

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

*Registry's translation,  
the French text alone  
being authoritative.*

**P. (No. 2)**

**v.**

**EPO**

**139th Session**

**Judgment No. 4997**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr L. M. A. P. against the European Patent Organisation (EPO) on 14 April 2018 and corrected on 19 May, the EPO's reply of 3 September 2018, the complainant's rejoinder of 30 November 2018 and the EPO's surrejoinder of 11 March 2019;

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 the rejection of his internal appeal relating to a letter which he intended to send to the French representative on the Administrative Council of the EPO.

On 27 June 2013 the Administrative Council adopted decision CA/D 5/13 introducing into the Service Regulations Article 30a on the right to strike and amending Articles 63 and 65.

The complainant, a French national, has been a permanent employee of the European Patent Office, the EPO's secretariat, since 2004, and, at the material time, was also a staff representative. By email of 2 February 2014, he informed the Principal Director of Human Resources that he intended to send a letter to the French representative on the Administrative Council of the Organisation, on behalf of a

“collective of French citizens (acting outside the scope of a group of EPO colleagues)”, in order to question the French public authorities about France’s support for the introduction of new Article 30a into the Service Regulations. He explained that the article in question and the support given to this amendment to the Service Regulations were “incompatible with French law and with the public commitments made by French politicians”, and asserted that his letter was not inconsistent with either the regulations or the image of the Office because it concerned the right of French citizens to “participate in the public affairs of [their] country” and that no confidential information was disclosed. He asked the Office to let him know if it disagreed in any way with the content of the draft letter – which was attached to his note – by 7 February 2014. It should be noted that the recipient of the proposed letter was addressed in his capacity of Director General of the French national institute of intellectual property.

On 6 February 2014 the Principal Director of Human Resources responded to him, saying that the draft letter called into question the legal framework applicable to permanent employees and that the “implied pressure and threats” contained therein contradicted the principles of social dialogue and were incompatible with the style of communication expected of an international civil servant. She pointed out that the short deadline given to respond to his letter did not correspond to the two-month time limit under the regulations and did not seem to be justified by any particular urgency. She informed him that his request would be examined by the relevant legal services as soon as possible and that, in the meantime, he should “carefully consider any external communications and avoid doing anything that could contravene the EPO Service Regulations”. In an email of 10 February 2014, the complainant stated that he regarded this response as an “implicit threat of disciplinary sanctions” and asked the Director to convey their discussions, by way of information, together with the draft letter of 2 February, to the French representative on the Administrative Council.

On 4 July 2014 he filed a request for review of the “lack of response” to his emails of 2 and 10 February, which was rejected on 29 July 2014. On 28 October 2014 he lodged an appeal with the Appeals Committee, invoking his right to participate in the political life of his country and asking, in particular, for the decision rejecting his request for review to be quashed, for the Office to issue a declaration that it was lawful for him to contact the French representative with “legitimate questions”, and for the award of damages for the moral injury he considered he had suffered, together with costs.

In its opinion of 14 November 2017 delivered after hearing the parties, the Appeals Committee unanimously recommended that the appeal be rejected as irreceivable on the grounds that the complainant’s emails of 2 and 10 February 2014 did not constitute requests within the meaning of Article 107(1) of the Service Regulations and that the email from the Principal Director of Human Resources of 6 February 2014 did not constitute a decision adversely affecting the complainant since it invited him to review the extent of his own obligations and to act accordingly. One member of the Appeals Committee issued a concurrent opinion, in which he confirmed that he fully endorsed the conclusions reached by the other members that the appeal should be rejected as inadmissible, but also considered that the Committee was not properly constituted. By a letter of 15 January 2018, the Vice-President of Directorate-General 4 informed the complainant of his decision, taken by delegation of power from the President, to reject his appeal in accordance with the Appeals Committee’s recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 29 July 2014 and to order that the letter in question be sent to the French delegation to the Administrative Council of the EPO. He also claims moral damages of at least 100,000 euros for the failure to respect his fundamental rights, at least 200,000 euros for moral harassment and 5,000 euros for the excessive length of the internal appeal procedure, together with costs. In the event that these claims could not be accepted, he asks the Tribunal to find the Appeals Committee’s opinion null and

void, to set aside the impugned decision and to send the case back to a new, properly-constituted Committee.

