

H.
v.
EPO

125th Session

Judgment No. 3965

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. L. H. against the European Patent Organisation (EPO) on 1 June 2012 and corrected on 13 July, the EPO's reply of 23 October 2012, the complainant's rejoinder of 23 January 2013 and the EPO's surrejoinder of 6 May 2013;

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 contends that the EPO did not properly address or investigate his claim of harassment.

After receiving his staff report for 2004-2005, the complainant lodged, on 17 July 2006, a formal harassment complaint pursuant to Circular No. 286, entitled "Protection of the dignity of staff". The President of the European Patent Office, the EPO's secretariat, acknowledged receipt of it and assigned the matter to an Ombudsman, Mr L. The complainant objected to this nomination, among other things, because Mr L. was based in Rotterdam (the Netherlands), while he had both his residence and place of employment in Munich (Germany). The President, recalling that the choice of the Ombudsman depends on the workload, availability, language and gender requirements,

rejected the complainant's objection and confirmed the nomination of Mr L. by letter of 28 August 2006.

Two meetings with the Ombudsman took place, in November 2006 and January 2007, following which the complainant sent several messages to the Ombudsman requesting him to contact the Vice-President of Directorate-General 1 (DG1) regarding the way the complainant was treated. In June 2007 the Ombudsman asked for clarification as to what the complainant wished to raise with the Vice-President of DG1, but the complainant declined to answer. There were no further contacts between the complainant and the Ombudsman, and the latter never produced a final report.

The provisions of Circular No. 286 were suspended by the EPO, first provisionally, in May 2007, then definitively, in June 2007.

In September 2009 the complainant's legal representative wrote to the President of the Office requesting information about the progress made in the Ombudsman's investigation and when the report was likely to be issued. By a letter dated 13 October 2009, the Director of the Employment Law Directorate, writing on behalf of the President, pointed out a number of obstacles that had delayed the proceedings and stated that, in the circumstances, it was impossible for the Ombudsman to conduct an investigation and issue a report within the meaning of the Guidelines on the protection of the dignity of staff. However, the Director stated that in mid-September, after the issue of the Ombudsman's investigation had been raised at a hearing regarding another internal appeal filed by the complainant, he had received some comments from the Ombudsman. In these comments, the Ombudsman had concluded that there was no evidence of harassment.

The complainant filed an internal appeal on 19 April 2010. After presenting his account of the procedure up to that point, he requested explanations as to the choice of the Ombudsman, the latter's "behaviour" and the "apparent inconsistencies" between the submissions of the EPO and his own records of the proceedings, and he claimed moral damages for the failure of the procedure.

The President rejected the appeal, considering that the relevant rules had been correctly applied, and referred it to the Internal Appeals Committee (IAC), which received it on 17 June 2010. The IAC held a hearing on 13 September 2011 and issued its opinion on 14 December 2011. The majority of its members recommended that the appeal be dismissed as inadmissible, while the minority considered the appeal admissible *ratione temporis* and recommended an award of material and moral damages.

In the final decision of 14 February 2012, taken in light of the IAC's recommendations, the EPO renewed its offer of a settlement on four internal appeals filed by the complainant. The offer was valid until 14 March 2012 and, if not accepted, the internal appeals were deemed to be rejected by delegation of power from the President of the Office. For the part relevant to the present complaint, the President relied on the IAC's majority opinion and considered the appeal wholly irreceivable. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to award him material damages for loss of income as well as moral damages, together with 8 per cent interest per annum, and costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and *ratione temporis* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant, who considered that he was a victim of harassment, had sent a formal harassment complaint, pursuant to Article 9(1) of Circular No. 286, to the President of the Office by letter dated 17 July 2006. Article 9(3) of the Circular required the President to assign an Ombudsman "without delay" to investigate the complaint. By letter dated 28 July 2006, the President acknowledged receipt of that complaint and informed the complainant that he had appointed Mr L., who would soon contact him.

