misconduct for which the appropriate sanction was dismissal pursuant to Article 93(2)(f) of the Service Regulations for permanent employees of the European Patent Office.

On 25 June 2015 the Administrative Council transmitted to the Enlarged Board of Appeal (EBoA) the Disciplinary Committee’s opinion and requested it to make a proposal for the complainant’s removal from office pursuant to Article 23(1) of the European Patent Convention and Article 12a of the EBoA Rules of Procedure (case 23 1/15). On 17 September 2015 the EBoA decided to reject the

Council's request for the complainant's removal from office as inadmissible.

In decision CA/D 14/15 of 15 October 2015, taken at the Administrative Council's 145th meeting, the Council also decided to submit a second request to the EBoA to make a proposal for the complainant's removal from office. That same day the Administrative Council issued on the EPO official website a communiqué summarising the aforementioned decision without identifying the complainant. On 16 October 2015 the President issued on the EPO Intranet an announcement to staff entitled "Defending our values. Unprecedented disciplinary case". In that announcement the President provided a summary of the ongoing disciplinary procedure against the complainant and of decision CA/D 14/15 again without identifying the complainant by name. Around the same time, a number of articles appeared in the Dutch and German press referring to the disciplinary proceedings pending against the complainant.

On 27 November 2015 the complainant submitted a request for a decision pursuant to Article 107(3) of the Service Regulations, asking the Administrative Council to order an investigation into the unauthorised public disclosure of confidential information, to initiate disciplinary proceedings against those involved and to award him moral and exemplary damages for the EPO's breach of its duty of care. Having received no response, on 26 February 2016 he filed a request for review against the Administrative Council's implied rejection of his 27 November request. This request for review went unanswered and on 15 August 2016 he filed the present complaint with the Tribunal, his sixth, impugning the Council's implied rejection of his 26 February 2016 request for review.

The complainant asks the Tribunal: (i) to set aside the impugned decision, that is, the Administrative Council's implied rejection on 16 May 2016 of his 26 February 2016 request for review; (ii) to also set aside the originally contested decision, that is, the Council's implied rejection on 16 February 2016 of his 27 November 2015 request; (iii) to order the Administrative Council to take appropriate corrective action in the matter; (iv) to instruct the President to order an independent

investigation into the breach of confidentiality relating to the ongoing disciplinary proceedings against him; (v) to award him moral and exemplary damages in the amount of “one gross annual salary” for the EPO’s failure to fulfil its duty of care toward him; (vi) to reimburse him all duly invoiced legal fees and costs; (vii) to award him interest on all amounts at the rate of 5 per cent per annum, from the date of his illegal suspension through the date that all amounts awarded are fully and completely paid; and (viii) to award him such other relief as the Tribunal deems just, necessary, appropriate and equitable.

The EPO requests that the Tribunal dismiss the complaint as irreceivable and, on a subsidiary basis, as unfounded. In view of the fact that the complainant has unnecessarily multiplied proceedings in respect of a single disciplinary procedure that has not yet been completed, it requests the Tribunal to consider whether he should bear part of the costs incurred by the EPO in these proceedings.

CONSIDERATIONS

1. In the present complaint, his sixth, the complainant impugns the Administrative Council’s implied rejection on 16 May 2016 of his 26 February 2016 request for review. That request for review was directed against the implied rejection on 16 February 2016 of his 27 November 2015 request that the Administrative Council investigate the alleged unauthorized disclosure of confidential information relating to the ongoing disciplinary procedure against him and that it initiate disciplinary proceedings against those involved.

2. The complainant submits that following the Administrative Council’s 145th meeting on 15 October 2015, a number of articles appeared in the Dutch and German press, which disclosed confidential information relating to the ongoing disciplinary proceedings being conducted against him. He states that the matter was reported in a manner that undermined the presumption of innocence and which was clearly prejudicial to him. In his request of 27 November 2015, the complainant asked the Administrative Council to “take appropriate

measures” to investigate the unauthorized disclosure of information to the press, and noted that there was evidence indicating the involvement in the matter of senior officials of the Administration, including members appointed by the Administrative Council. As no mention of the issue was recorded in the Agenda for the Council’s 146th meeting on 16-17 December 2015, the complainant submitted on 26 February 2016 a request for review of the implied rejection of his 27 November request. Having again received no response, this time to the 26 February request for review, he filed the present complaint with the Tribunal, his sixth, and asked the Tribunal to hold oral hearings.

