

H. (No. 11), R. (No. 13) and S. (No. 6)

v.

EPO

132nd Session

Judgment No. 4419

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr W. H. H. (his eleventh), Mr L. R. (his thirteenth) and Mr D. M. S. (his sixth) against the European Patent Organisation (EPO) on 13 November 2014 and corrected on 12 January 2015, the EPO's single reply of 10 June, the complainants' single rejoinder of 24 August, corrected on 2 September, and the EPO's surrejoinder of 11 December 2015;

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 none of the parties has applied;

Considering that the facts of the case may be summed up as follows:

The complainants contest the appointment of members of the General Advisory Committee (GAC) in 2012 and 2013.

In December 2011 and 2012, the President of the European Patent Office – the EPO's secretariat – announced his appointments to the GAC for 2012 and 2013 respectively. At that time, the complainants were permanent employees of the Office and members of the GAC appointed by the Staff Committee. They initiated the internal appeal procedure between December 2011 and February 2012 with respect to the appointments for 2012, and in December 2012 with respect to the appointments for 2013. They contested the President's appointments alleging violation of Articles 1 and 2 of the Implementing Rule for Article 38 of the Service Regulations for permanent employees of the

Office (hereinafter “the Implementing Rule”) insofar as he appointed non-permanent employees. They requested in particular that the contested appointments be withdrawn and that all decisions taken during 2012 and 2013 after having consulted the GAC in the irregular composition be quashed. The appeals were registered separately, but examined together.

In its opinion of June 2014, the Internal Appeals Committee (IAC) unanimously recommended that the President find that the GAC was improperly composed in 2012 and 2013 but considered that the claims for annulment of the contested appointments and for the appointment of permanent employees to the GAC for 2012 and 2013 had become redundant in view of the time since elapsed. Irrespective of the findings on the merits, the panel members disagreed on the receivability of the appeals. The majority of the IAC’s members considered that the appeals were inadmissible insofar as the complainants sought the annulment of all decisions adopted after consultation of the GAC in 2012 and 2013; that claim was too vague. To the contrary, the minority considered that the claim was clear and admissible. With respect to the argument that several of the GAC members appointed by the President were also members of the Management Committee (MAC), the majority found that there were no legal grounds manifestly precluding the appointment of the MAC members to the GAC. To the contrary, the minority considered that the exercise of functions as a MAC member was incompatible with those of a GAC member.

On 28 August 2014 the President informed the complainants that he had decided to reject their appeals as irreceivable insofar as their claims were based on the contracts of employment of Vice-Presidents as they did not hold such a contract. On the merits, he found that the appeals were unfounded. In his view, decision CA/D 22/09 showed that the legislator intended to safeguard the possibility for employees on contract to participate in the GAC; that reasoning also applied to Vice-Presidents. The President stressed that participation in statutory bodies was a right of a collective nature, which could not be subject to individual contract arrangements. Therefore, the lack of reference in a Vice-President’s contract to the provisions concerning participation in statutory bodies was immaterial. Lastly, he found that there was no basis to consider that a Vice-President who represents the President, in certain areas of activity, could not serve on a statutory body. Neither the Service Regulations nor the Implementing Rule required that the GAC members be independent. The President therefore agreed with the

majority opinion that membership of the MAC was not incompatible with membership of the GAC. That is the decision the complainants impugn before the Tribunal.

The complainants ask the Tribunal to quash *ab initio* the nominations of Mr M., Mr V., Mr C., Mr E., Mr T., Mr L. and Mr P. as Chairman, members or alternate members of the GAC in 2012 and 2013, as well as all decisions taken after consultation of the GAC in its irregular composition of 2012 and 2013. They seek an award of moral damages in the amount of not less than 10 euros per staff member of the Office as of 1 January 2013, plus costs.

The EPO asks the Tribunal to dismiss the complaints as irreceivable for lack of a cause of action and otherwise unfounded.

CONSIDERATIONS

1. These proceedings concern the appointment by the President of some individuals as members of the GAC in December 2011 and December 2012 to sit on that body for the years 2012 and 2013 respectively. The contested decision to appoint the members for 2012 was challenged in internal appeals to the IAC commenced in the period December 2011 to February 2012 and for the contested decision to appoint the members for 2013, in December 2012. The appeals were ultimately dismissed by decisions of the President dated 28 August 2014. They are the decisions, insofar as they concern each of the three complainants, impugned in these proceedings. There are three complaints which should be joined so one judgment can be rendered.

2. The central issue raised in these proceedings is whether the President was able to appoint, lawfully, Vice-Presidents as members of the GAC as he had done for 2012 and 2013. The general issue of who the President may appoint has been a live one for some considerable period and various attempts have been made to amend normative legal documents to make clear the Organisation's view about the appropriate breadth of the President's powers.

3. The EPO raised in its reply dated 10 June 2015 the issue of whether the complainants had a cause of action, referring to a Tribunal judgment decided in 2015. The EPO argued they did not and repeated

the argument in its surrejoinder of 11 December 2015. The complainants contested this argument also saying, additionally, it was not an issue that had been raised in the internal appeals.

4. In a judgment delivered by the Tribunal on 24 July 2020, Judgment 4322, there was a conclusive determination that staff members in the position of the complainants had no cause of action to challenge, relevantly, the appointment of Vice-Presidents to the GAC (see Judgment 4322, considerations 8 and 9). Indeed the three complainants in the present proceedings were complainants in the proceedings leading to Judgment 4322. The question of whether the complainants had a cause of action was raised by the Tribunal of its own motion notwithstanding it had not been raised by the parties before the Tribunal. It is unnecessary to repeat the analysis of the Tribunal in Judgment 4322. Suffice it to note that there are no material factual or legal differences between the circumstances addressed in that judgment and those of the present case notwithstanding the plea at the conclusion of consideration 3 above.

5. Each of the complainants in the present proceedings does not have a cause of action and, accordingly, the complaints should be dismissed. No order should be made in relation to costs.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 26 May 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