C. (No. 9)

v.

EPO

139th Session **Judgment No. 4991**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr T. C. against the European Patent Organisation (EPO) on 13 August 2019 and corrected on 14 October 2019, the EPO's reply of 5 February 2020, the complainant's rejoinder of 17 June 2020, the EPO's surrejoinder of 30 October 2020, the complainant's additional submissions dated 24 October 2023 and the EPO's final comments of 7 February 2024;

Considering the letter of 12 January 2023 by which the EPO informed the Registry of the Tribunal that it had paid 100 euros in moral damages to the complainant for the irregular composition of the Appeals Committee, as was done in Judgment 4550;

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 challenges Internal Instructions that modified the examination of patent law applications.

In June 2012, the staff of the European Patent Office, the secretariat of the EPO, were informed of the entry into force as from 20 June of new Internal Instructions ("the 2012 Internal Instructions") concerning the patent granting procedure. Hence, Article 2 of Section IC-VIII of the 2012 Internal Instructions was revised. In addition, the Practice and

Procedure Notice 08/12 was issued to provide information on the roles in the Examining Division and the votum template. In September 2012, the complainant, who was an examiner, wrote to the President of the Office, in his capacity as staff representative, appealing the Internal Instructions on the ground that both directors and examiners were negatively affected by the instructions to intervene in the decision-taking process of the Examining Division. He contested in particular Article 2.4 of Section IC-VIII of the 2012 Internal Instructions concerning the role of directors.

In February 2015, the complainant was informed that his appeal was dismissed as manifestly irreceivable in accordance with the recommendation of the Appeals Committee. He filed a complaint before the Tribunal, his third, which led to Judgment 3694. The Tribunal found that the Appeals Committee was not composed in accordance with applicable rules and sent the case back to the EPO so that a new Appeals Committee, composed in accordance with the applicable rules, may examine the appeal anew.

In March 2017, the complainant was informed that the President had remitted the matter to the Appeals Committee. He asked to be provided with information on the composition of the panel, but received no reply. Consequently, in April 2017, he filed an application for execution and interpretation of Judgment 3694. In late 2017, the Tribunal dismissed the application for execution.

Later, in November 2018, the Secretariat of the Appeals Committee informed the complainant that his appeal would be examined in accordance with applicable rules (as modified by decision CA/D 7/17), and that the presiding member of the panel examining his appeal had decided to propose to the Appeals Committee to apply the summary procedure. Shortly afterwards, the complainant raised objections concerning the independence and impartiality of the presiding member of the panel examining his appeal and of the chair of the Appeals Committee.

The Appeals Committee deliberated in February 2019 and issued its reasoned opinion on 15 March 2019. It unanimously recommended dismissing the appeal as manifestly irreceivable, and awarding the

complainant 600 euros for the length of the procedure. Contrary to the complainant's view, the fact that he received a standard letter indicating that his appeal would be dealt with under the summary procedure did not give rise to any justified objections against the independence and impartiality of the presiding member of the panel or the chair of the Appeals Committee, neither did it show that the new Appeals Committee systematically applied the same approach as the former Appeals Committee. His appeal was re-assessed by the presiding member when it was remitted for the new examination, and the decision to apply the summary procedure was taken by the entire panel in conformity with applicable rules, which allowed that procedure to be applied to appeals registered prior to January 2013 when the new rules came into force. The Appeals Committee rejected the allegations of bias stressing that the members of the panel had no personal or family interest in the outcome of the dispute. As to the scope of the appeal, it noted that the contested decision was limited to the introduction of Article 2.4 of Section IC-VIII of the 2012 Internal Instructions. The contested instruction was not an appealable decision in the sense of Article 108 of the Service Regulations for permanent employees of the Office as it concerned the law and procedures applicable to patent applications and had no direct effect on the complainant's employment relationship with the Office. In those circumstances, the procedure laid down in Article 38(3) of the Service Regulations on consultation was not required.

