

F. (No. 2)

v.

EPO

123rd Session

Judgment No. 3785

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr S. C. F. against the European Patent Organisation (EPO) on 18 September 2015, the EPO's reply of 7 April 2016, corrected on 14 April, the complainant's rejoinder of 6 September and the EPO's surrejoinder of 3 October 2016;

Considering Article II, paragraph 5, of the Statute of the Tribunal;
Having examined the written submissions;

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

On 18 December 2013 the EPO issued Practice and Procedure Notice 05/13 (PPN 05/13) which concerned the documents making up European patent applications. PPN 05/13 came into force with effect from 1 January 2014.

On 2 April 2014 the complainant requested a review of PPN 05/13. By a letter of 2 June he was informed that the President of the Office had decided to reject his request as manifestly irreceivable and to maintain the decision to introduce PPN 05/13. In addition, the complainant's request for review did not comply with the three-month time limit set out in Article 109(2) of the Service Regulations for permanent employees of the European Patent Office.

On 28 August 2014 the complainant lodged an internal appeal (registered as RI/117/14) in which he challenged, among other things,

PPN 05/13 and its implementation. He filed another request for review of PPN 05/13 on 10 October 2014. In a letter of 10 December 2014 the President informed him that his request of 10 October was rejected and had been sent, along with a copy of the letter of 10 December, to the Appeals Committee so that those documents could be added to the file of his pending appeal RI/117/14.

The Chair of the Appeals Committee decided that the complainant's appeal could be dealt with in a summary procedure, pursuant to Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, and the complainant was so informed on 2 March 2015.

By an e-mail of 9 March the complainant requested that his internal appeal follow what he characterised as a normal procedure. In addition, he challenged the composition of the Appeals Committee on the basis that it did not include a member nominated by the Central Staff Committee and he asked to be heard by a duly constituted Appeals Committee. In an e-mail of 17 March from the Administrator of the Appeals Committee the complainant was notified that the Committee was of the opinion that its current composition met the requirements of Articles 111(1)(a) and (b) of the Service Regulations. Two of its members had been appointed by the President and two members were elected staff representatives. Thus, his appeal would be considered by the Committee as it was then composed.

In the meantime, on 10 March 2015 the complainant lodged an internal appeal (registered as RI/31/15) in which he challenged the President's decision of 10 December 2014.

In its opinion of 20 April 2015 the Appeals Committee unanimously considered the complainant's appeal to be manifestly irreceivable and therefore treated it by way of a summary procedure. It recommended that the appeal be rejected as manifestly irreceivable.

By a letter dated 24 June 2015 the complainant was notified that the Principal Director of PD 4.3 (Human Resources), by delegation of authority from the President, had decided to reject his appeal as manifestly irreceivable in its entirety in accordance with the reasoning of the Appeals Committee. The appeal was manifestly irreceivable *ratione materiae* because it concerned an internal working instruction

which was not a decision challengeable by way of an internal appeal. As his main claim was rejected, his claim for moral damages was also rejected. In addition, the Principal Director endorsed the Committee's rejection of the complainant's objections to its composition. That is the impugned decision.

As a preliminary matter, the complainant seeks oral proceedings. He asks the Tribunal to quash the impugned decision and to declare the Appeals Committee's opinion and the entire appeal procedure null and void. He requests that appeal RI/117/14 be sent back to a newly composed Appeals Committee (excluding members who have previously taken part in the proceedings) in order for that Committee to consider the appeal "in substance" and in a consolidated procedure including his appeal RI/31/15. He also seeks moral damages in the amount of 2,000 euros for the procedural violations and delays in the process. On a subsidiary basis, he asks the Tribunal to complement the "fact finding and taking of evidence", to provide him with the opportunity to comment on any further evidence submitted by the President in response to the appeal and to declare PPN 05/13 and the corresponding public notice and communications forms inapplicable. He seeks moral damages in the amount of 100 euros per month as from 6 January 2014, moral damages in the amount of 5,000 euros for each "illegitimate" communication sent in his name to an applicant as a consequence of the practice introduced with PPN 05/13, and moral damages in the amount of 2,000 euros for procedural violations. He further claims costs and compound interest at the rate of 8 per cent per annum on all amounts due.

In his rejoinder the complainant expands his requests for relief and seeks, in particular, the urgent treatment of several of his internal appeals.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary basis, as unfounded in its entirety on the merits. It requests that his ancillary claims be dismissed accordingly.

CONSIDERATIONS

1. In the present complaint the complainant impugns the decision of the Principal Director of PD 4.3, acting with delegation of power

from the President, in which she endorsed the Appeals Committee's recommendation to reject his appeal as manifestly irreceivable.

