H. (No. 2)

v.

EPO

125th Session **Judgment No. 3966**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. L. H. against the European Patent Organisation (EPO) on 1 June 2012 and corrected on 17 July, the EPO's reply of 23 October 2012, the complainant's rejoinder of 9 February 2013 and the EPO's surrejoinder of 23 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 objects to the behaviour of his director which he characterises as harassment.

Subsequent to the facts that led to Judgment 3965, also delivered in public this day, the complainant sent a letter, dated 23 July 2007, to the President of the European Patent Office, the EPO's secretariat, "in protest at the later episodes of harassing behaviour exhibited by [his] director, Mr [L.]". In support of his assertion that the director made "repeated (and apparently deliberate) attempts" to cause him "duress", the complainant mentioned two examples: (1) a series of verbal statements, which the complainant tried to confirm and/or clarify in writing in several emails that he sent to the director; and (2) the non-approval of his request for annual leave by the director, who, according to the

complainant, "apparently abandoned the somewhat relaxed approach to requesting annual leave" which existed over 18 years, and "appl[ied] *a posteriori* the strictest interpretation" of the applicable Service Regulations. The complainant made two specific requests: "a full and detailed explanation for the behaviour of [the] director, and also a full and public apology from the director himself". Should his requests be rejected, he asked that his letter be treated as an internal appeal.

The Director of the Employment Law Directorate informed the complainant on 18 September 2007 that the President of the Office had rejected the appeal as she had come to the conclusion that all the applicable rules had been properly applied. The complainant was also advised that his appeal had been forwarded the same day to the Internal Appeals Committee (IAC) for an opinion.

The IAC held a hearing on 21 April 2010 during which the parties considered the possibility of reaching an amicable settlement. They entered into settlement negotiations, which were unsuccessful. During those negotiations, the proceedings before the IAC were suspended. On 13 December 2011 the IAC issued its opinion and concluded unanimously that the request for an apology from the director was inadmissible. It also found that the verbal statements listed in one of the emails that the complainant had attached to his 23 July 2007 letter – an email by which the complainant was trying to obtain written confirmation of the said statements – provided no evidence of misconduct by the director. Regarding the request for an explanation of the director's behaviour, the majority of the IAC members recommended that the appeal be dismissed as both inadmissible and unfounded. A minority recommended that the appeal be allowed in part as admissible and well-founded and that an explanation be provided for the initial refusal of the complainant's request for annual leave.

On 14 February 2012 the President of the Office offered the complainant an amicable settlement covering both that appeal and another appeal filed by the complainant. However, he indicated that if the complainant did not accept the settlement offer, the appeals would be deemed rejected for the reasons explained by in the majority opinion of the IAC. The President also stated that the complainant's request for

annual leave had initially been refused in accordance with the applicable rules, and he noted that the refusal had subsequently been withdrawn and the leave approved. That is the impugned decision.

The complainant did not accept the settlement offer but filed a complaint with the Tribunal on 1 June 2012, in which he seeks the quashing of the impugned decision, the payment of punitive damages in the amount of at least 3,000 euros for the excessive delay in the internal appeal procedure, the payment of moral damages and an award of costs.

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

CONSIDERATIONS

1. The EPO applies for the joinder of this complaint with the complainant's first and third complaints. The Tribunal has held in Judgment 3965, which is also delivered in public this day, that the first complaint cannot be joined with this complaint or with the complainant's third complaint because it does not raise the same issues of fact and law. Judgment 3967 on the third complaint is also delivered in public this day.

In the present proceedings, the complainant and the EPO applied alternatively for the joinder of this complaint with the complainant's third complaint. This application will also be dismissed as these complaints do not raise the same issues of fact and law.

