G. (No. 9)

v.

EPO

134th Session **Judgment No. 4561**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr W. A. G. against the European Patent Organisation (EPO) on 24 October 2019, the EPO's reply of 21 February 2020, the complainant's rejoinder of 5 April 2020, the EPO's surrejoinder of 7 July 2020, the EPO's additional submissions of 27 October 2021 and the complainant's final comments of 28 January 2022;

Considering the applications to intervene filed by Mr T. C. on 4 August 2021, Mr A. E. on 6 August 2021, Mr W. R. on 13 August 2021, Ms M. E. on 19 August 2021, Mr M. S. on 20 August 2021, Mr H. H. on 24 August 2021, Mr T. E. on 31 August 2021, Mr L. C. on 15 September 2021 and Mr S. É. on 20 September 2021, and the EPO's comments thereon dated 3 November 2021;

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 decision to reject as time-barred his appeal against the President's refusal to organise a strike ballot in accordance with the applicable rules.

Facts relevant to this case may be found in Judgment 4434, delivered in public on 7 July 2021. Suffice it to recall that in June 2013 the EPO's Administrative Council adopted decision CA/D 5/13, creating a new Article 30a of the Service Regulations for permanent employees of the European Patent Office concerning the right to strike and amending the existing Articles 63 and 65 concerning unauthorised absences and the payment of remuneration. Paragraph 10 of Article 30a authorised the President to lay down further terms and conditions for the application of Article 30a, including with respect to the voting process. Relying on that provision, the President issued Circular No. 347 containing "Guidelines applicable in the event of strike". This text entered into force on 1 July 2013, at the same time as CA/D 5/13. Circular No. 347 relevantly provided that, upon receipt of a call for strike, the Office was responsible for organising a strike ballot, which must be completed within one month from the date of the call for a strike.

In September 2013 the Munich Staff Committee notified the President of a call for strike by a group of staff members calling themselves the "LIFER initiative". After a successful ballot, the LIFER initiative notified the President, via the Staff Committee, of strike actions to be held during the 30-day period from 17 October to 15 November 2013 (strikes being planned on five days during that period). On 24 October 2013 the Central Staff Committee (CSC) forwarded to the President another call for strike from a group of staff members calling themselves the "IFLRE initiative", which had gathered more than a thousand signatures. This time, however, the President refused to organise a ballot as he considered that the call for strike contravened the new rules in two respects: firstly, no new strike action could be organised until the one-month period of strike action covered by the LIFER initiative had ended, and secondly, there was no interlocutor with whom the points of dispute could be discussed, as the IFLRE initiative had no designated representative. The President's decision not to organise a ballot was conveyed to the CSC in a letter of 31 October 2013 and announced to the staff on 21 November 2013 in Communiqué No. 41.

On 24 February 2014 the complainant, who was one of the signatories of the IFLRE initiative, filed a request for review in which, noting that the President had not organised a ballot within one month of their call for strike, he challenged what he described as the President's "implied decision of rejection". This request for review was rejected on 8 April 2014 as being time-barred. The President pointed out that his decision not to organise a ballot had been announced on 21 November 2013 in Communiqué No. 41. The complainant's request for review had not been filed within three months following the publication of Communiqué No. 41, as required by Article 109(2) of the Service Regulations. It was therefore considered to be irreceivable.

The complainant then lodged an appeal with the Appeals Committee. In an opinion dated 11 May 2015 the Committee unanimously concluded that the request for review had been filed outside the statutory time limit and recommended that the appeal be dismissed as inadmissible for that reason. The complainant was notified by letter of 20 July 2015 of the President's decision to endorse the Committee's recommendation. In September 2015 he filed a complaint with the Tribunal (his fourth) impugning the decision of 20 July.

Following the delivery of Judgments 3694 and 3785, in which the Tribunal held that the composition of the Appeals Committee was unlawful, the President of the Office decided to withdraw a number of decisions he had taken on internal appeals which were affected by the same flaw. The complainant was informed in March 2017 that the above-mentioned decision of 20 July 2015 had been withdrawn and that his appeal had been remitted to an Appeals Committee composed in accordance with the applicable rules. In light of this development, the EPO invited him to withdraw his fourth complaint, but he chose not to do so. That fourth complaint was subsequently dismissed by the Tribunal in Judgment 4256 on the grounds that it was now without object.

A newly-composed Appeals Committee examined the complainant's appeal and issued an opinion on 30 April 2019. It again unanimously concluded that the appeal should be dismissed because of the late filing of the request for review, but it recommended an award of 400 euros in moral damages because of the length of the proceedings. By a letter of

16 September 2019, the Principal Director of Human Resources informed the complainant that she had decided, by delegation of power from the President, to reject his appeal as manifestly irreceivable, in accordance with the Appeals Committee's recommendation, and to award him 500 euros for the length of the proceedings. That is the impugned decision.

The complainant asks the Tribunal to quash Circular No. 347 and to award him 20,000 euros in moral damages for the President's failure to organise a ballot, which amounted to a violation of his right to strike. He also claims moral damages for alleged flaws in the internal appeal proceedings and for procedural delay, as well as punitive damages and costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. This judgment concerns a complaint filed with the Tribunal on 24 October 2019 by a member of staff of the EPO. If the complaint is receivable it raises an issue effectively dealt with by the Tribunal in Judgment 4434. While the complainant appears from correspondence addressed to the Tribunal's Registrar to have been prepared to discontinue or withdraw his complaint having regard to that judgment, it also appears he has persisted to prosecute the complaint because other members of staff (nine in total) have sought to intervene and gain the benefit of any judgment in his favour.

2. At all times, the EPO has taken the position that this complaint is irreceivable, notwithstanding that it agreed, "in a spirit of appeasement", to grant the complainant the same relief as was awarded to the complainants in Judgment 4434. Accordingly, it is appropriate to address, at the outset, the question of receivability. The subject matter of the complaint was a decision of the President, published in a Communiqué of 21 November 2013, not to organise a ballot for a strike notwithstanding a petition calling for such a ballot advanced by over 1,000 members of staff. Whilst the complainant appears to dispute that he was validly notified of the President's decision by means of that Communiqué, the wording

of Article 109 of the then prevailing Service Regulations, dealing with the review procedure, clearly contemplates the possibility of communicating a decision in this way when it refers, in paragraph 2, to "the date of publication, display or notification of the decision challenged". It may therefore be accepted that, as the EPO contends, the complainant was validly notified of the President's decision on 21 November 2013. Moreover, it is more likely than not that, as a matter of fact, the complainant saw the Communiqué on the day it was issued or shortly afterwards, given the complainant's active involvement in staff union affairs and the subject matter of the Communiqué. Under Article 109(2), the complainant had until 21 February 2014 to lodge a request for review but, in fact, he did not do so until 24 February 2014. It is this failure to comply with the time limit which has provided the basis on which the EPO has maintained from the outset that the complainant has not followed the procedures for internal review. This, it is argued, has the result that the complainant has not exhausted internal means of redress as required by Article VII, paragraph 1, of the Tribunal's Statute.

3. The EPO's pleas in this respect are well founded. It is entitled to rely upon a failure to comply with time limits for internal review as a basis for challenging, ultimately, the receivability of a complaint before the Tribunal, as it has done in this case (see, for example, Judgment 4369, consideration 3). This complaint is irreceivable and should be dismissed. It follows that the applications to intervene must also be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 18 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