2. In his submissions the complainant refers to several other complaints that he has filed with the Tribunal. The Tribunal finds it convenient not to join these complaints to the present one.

3. As to the complainant's request for oral proceedings, the Tribunal notes that the parties have presented their case extensively and comprehensively in their written submissions, which are sufficient to enable the Tribunal to reach a reasoned and informed decision on the only issue that must be determined at this stage. The request for oral proceedings is therefore rejected.

4. The complainant argues that the Appeals Committee was improperly composed as it did not include two members appointed by the Central Staff Committee. In addition, he submits that the Appeals Committee unlawfully applied the summary procedure to his appeal, thereby infringing his right to be heard. The complainant also challenges PPN 05/13, and contends that it violates Rule 49(12) of the European Patent Convention.

5. The EPO contends that the Appeals Committee was properly composed. As a result of the Central Staff Committee's failure to appoint, before 1 October 2014, two full and two alternative Appeals Committee members, as required by Article 36(2) of the Service Regulations and Article 5(3) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, the President of the Office called upon elected staff representatives to volunteer as members of the Appeals Committee. With the participation of staff representative volunteers, the Appeals Committee was able to function as a duly composed body as from January 2015. The EPO submits that the present complaint is clearly irreceivable *ratione materiae* and *ratione temporis*, and, subsidiarily, that the complainant's claims are unfounded on the merits.

6. The Tribunal will deal first with the issue regarding the composition of the Appeals Committee.

The Tribunal has previously stated, in Judgment 3694, under 6, that “considering the quasi-judicial functions of the Appeals Committee, its composition is fundamental and changing it changes the body itself. While it is true that the fundamental functions of that body must not be paralysed, it is also true that the body itself cannot be changed through a changed composition. The balance sought to be achieved by the composition of this body, which includes members appointed by the Administration and the staff representation, is a fundamental guarantee of its impartiality. That balanced composition is an essential feature underpinning its existence. Without it, it is not the Appeals Committee.” In Judgment 3694 the Tribunal sent the case back to the EPO so that the Appeals Committee, “composed in accordance with the applicable rules”, could examine the appeal.

7. In the present case, the Appeals Committee which issued the recommendations on which the impugned decision was based was not composed in accordance with the applicable rules set out in Articles 36(2)(a) and 111(1)(a) of the Service Regulations, and Article 5(3) of the Implementing Rules to Articles 106 to 113 of the Service Regulations.

These Articles provide in relevant part:

**“Article 36
Competence of the Central Staff Committee**

[...]

- (2) The Central Staff Committee shall be responsible for:
- (a) making appointments to the bodies under the Service Regulations or as requested by the President of the Office. [...]

**Article 111
Appeals Committee**

- (1) The Appeals Committee shall consist of:
- (a) a chairman and four members, when dealing with appeals against decisions of the President of the Office;
- [...]

Article 5
Composition of the Appeals Committee

[...]

- (3) For the purposes of Article 111(1)(a) and (b) of the Service Regulations, the Staff Committee shall appoint, among employees in active employment:
- (a) two full members and
 - (b) two alternate members of the Committee.”

Two members of the Appeals Committee were volunteers who were not appointed by the Staff Committee as specifically required by the applicable provisions and therefore the composition of the Appeals Committee cannot be considered to be the balanced composition as provided for by the rules.

The Staff Committee, which is directly elected by staff, is responsible for appointing two full members and two alternate members of the Appeals Committee as representative of the collective interests of the staff. The two volunteers did not have that representative capacity.

8. The Tribunal has not dealt with the question, raised by the EPO, that the first step in the internal appeal process, the request for review by the President, was out of time and accordingly the complainant has not exhausted internal means of redress and his complaint to this Tribunal is irreceivable (Article VII, paragraph 1, of the Statute). The Tribunal has taken this approach because the Appeals Committee (properly constituted), or the President in the final decision based on the recommendations of the Committee, can adopt the approach that non-compliance with the time limit in relation to the first step can be waived or that the time limit has been met.

9. The impugned decision of 24 June 2015 must be set aside. The case will be sent back to the EPO for the Appeals Committee, composed in accordance with the applicable rules, to examine the appeal.

In the specific circumstances of this case, no award of moral damages or costs will be made.

DECISION

For the above reasons,

1. The decision of 24 June 2015 is set aside.
2. The case is sent back to the EPO for examination by an Appeals Committee composed in accordance with the applicable rules.
3. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 November 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