Article 10(1)(a) of the Circular requires the Ombudsman to conduct an initial interview with a person who files a formal harassment complaint within two weeks of receiving the complaint. It further states that, in exceptional cases, where an extension is required, the Ombudsman must provide reasons for the extension. For reasons which need not to be explained at this juncture, the Ombudsman conducted the initial interview with the complainant on 29 November 2006 and then another at the end of January 2007.

Pursuant to Article 11(1) of Circular No. 286, the Ombudsman shall submit a report to the President of the Office within three months from the date of the complaint, or, where an extension is required, she or he shall provide reasons. The report should contain several elements listed in Article 11(2), including a summary of the arguments of each party, a succinct analysis of the relevant facts as found by the Ombudsman, a summary of the procedure, the outcome of the procedure and any recommendations to the President.

Article 12(1) of the same Circular provides that, within two months of receiving the report, the President shall take a decision to end the formal procedure. If the complaint is dismissed, the President “shall inform the parties why the relevant facts of the harassment-related grievance did not constitute a breach of [the rules]”. Pursuant to Article 12(3), the President shall inform the parties, their line managers and the Ombudsman confidentially in writing of his decision and “shall state the grounds on which it is based”.

2. It was after the complainant’s legal representative enquired about the status of the Ombudsman’s investigation, by letter of 23 September 2009 to the President of the Office, that he received a response, by letter dated 13 October 2009. In this letter, the Director of the Employment Law Directorate, on behalf of the President, informed the complainant’s legal representative, among other things, that after the two initial interviews the complainant had informed the Ombudsman’s contact person that the procedure had been suspended pending conciliation. The letter further stated that during the conciliation, the Ombudsman had contacted the Vice-President of DG1, who said that

he was willing to meet the complainant, but the meeting did not take place and the complainant did not contact the Ombudsman again. This, according to the letter, was understandable given the complainant's illness and his absence from work for most of the period from December 2006 to January 2008: circumstances which made it impossible for the Ombudsman to conduct the investigation and to submit a report to the President in accordance with Article 11 of the Circular. According to the letter of 13 October 2009, the question of the Ombudsman's investigation had arisen during the hearing of another of the complainant's internal appeals (RI/89/05), which gave rise to Judgment 3967, also delivered in public this day. The Administration had undertaken to look into the matter and received the Ombudsman's comments in mid-September 2009. The letter of 13 October 2009 concluded that "[i]t can be gathered from these comments that [the complainant] and the [O]mbudsman concluded that the [Administration] had behaved inappropriately in [the complainant]'s very difficult situation, but that there was no evidence of harassment". The EPO sent a copy of the Ombudsman's comments to the complainant with the letter of 13 October 2009.

3. In his comments, the Ombudsman noted that the harassment complaint was concerned with what the complainant thought was an inappropriate warning letter sent to him by his supervisor regarding his productivity and that the complainant referred to that conduct as irresponsible, unprofessional, abusive and an affront to his dignity. According to the Ombudsman, the complainant sought to have the warning letter removed from his personal file. He also sought an official apology from the EPO explaining why he had been subjected to that behaviour during a particularly delicate situation (the result of tragic family circumstances). He (the Ombudsman) had had two or three conversations with the complainant and, upon examining the complaint, he had "concluded together with [the complainant]" that, while the EPO had, in what was a very serious crisis situation for the complainant, shown a lack of tact, there was no evidence of harassment. The EPO had however apologised for any lack of tact that it had displayed towards the complainant but it had not withdrawn its "negative

assessment”. The Ombudsman had offered to contact the Vice-President of DG1, and upon doing so, had asked him to apologise again to the complainant. He was not however aware whether the Vice-President of DG1 had actually contacted the complainant, although he (the Vice-President) had indicated to him (the Ombudsman) that he was prepared to do so. The Ombudsman subsequently had no further contact with the complainant.

