

K. (No. 16)

v.

EPO

126th Session

Judgment No. 4049

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 3 October 2017, the EPO's reply of 22 January 2018, the complainant's rejoinder of 8 March and the EPO's surrejoinder of 29 March 2018;

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 case may be summed up as follows:

The complainant challenges the composition of the Appeals Committee which issued the opinion on the basis of which the impugned decision was taken.

The complainant joined the European Patent Office – the secretariat of the EPO – in 1991 as an administrative employee. By a note of 1 August 2000 he was informed that he would be detached as of 1 October 2000 and for a maximum period of three years to another position. His detachment was subject to a six-month probationary period. In March 2014, he requested that the Administration provide him with a probationary report for the six-month period starting 1 October 2000.

Having not received the requested report, on 17 May 2014 he asked the President of the Office to review the decision not to provide him with that document. His request was rejected and mid-September he wrote to the Appeals Committee stating that he was challenging the decision not to process his request to be provided with a probationary report. He also challenged the note of 1 August 2000 and the staff report for the period 1 October 2000 to 31 December 2001. The Appeals Committee registered the appeal on 13 October 2014.

The Appeals Committee issued its opinion on 5 May 2017, applying the summary procedure provided for in Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations. It unanimously considered the appeal to be manifestly irreceivable on the grounds that the complainant had received a staff report for the period 1 October 2000 to 31 December 2001, which covered the period during which he was detached. It also considered that the time limits for challenging the said staff report and the detachment decision had expired a long time ago. One member of the Appeals Committee, whilst agreeing with the main findings and conclusions of the other members, gave a concurring opinion in which he expressed a divergent view concerning the composition of the Appeals Committee. He considered that the Appeals Committee was not composed in accordance with applicable rules, in particular Article 5(3) of the Implementing Rules for Articles 106 to 113 of the Service Regulations for permanent employees of the Office, nor with Judgment 3785, nor with the legal principle of impartiality.

The Principal Director of Human Resources, acting on delegation of power from the President, informed the complainant by a letter of 6 July 2017 that she had decided to endorse the recommendation of the Appeals Committee to summarily dismiss his appeal as manifestly irreceivable. Regarding the composition of the Appeals Committee, she considered that it was in line with the applicable provisions since the Appeals Committee was composed of a Chair and two members appointed by the President as foreseen in Article 5(1) and (2) of the Implementing Rules, and, by way of exception and following the Central Staff Committee's failure to make the required appointments, two members nominated by calling for volunteers or drawing lots from

among eligible staff members in accordance with Article 36(2)(a) of the Service Regulations. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision and to send the case back to the EPO for examination by the Appeals Committee composed in accordance with applicable rules. He also asks the Tribunal to order that the case be treated within six months by the Appeals Committee when received, that the case be treated by a differently constituted Appeals Committee, and that, in light of Judgments 3694 and 3785, the Appeals Committee is constituted in a manner that complies with the general principles of law, due process and impartiality. The complainant claims moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as moot and irreceivable for failure to exhaust internal means of redress. Subsidiarily it asks the Tribunal to dismiss the complaint as unfounded. It makes a counterclaim for costs of 1,000 euros considering that the complaint is an abuse of process. In its view, remitting the case to the Organisation would serve no useful purpose.

CONSIDERATIONS

1. The claim raised by the complainant that the Appeals Committee, which, by a summary procedure, in accordance with Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, unanimously recommended rejecting his appeal as manifestly irreceivable, was improperly constituted is a threshold issue. One member of the Appeals Committee issued a concurring opinion in which he agreed with the findings and conclusions of the other members, except with respect to the issue of the composition of the Appeals Committee.

2. It is recalled that on 15 September 2014 the complainant had appealed internally against the Office's failure to provide him with a copy of a probationary report for the period 1 October 2000 to 31 March 2001. Before the Appeals Committee, he also challenged the note of

1 August 2000 informing him of his detachment and his staff report for the period 1 October 2000 to 31 December 2001.

3. The EPO contends that the complainant's claim that the Appeals Committee was unlawfully constituted is irreceivable. It argues that the complainant did not raise this issue during the internal proceedings and brings it up for the first time before the Tribunal. It points out that the complainant admits that he does not seek individual redress but attempts to challenge the rules governing the composition of the Appeals Committee. The EPO's objection to receivability is unfounded. The complaint is receivable as the question of the composition of the Appeals Committee was considered both by the Committee itself in its opinion and by the Principal Director of Human Resources who, by delegation of power from the President, rejected the complainant's internal appeal. Moreover the complainant had a right to have his internal appeal examined by an Appeals Committee that was properly constituted.

4. The grounds for complaint regarding the unlawful composition of the Appeals Committee are the following:

- (a) The EPO violated the provisions of Article 36(2)(a) of the Service Regulations as amended by Administrative Council decision CA/D 18/16 of 15 December 2016, and Article 5(3) and (4) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, as the EPO did not appoint members from the list of nominees for 2017 provided by the Central Staff Committee in a timely manner. It therefore unlawfully applied Article 36(2)(a) of the Service Regulations according to which:

“[...] [b]y way of exception, if the Central Staff Committee, despite an invitation to do so, fails to make appointments to [the bodies under the Service Regulations], the President shall take appropriate steps to ensure and make the necessary appointments, by calling for volunteers or drawing lots from among eligible staff members”.

- (b) There was no indication as to who, among the members of the Appeals Committee which dealt with the complainant's appeal, was an alternate member and who was a full member.
- (c) The Appeals Committee ruled itself on the legality of its composition.

- (d) The provision of Article 36(2)(a) of the Service Regulations, in force at the material time, is ambiguous and does not guarantee a balanced composition of the Appeals Committee when appointments are made by way of exception.

The complainant also contends that the decision of the Appeals Committee to apply the summary procedure was flawed.

5. These claims are unfounded. The Tribunal's examination is limited to considering the provision in force at the material time (Administrative Council decision CA/D 18/16 amending Article 36(2)(a) of the Service Regulations in force on 1 January 2017 until 30 June 2017) and the issues, cited above, raised by the complainant with the Tribunal. Article 36(2)(a) of the Service Regulations was not violated as the list of nominees for 2017 communicated to the Office by the Central Staff Committee did not comply with Article 36(2)(a) because three of the proposed appointees were not elected members of the Staff Committee. The proposed appointments were made subject to a number of conditions and were, as the President repeatedly explained to staff representatives, made "[b]y way of exception" in line with Article 36(2)(a) of the Service Regulations.

6. At the material time, Article 5 of the Implementing Rules concerning the appointment of members of the Appeals Committee provided for the appointment of full members and alternate members.

The Tribunal is satisfied that two of the four members were appointed by the President (A.L. and G.V.D.) and two were chosen "[b]y way of exception" among eligible staff members (S.F. and C.P.), and considers that the Committee's balanced composition was guaranteed in accordance with the provisions of Article 36(2)(a) of the Service Regulations, which are not ambiguous. The Appeals Committee was competent to rule on the legality of its composition, which is a condition for its competence. The Appeals Committee's decision to apply the summary procedure was a proper exercise of its power of evaluation.

7. On the merits, the impugned decision shall stand because the complainant did not challenge within the applicable time limit the staff report for the period 1 October 2000 – 31 December 2001 which encompassed the probationary period.

8. In light of the above considerations, the complaint must be dismissed. The EPO's counterclaim for costs must also be dismissed, as the complaint is not vexatious.

DECISION

For the above reasons,

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

In witness of this judgment, adopted on 17 May 2018, 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 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