2. In this complaint, the complainant contends that in 2007 his director made offending verbal statements and refused to grant him annual leave in circumstances which showed that the director had abandoned a more flexible approach to the grant of such leave which had prevailed for many years. According to the complainant, these actions caused him distress; breached the EPO's duty of care towards him; infringed his dignity and amounted to harassment. By way of relief, in his internal appeal, the complainant had requested from the

President "a full and detailed explanation for the behaviour of [his] director, and also a full and public apology from the director himself".

The EPO contends, relying on the Tribunal's statement in Judgment 1635, consideration 22, that the complainant's request for an apology from the director is irreceivable because it is not the kind of relief which can be sought through the EPO's internal appeal process. Concerning the request for a detailed explanation from the President of the Office for the behaviour of the complainant's director, the EPO argues that it is irreceivable *ratione materiae* since such explanation would have no legal effect and cannot be construed as a challengeable decision.

3. The complainant initiated his internal appeal, which led to the present complaint, by letter to the President dated 23 July 2007. That letter was transmitted to the IAC when the President rejected the appeal pursuant to Article 109 of the Service Regulations.

4. In his letter of 23 July 2007, the complainant alleged that his director had subjected him to a series of verbal statements which served only to exacerbate his already less than ideal situation. The last reference was to the personal family tragedy which he had sustained in 2004. The complainant had chronicled some of the alleged offending statements to which he referred in an email dated 22 February 2007 to his director. He thereby sought the latter's confirmation that he had made the statements to him when they met on 16 February 2007. He asked his director to confirm that he had told him that he feared that he was becoming more isolated within the Directorate; that that concern was heightened because he (the director) did not see him often at lunch inside the office; that there were rumblings of discontent from other members of the Directorate who had to do the work which the complainant was unable to complete; that he was not satisfied with the complainant's lack of progress; that the complainant could well be pressured from outside the office, especially by applicants who were not satisfied with long delays in his dealing with replies; that his (the director's) successor might not be as reasonable and understanding; and

that the complainant would not be able to get along with anyone else if he could not get along with him.

The complainant further alleged, in the letter of 23 July 2007, that he was distressed because his director had "apparently abandoned the somewhat relaxed approach to requesting annual leave enjoyed by [him] over the past eighteen years" by applying, after the fact, the strictest interpretation of the Service Regulations concerning the procedure for requesting such leave. The complainant insisted that it was because of that strict interpretation that his director refused to grant his request for annual leave. He received the request with the arrival of the first office post on 19 March 2007: the day on which the requested leave was due to commence. The complainant stated that it appeared that his director had relied upon the vagaries of the EPO's internal postal system to justify what was rapidly becoming perceived as a case of sustained personal mobbing.

5. The complainant's director subsequently approved his request for annual leave. The actual grant of that leave is not itself an object of this complaint. Moreover, the impugned decision, accepting the IAC's majority opinion, correctly held that the requests for a detailed explanation of the director's behaviour and for an apology from the director could not properly be granted as relief because the first request was not directed towards an appealable decision within the meaning of Article 107(1) of the Service Regulations and the second was outside the Tribunal's competence (see Judgment 1635, consideration 22). The focus of his main claim is on a narrow procedural aspect of his harassment complaint, which will be put into context in consideration 7 below.

6. In these proceedings, the complainant adds for the first time two new claims. He states that these claims are "for the moral injury resulting from the breach of [the EPO's] duty of care and in respect for infringement of [his] dignity", as well as for the harm which he suffered on account of the deterioration of his health which finally resulted in the termination of his service due to invalidity. As the complainant did not put forward these claims in his internal appeal, they are irreceivable

under Article VII, paragraph 1, of the Tribunal's Statute and will be dismissed on the ground of his failure to exhaust the internal remedies. The complainant's claim for punitive damages for excessive delay in the internal proceedings, which he makes in this complaint, will be considered later in this judgment.