3. The grounds for review of the complaint are that the complainant was adversely affected by the following: articles that appeared in the press, an official Communiqué posted on the EPO official website, and an announcement to staff issued on the EPO Intranet by the President of the Office, which mentioned that a member of a Board of Appeal was suspected of being involved in a campaign of defamation against the Organisation and its staff members; the Administrative Council’s alleged failure to investigate his allegations of breach of confidentiality; the lack of response from the Administrative Council regarding his request for review, which effectively deprived him of a meaningful form of internal procedure; the dereliction of duty on the part of the Administrative Council, which was required to act under Article 4 of the European Patent Convention; the lack of response from the Administrative Council, which amounted to a breach of due process and was tainted by manifest bias, prejudice and procedural flaws.

4. In his original request of 27 November 2015, cited in consideration 2 above, the complainant asked for an investigation into the unauthorised public disclosure of confidential information, and requested the Administrative Council to initiate disciplinary proceedings against those involved in the aforementioned unauthorised public disclosure of confidential information. The Tribunal finds the complaint to be irreceivable on two different but related grounds, both of which are decisive. On the one hand, the complainant has no right to request the initiation of an investigation and presumably of disciplinary

proceedings against another staff member, and the EPO has no duty to reply to such a request. That is because the complainant has no cause of action, since he would be entitled to file a complaint with the Tribunal only on the basis of his personal employment relationship with the EPO by challenging measures which concern him personally on account of his status as an EPO permanent employee. The complainant is challenging the Administrative Council's refusal to take measures that do not concern him personally and which would only serve to defend the general interests of the Organisation, such as good administration, efficiency and impartiality (see Judgments 3427, under 33, 2387, under 3, and 1899, under 3). As the EPO noted in its reply, the Tribunal stated in Judgment 1899, under 3, that "[d]isciplinary relations between an organisation and a staff member do not directly concern other members of staff or affect their position in law. Consequently, a decision regarding a disciplinary inquiry or a disciplinary measure relating to one staff member will not adversely affect other staff, so the latter will have no cause of action for challenging a disciplinary sanction or a refusal to impose one." On the other hand, once the ongoing disciplinary proceedings against the complainant have concluded and a final decision within the meaning of Article VII of the Statute of the Tribunal has been delivered, the complainant may then challenge that decision and any part of the proceedings. In the meantime, in the absence of a final challengeable decision, this complaint is premature. Consistent case law holds that procedures may include many steps which lead to a final, impugnable decision, but those steps cannot be challenged separately. To allow otherwise would open procedures to a senseless and paralysing number of individual appeals that would serve no useful purpose (see Judgments 3876, under 5, 3700, under 14, 3433, under 9, and 3512, under 3).

5. Considering the irreceivability of the main issue, the Tribunal shall not entertain any of the other incidental issues raised in the complaint, as they do not play a decisive role. The other issues raised include decisions that are being challenged in separate complaints, as well as elements that relate to the ongoing disciplinary proceedings mentioned above.

Also, as the written submissions are sufficient to reach a reasoned decision on the complaint, the request for oral proceedings is denied.

6. The EPO submits that there was no justification for filing the underlying request for review or for bringing the present complaint. In its reply, it notes that the complainant has, at the time of filing, three separate complaints against the disciplinary procedures that are still pending. It cites Judgment 1884, stating that the Tribunal's case law has it that the unnecessary filing of multiple complaints absorbs the Tribunal's resources and "impede[s] its ability to deal expeditiously and fully with the many meritorious complaints that come before it. They are also, of course, costly and time-wasting for the defendant organization" (see Judgment 1884, under 8). The EPO asks the Tribunal to reject the complainant's request for costs, in light of the fact that the complainant has multiplied proceedings in respect of a single disciplinary procedure which has not yet concluded. By way of a counterclaim, it asks the Tribunal to consider whether the complainant should be required to bear part of the financial burden it has incurred in these proceedings.

7. The Tribunal shall not order the complainant to pay costs because, notwithstanding the fact that he has filed multiple complaints with duplicate requests, the present complaint cannot be regarded as vexatious by reason of its irreceivability.

DECISION

For the above reasons,

The complaint is dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 26 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