On 15 May 2019, the Principal Director of Human Resources, acting by delegation of power from the President, informed the complainant of her decision to endorse the Appeals Committee's recommendations. That is the impugned decision.

The complainant asks the Tribunal to declare Article 111a(2) of the Service Regulations as introduced by Article 58 of decision CA/D 7/17 null and void insofar as it prescribes the "approval by the competent appointing authority", the "whole appeals procedure" null and void *ab initio*, and to send the case back to the EPO so that the Appeals Committee – composed in a balanced way (in accordance with Judgments 4550, consideration 15, 3785, consideration 6, and 3694,

consideration 6) – examine his appeal. The appeal should be examined *ab initio* and the panel examining it should not include members of the Appeals Committee, who took part in the procedure so far. He claims moral damages for the procedural flaws that affected negatively his dignity and burdened him unnecessarily, and for undue delay in the internal appeal procedure. He also seeks an award of costs, including for the complaint he filed leading to Judgment 3895 together with interests at the rate of 2 per cent per month delay on any amount awarded to him. In addition, he asks the Tribunal to order the EPO to pay any amount granted directly to his bank account. On an auxiliary basis, he asks the Tribunal to annul *ab initio* the Practice and Procedure Notice 03/11, and the "corresponding working instructions, part IC-VIII, 2.4 in the Internal Guidelines for Examination and [Patent Cooperation Treaty]".

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* as the Tribunal is not competent to examine patent law. Subsidiarily, it asks the Tribunal to dismiss the complaint as unfounded. It stresses that the complainant has received adequate compensation for the length of the procedure, and that his claim for costs with respect to the case leading to Judgment 3895 is *res judicata*. The claim concerning the costs of the present procedure should be rejected as he produces no evidence of the costs incurred. Lastly, the EPO makes a counterclaim for costs considering that the complaint is vexatious.

CONSIDERATIONS

1. The complainant requests oral proceedings and lists witnesses. Pursuant to Article V of the Statute of the Tribunal, "[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party". In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision. The Tribunal, therefore, rejects the request.

2. The following discussion proceeds against the background already set out in the facts described above. The complainant challenges the 15 May 2019 decision, by which the Principal Director of Human Resources, endorsing the Appeals Committee's opinion issued on 15 March 2019, dismissed as manifestly irreceivable the complainant's internal appeal lodged against Article 2.4 of Section IC-VIII of the 2012 Internal Instructions, concerning the role of the Director in the patent granting process. It read as follows:

> "2.4. Role of the Director
>
> The Director is accountable for the quality of the work delivered by the Directorate. If the Director is of the opinion that the application [for patent granting] is not in order for grant, he shall discuss the issue with the examining division, who will review the situation in light of the director's concerns."

The impugned decision also awarded the complainant 600 euros for the length of the procedure.

3. It is appropriate at the outset to establish the scope of the present complaint. The complainant in his pleas and annexes to his brief challenges the Practice and Procedure Notice (PPN) 08/12.

4. The Tribunal will first address the receivability issue raised by the EPO with regard to the challenge of PPN 08/12, which, in the EPO's view, is not a challengeable decision.

The Tribunal recalls that PPN 08/12 contains working instructions concerning the patent granting process. In this respect, the European Patent Convention (EPC) lays down the functions of examiners within the procedure of granting patents; Article 18 read:

> "**Examining Divisions**
>
> (1) The Examining Divisions shall be responsible for the examination of European patent applications.
>
> (2) An Examining Division shall consist of three technically qualified examiners. However, before a decision is taken on a European patent application, its examination shall, as a general rule, be entrusted to one member of the Examining Division. [...] If the Examining Division considers that the nature of the decision so requires, it shall be enlarged by the addition of a legally qualified examiner. In the event of parity of votes, the vote of the Chairman of the Examining Division shall be decisive."