7. The complainant puts the central claim, which he makes in his complaint, into context in the following statement:

> "47. The focus of this present case lies not on the question, if harassment took place, but rather, whether or not the Office fulfilled its duty to investigate the allegations. As the Office failed in doing so, no question arises with respect to receivability.
>
> 48. As it held in Judgment 2552 an accusation of harassment 'requires that an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused'. Moreover, it [is] recalled in Judgment 2642 that the Organisation's duty to a person who makes a claim of harassment: 'requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed, not be stigmatised or victimised on that account (see Judgment 1376).'"

8. The Tribunal determines that the central claim in the present complaint is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute because the complainant failed to exhaust internal remedies in relation to that claim. The issue whether or not the EPO fulfilled its duty to properly investigate the allegations of harassment was not raised in the internal appeal. The IAC did not address it in its opinion dated 13 December 2011, neither was it addressed in the impugned decision dated 14 February 2012. The central claim will therefore be dismissed.

9. The complainant also makes a claim for punitive damages for the alleged excessive delay in the internal appeal proceedings. Contrary to the EPO's submission, according to which the complainant's claim is irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute because it was made for the first time in the present complaint,

that claim is receivable before the Tribunal as it may only arise after the fact of delay in the internal appeal proceedings.

10. To support his claim for damages for the excessive delay, the complainant states that, since compliance with the internal appeal procedure is a condition precedent to access to the Tribunal, the EPO has an obligation to ensure that its internal procedure "move[s] forward with reasonable speed". He relies on the Tribunal's statement in Judgment 2197, consideration 33, which reads as follows:

> "33. The complainant's claim for excessive delay in the Board's proceedings is far more substantial. Since compliance with internal appeal procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed. Here, while the Board, once the meetings had started, came to its conclusion fairly quickly, there can be no valid excuse to justify the delay of over twenty months between the filing of the internal appeal and the start of the hearings. No doubt some of this was due to the complainant herself and the long convoluted and complicated nature of her pleadings, which frequently contradict themselves, but [the Organization] cannot escape responsibility for the inordinate amount of time taken."

11. The complainant submitted his letter, which was referred to the IAC as his internal appeal, on 23 July 2007. He was informed, by letter dated 18 September 2007 from the Director of the Employment Law Directorate, that it had been referred to the IAC for its opinion. The EPO did not file its position paper until 13 January 2010, over two years later. The IAC conducted a hearing on 21 April 2010. The EPO submits that it should not be blamed for the delay in the internal appeal proceedings because it was actively seeking an amicable settlement. This explanation may however be valid only for the period after the hearing of 21 April 2010, when the internal appeal proceedings were suspended to facilitate negotiations, until the time when the proceedings resumed in June 2011. It cannot apply to the delay in the proceedings between the dates when the complainant lodged his internal appeal and the conduct of the IAC's hearing. The EPO cannot escape responsibility for the inordinate amount of time taken, from July 2007 to 14 February 2012, date of the impugned decision, for the internal appeal proceedings.

The complainant's claim for an award of punitive damages for the delay will be dismissed. The Tribunal has stated, for example in Judgment 2935, consideration 5, that an award of punitive damages can be made only in exceptional circumstances, for instance where an organisation's conduct has been in gross breach of its obligation to act in good faith. There is no evidence that the EPO acted in bad faith with respect to the delay in the internal appeal proceedings. However, the complainant will be awarded moral damages in the amount of 6,000 euros, particularly given the length of the delay and the impact of that delay on him in his personal circumstances. He will also be awarded costs in the amount of 3,000 euros since he has succeeded in part.

12. The complainant applies for oral proceedings on the ground that they would permit evidence to be heard regarding the impact of his director's behaviour towards him on his health condition, as neither the IAC nor the Organisation heard witnesses or asked for medical reports from the relevant physicians. He insists that the IAC arrived at its conclusions without considering the causal link between his director's actions and the deterioration of his health. The application will be dismissed as these issues do not arise for consideration in this case.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 6,000 euros in moral damages.
2. The EPO shall pay the complainant costs in the amount of 3,000 euros.
3. 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