4. The internal appeal process in this case commenced with the complainant’s letter to the President of the Office dated 19 April 2010. In that letter, the complainant referred to the harassment complaint which he had filed, pursuant to Circular No. 286, “to try to find a timely solution to the increasingly difficult circumstances in which [he] found [him]self due to a combination of personal difficulties and the extremely inappropriate behaviour on the part of [his] then director”, the details of which were the main subject of his internal appeal RI/89/05. The complainant recalled that the former President of the Office had appointed Mr L. as Ombudsman to deal with his case. He outlined the way in which the Ombudsman’s procedure had been implemented, from his perspective, and expressed his dissatisfaction with it, particularly because the Ombudsman had not, by the date of his appeal, produced a final report. The complainant disputed some of the statements contained in the EPO’s letter of 13 October 2009 and the Ombudsman’s comments. He then set out the claims which he made in that internal appeal as follows:

“I request a full explanation of the selection and behaviour of the Ombudsman, [Mr L.]. I also request a full explanation of the apparent inconsistencies between the submissions made by [the EPO] and my own records [...]. I also request moral damages commensurate with failure of this particular procedure, bearing in mind that a successful intervention by a competent [O]mbudsman may well have prevented my removal from active service with the [EPO]”.

The reply, on behalf of the President, to the letter of 19 April 2010, which the complainant received on 17 June 2010, stated that, as the President concluded that the relevant rules had been followed, the matter was referred to the IAC for an opinion, pursuant to Article 110 of the Service Regulations.

5. In the present complaint, the complainant seeks to challenge the findings of the IAC on the grounds that it failed to evaluate the facts and came to a wrong conclusion. The complainant states that the Ombudsman's report, in particular, would have been an essential element of his harassment case, "as an indispensable source of evidence in any subsequent litigation", and that "[t]he [IAC's] majority opinion is flawed and the decision taken thereupon is to be set aside". He further contends that, due to delays and disregard of proper procedure, he suffered irreparable damage. He seeks, in addition to an order setting aside the impugned decision, material and moral damages, interest and costs.

6. As a preliminary matter, the Tribunal will deal with the application for joinder. The claims in the internal appeal, as well as in this complaint, put into perspective the EPO's application for the joinder of this complaint with the complainant's second and third complaints. The latter complaints stem from his prior internal appeals RI/119/07 and RI/89/05. In its application, the EPO recalls that the Tribunal's case law states that cases may be joined in a single judgment if they raise the same issues of law (Judgment 1680, consideration 2) and of fact (Judgment 1541, consideration 3). The complainant objects to the joinder of this complaint with his second and third complaints on the ground that, unlike his second and third complaints which "relate to acts and omissions of his supervisor which he considers to be recurring behaviour of an inappropriate, intimidating, and abusive nature", the present complaint "is brought against the failure of the [EPO] to implement its own rules" for the Ombudsman's procedure, which rules are intended "to ensure that staff dignity is respected at the [EPO] and that grievances are properly dealt with".

The present complaint, like the underlying internal appeal, challenges the Ombudsman's procedure in a discrete case arising from its own particular factual circumstances and raises issues which are not central to the complainant's second and third complaints. The Tribunal therefore dismisses the application for joinder.

7. The EPO submits that, under Article VII, paragraph 1, of the Tribunal's Statute, the complaint is irreceivable *ratione temporis* because the complainant failed to lodge his internal appeal within three months from the date on which he was notified of the decision which he challenges, as Article 108(2) of the Service Regulations required. Under Article 108(3) of the Service Regulations, the three-month period runs from the date on which an appellant was notified of the act/decision or, at the latest, from the date on which she/he became aware of it. In support of this submission, the EPO states that, although it did not expressly notify the complainant that the harassment procedure he had initiated under Circular No. 286 was closed, this must have been evident to him at the latest upon receipt of the letter dated 13 October 2009.