As the EPO correctly notes, there are two distinct sets of rules: patent law and employment law. The EPC is concerned with patent law and it is not part of the staff terms of employment. The EPC lays down the functions of examiners within the procedure of granting patents but does not confer the rights that they could enforce against the Office. Any breach of the patent granting procedure strictly relates to patent law and falls within the ambit of the Boards of Appeal (Article 21 of the EPC).

As a rule, instructions concerning the patent granting process fall within the ambit of patent law and, thus, they are not challengeable by staff and they do not fall within the competence of the Tribunal. The Tribunal recalls that, in a judgment regarding the issue of alleged interference in the work of the Examining Division, the Tribunal held that decisions with respect to the law and/or procedures applicable to patent applications do not "adversely affect" staff members and, thus, cannot be the subject of an internal appeal. In short, such decisions are not appealable and do not create a cause of action (see Judgment 4417, considerations 7 and 8). In other judgments, the Tribunal held that, in principle, proposals and/or decisions relating to the law and/or procedures applicable to patent applications do not directly affect the relationship of staff with the organization, whether in terms of the work to be performed, the way in which it is to be performed, the method by which it is to be evaluated or the like, although decisions or proposals as to the implementations of changes to the law and/or procedures may well do so (see Judgments 4797, consideration 7, and 3053, consideration 10). In any event, where instructions concerning the patent granting process are also "working instructions", they might impact the management of the daily work of the examiners who carry out the patent granting process, in terms of the work to be performed, the way in which it is to be performed, the method by which it is to be evaluated or the like. Similarly, Judgment 4797, concerning working instructions PPN 03/11 being of the same nature as the one in the present proceedings, held that, whilst it is true that the Notice concerns the procedures applicable to patent applications, it nonetheless "concerned the work to be performed and the way it was performed" (see Judgment 4797, consideration 9). However, Judgment 4797 reached this conclusion for the purpose of

stating that the EPO should have complied with Article 38(3) of the Service Regulations for permanent employees of the Office (consultation with the General Advisory Committee, GAC) in the process leading to the adoption of the working instructions. Judgment 4797 allowed the immediate challenge of working instructions on the basis that they had been impugned by a staff member in his capacity as a member of the GAC, thus having an interest that the body on which he was a member was properly consulted (see Judgment 4797, consideration 5). Unlike in the case decided by Judgment 4797, in the present complaint, the complainant has not raised the issue of breach of Article 38(3) of the Service Regulations. Thus, the working instructions cannot be held immediately and directly challengeable on the same ground considered by Judgment 4797, consideration 5.

The Tribunal holds that the fact that PPN 08/12 concerns “the work to be performed, the way in which it is to be performed” does not by itself imply that it immediately and adversely affects the rights of the staff, and, thus, that it is a challengeable decision. In the present case, the complainant has not established that it does.

5. The complainant advances a number of pleas concerning the composition of the Appeals Committee, the summary procedure it followed, including the delay. He also requests that the case be sent back to a newly composed Appeals Committee. Given that the complaint is irreceivable, the Tribunal has no competence to consider these matters. But, even assuming they remain issues that the Tribunal can address (which the Tribunal does not accept), they are not founded.

6. As the complaint fails, the complainant is not entitled to costs for the present proceedings. His request to also be awarded costs for the complaint he filed leading to Judgment 3895, is irreceivable. Judgment 3895 was delivered on the complainant’s application for execution and interpretation of Judgment 3694, it dismissed the application and, inter alia, rejected the claim for costs. Judgment 3895 has the authority of *res judicata* between the parties, and, accordingly, the complainant is not allowed to resubmit a claim already rejected on the merits.

7. The EPO submits a counterclaim for costs, alleging that the complaint amounts to an abuse of process as it is "frivolous, vexatious and repeated". While there is substance to that argument the Tribunal is not satisfied, on balance, that the proceeding should be characterised in that way. Accordingly, no costs will be awarded against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.

2. The counterclaim for costs is dismissed.

In witness of this judgment, adopted on 1 November 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER