H. (No. 26)

v.

EPO

139th Session **Judgment No. 4992**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-sixth complaint filed by Mr W. H. H. against the European Patent Organisation (EPO) on 11 May 2018 and corrected on 28 May 2018, the EPO's reply of 3 September 2018, the complainant's rejoinder of 28 November 2018 and the EPO's surrejoinder of 7 March 2019;

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 contests the change in the examination of the patent application procedure.

The complainant was an examiner at the European Patent Office, the secretariat of the EPO. In September 2016, a decision was made on behalf of the Examining Division to send to a patent applicant an automatic letter, dated 14 September 2016, allegedly without the knowledge of the said Division. In that letter, the patent applicant was informed that substantive examination of his patent application was expected to begin on or after 14 November 2016 and that, if his application was withdrawn, refused or deemed to be withdrawn before substantive examination had begun, the examination fee would be

refunded. The complainant, who was the examiner in charge of that patent application, requested the President of the Office to review the decision to send the automatic letter stressing that neither him nor anyone in the Examining Division had been involved in that decision, which had an impact on the work process.

The request for review having been rejected, he filed an internal appeal with the Appeals Committee in December 2016 explaining that the contested decision made him look "silly" as it offered the applicant the possibility to withdraw the application just after having filed a substantive response. He stressed that the letter was sent to the applicant without prior knowledge of the Examining Division that was responsible for examination, and it conveyed views that were not shared by the members of the Division since they had not planned to begin working on that application in November 2016. The act of issuing the contested letter would change the order of priority of his work adding stress and pressure on him for no reason. The complainant requested the abolition of the current procedure for sending automatic letters to applicants, an apology for the deliberate harm caused to him, moral damages and costs.

The Appeals Committee deliberated on 20 September 2017 on the complainant's appeal and issued its opinion on 14 December 2017. By a majority, it considered that his appeal was manifestly irreceivable and therefore applied the summary procedure. The majority considered that an automatic communication in the patent granting procedure was not an appealable decision in the sense of Article 108 of the Service Regulations for permanent employees of the Office and found that the contested communication did not affect the complainant's relationship with the EPO. One member disagreed with the majority arguing that the regular procedure for the examination of the appeal should be followed given that the complainant challenged the specific instance of automatic communications sent on behalf of the Examining Division; hence, he was not challenging the general decision of sending automatic communications but a specific instance of the decision.

On 14 February 2018, the complainant was informed that the Vice-President of Directorate-General 4 had decided to endorse the Appeals Committee's recommendation to dismiss his appeal as manifestly irreceivable. He also endorsed the majority's opinion that the Appeals Committee was composed in accordance with the applicable rules and that its independence, expressly foreseen in the rules, was a sufficient guarantee. That is the decision the complainant impugns in his complaint.

The complainant asks the Tribunal to quash the impugned decision, to scrap the procedure of sending automatic letters without the examiner's knowledge or approval, and to award him moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable for lack of a cause of action, and subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant was, at the time the events occurred in 2016 culminating in this complaint, a patent examiner, in fact, a patent examiner in charge. The factual background is set out earlier in this judgment and it is unnecessary to repeat it. Suffice it to note that the complainant's grievance was a decision to send a letter to patent applicants concerning the time at which their application was expected to be considered and the circumstances in which the application fee might be refunded.

2. Nothing in the complainant's pleas demonstrates that the decision to send the letter had any legal effect on him. One of the touchstones of the Tribunal's jurisdiction is that the impugned decision has had a legal effect on the complainant. As the Tribunal discussed in Judgment 4145, consideration 5:

> "[...] Article II of the Tribunal's Statute has been interpreted to require that for a complaint to be receivable the staff member must have a cause of action and the impugned decision must be one that, by its nature, is subject to challenge. As the Tribunal explained in Judgment 3426, consideration 16, in addition to the requirement that the complainant must be an official of the defendant organization or other person as provided in paragraph 6 of the Article, paragraph 5 requires that a complaint 'must relate to [a] decision

> involving the terms of a staff member's appointment or the provisions of the Staff Regulations'. In Judgment 4048, consideration 5, the Tribunal elaborated that 'to invoke the Tribunal's jurisdiction, it must be a decision adversely affecting the complainant concerning either rights, privileges, obligations or duties arising under the provisions of staff regulations or the complainant's terms of appointment' and that '[t]he complaint must allege non-observance of either or both (see Article II of the Tribunal's Statute)'. As the complaint does not relate to a decision involving the complainant's terms of appointment or the provisions of the EMBL's Staff Rules and Regulations, it does not disclose a cause of action and is irreceivable. [...]"

3. Specifically, in relation to patent examinations and the reach of the Tribunal's jurisdiction and its limits in relation to patent examiners, the Tribunal said in Judgment 4799, consideration 4:

> "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)."

(See also Judgment 4798, consideration 4.)

4. The complainant does not have a cause of action in relation to the decision to send the letter. Accordingly, his complaint is irreceivable and should be dismissed.

DECISION

For the above reasons,

The complaint 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