On the other hand, the complainant adopts the reasoning of the IAC's minority to support his argument that his internal appeal was not lodged out of time. According to the minority, the letter of 13 October 2009 merely referred to a suspension of the Ombudsman's procedure. It also referred to the complainant's health condition and stated that the Ombudsman had not drawn up or submitted a report to the President, but it did not explicitly exclude the possibility that a report would subsequently be submitted (pursuant to Article 11 of the Circular). Since no report was submitted, and the President did not give a decision on it (pursuant to Article 12 of the Circular), there was no date from which the three-month time limit (under Article 108(2) of the Service Regulations) could have run. The date of 19 April 2010, when the complainant filed his internal appeal, was a reasonable time for doing so, given that he was hospitalized for a long period from 2007. Additionally, by that time it was clear to the complainant that he could no longer expect to receive either the Ombudsman's report or a decision thereon from the President.

8. The EPO admits that the Ombudsman has never prepared the report required by Article 11 of the Circular. In fact, the Tribunal notes that the Ombudsman has never properly executed his mandate, either by providing reasons for not complying with the deadlines set forth in the Circular, or by preparing a report and recommendations for the

President. The Ombudsman's comments, prepared upon the insistence of the Administration more than three years following the assignment of the case to him by the President, do not correspond either in form or in substance to what is required under Circular No. 286 for a report. The EPO's assumption that it was for the complainant to be proactive in pursuing the procedure with the Ombudsman, and to have contacted him again or made the Organisation aware that the procedure was not running smoothly, is incorrect. Although the complainant had a duty to collaborate in good faith with the Ombudsman, it is primarily the latter's duty to discharge the mandate assigned to him under Article 11 of the Circular. In turn, it was the duty of the President, who assigned the mandate to the Ombudsman, to monitor its execution. There was failure on both counts. The suspension of the Circular during the procedure did not add to the clarity of the situation for the complainant, as the Organisation did nothing to assess the impact of the suspension on the ongoing procedure and to inform the complainant accordingly.

9. The President's decision, communicated by the letter of 13 October 2009, was based on the Ombudsman's comments, which did not comply with Article 11 of Circular No. 286, and the decision itself did not correspond to what Article 12 of the Circular required. Most importantly, the decision of 13 October 2009 did not clearly reject the complainant's harassment complaint or determine any other course of action on it. The complainant was therefore not only deprived of his right to have his complaint dealt with in accordance with the applicable rules, but was also misled as to the possibilities of challenging a decision. Accordingly, the decision of 13 October 2009 must be set aside. As this decision was ambiguous and misleading, the filing of the internal appeal on 19 April 2010 comes within the scope of the exceptions that the Tribunal has established for accepting a late internal appeal (see, for example, Judgments 1466, consideration 5, 2722, consideration 3, and 3406, consideration 13). To the extent that the IAC's majority opinion and the impugned decision of the President were based on the argument that the appeal was irreceivable, they are tainted with an error of law and the impugned decision of 14 February 2012 will therefore be set aside.

10. The complaint should ordinarily be remitted to the EPO for a proper investigation to be made into the allegations of harassment. However, this does not seem practicable given the overall passage of time and the fact that most of the persons involved, including the complainant, are no longer in active service.

11. The complainant applies for oral proceedings. However, the parties' briefs, as well as the documents and evidence which they have provided, are sufficient to enable the Tribunal to reach an informed decision. This application is therefore rejected.

12. The Tribunal determines that, in light of the EPO's failure to afford the complainant an opportunity to have the procedure on his harassment complaint brought to a conclusion in accordance with Articles 11 and 12 of Circular No. 286, including the time requirements therein, he will be awarded 20,000 euros in moral damages. He will also be awarded 8,000 euros in costs.

DECISION

For the above reasons,

1. The decision of 13 October 2009 and the impugned decision of 14 February 2012 are set aside.
2. The EPO shall pay the complainant 20,000 euros in moral damages.
3. The EPO shall pay the complainant 8,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