The EPO submits that the complainant has no cause of action as he does not allege any breach of the provisions of the Service Regulations or the terms of his appointment, and has not suffered any injury. It also maintains that, in the emails of 2 and 10 February 2014, the complainant did not submit any request within the meaning of Article 107(1) of the Service Regulations and that the reply of 6 February 2014 was therefore not a decision adversely affecting him that was capable of challenge by review or internal appeal in accordance with Article 108(1) of the Service Regulations. The EPO asserts that, even if that had been the case, the request for review would in any event have been out of time. Consequently, the Organisation asks the Tribunal to dismiss the complaint as irreceivable. Subsidiarily, it asks for the complaint to be dismissed as unfounded.

#### CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 15 January 2018 by which the Vice-President of the European Patent Office in charge of Directorate-General 4, in accordance with the unanimous opinion of the Appeals Committee, rejected as irreceivable the internal appeal brought by the complainant against the reaction of the Principal Director of Human Resources to emails he had sent her on 2 and 10 February 2014.

In those two emails – the second of which was sent in reaction to the response of 6 February to the first – the complainant asked the Director, in essence, to let him know whether the administration believed there to be any constraints under the regulations on his ability to send a letter, in the name of a “collective of French citizens”, essentially consisting of permanent employees of the Office, to the representative of France on the Administrative Council of the EPO. The purpose of the letter in question, a draft of which was attached to the email of 2 February, was to question the French authorities about the support they had lent, shortly before, to the adoption of the new

Article 30a of the Service Regulations on the right to strike. In his draft letter, the complainant argued that the provisions of that article imposed a “limit on the right to strike [...] inconsistent with French law and with political commitments made by [successive] French governments”.

In her email sent in response of 6 February 2014, the Principal Director of Human Resources expressed considerable reservations about the content of the draft letter. She noted in particular that it “call[ed] into question the legal framework applicable to permanent employees of the Office” and that it contained “implied pressure and threats against a French civil servant” which seemed to her “incompatible with the style of communication expected of an international civil servant”. As a consequence, she informed the complainant that, while waiting for the EPO’s legal services to review the matter, she would “encourage [him] to carefully consider any external communications and avoid doing anything that could contravene the EPO Service Regulations”.

2. Article II of the Statute of the Tribunal provides, in paragraphs 1 and 5, that the Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of an official’s appointment and of the provisions of the staff regulations of the organisation that employs her or him. As the Tribunal has repeatedly stated in its case law, it may be inferred from these provisions that, if a complaint is to be receivable, first, it must be directed against a decision which is of a kind that may be challenged before the Tribunal and, secondly, the staff member in question must have a cause of action (see, for example, Judgments 4337, consideration 6, 4296, consideration 6, 4145, consideration 5, or 3426, consideration 16).

As regards the first of these requirements, the case law has it that an act by an international organisation must have legal effect if it is to be a challengeable decision (see, for example, Judgments 4038, consideration 3, 3428, consideration 13, 2364, consideration 4, or 1674, consideration 6(a)).

As regards the second requirement, the case law has made it clear, with reference to the provisions of the aforementioned Article II of the Statute of the Tribunal, that, for a cause of action to arise, a staff member's claims must rest on the rights or obligations arising under her or his terms of appointment or the provisions of staff regulations (see, in particular, Judgments 4337, consideration 6, 4145, consideration 5, 4048, consideration 5, and 3426, consideration 16).

3. In the present case, the Tribunal considers that – subject to the sole reservation mentioned below – the complaint before it is not directed against a challengeable decision.

In his email of 2 February 2014, the complainant, having asserted that he did not regard the letter he had drafted to be inconsistent with any obligation under the Service Regulations, asked the Principal Director of Human Resources, “[s]hould the Office not share this view”, to “inform [him] of the reasons, in writing, by 07 February 2014”. In his email of 10 February, the complainant asked the Director to “notify [him] by 15 February 2014 of any constraints under the [S]ervice [R]egulations on [the] ability [of Office employees] to communicate with the representative of [their] country on the [Administrative Council] of the EPO [...] and with the representatives of the [S]tate of which [they] are citizens”.

The Tribunal considers that the manner in which these approaches were worded meant that their purpose was deemed to be simply to check whether the Office might have any ethical objections to the sending of the letter. They were therefore not capable of provoking an administrative decision in response but merely of eliciting an opinion on the matter from the relevant departments.

Furthermore, Article 107 of the Service Regulations provides that an employee wishing an administrative decision relating to her or him to be taken must submit a request to this effect and that the competent authority then has two months to act on that request, a failure to respond within that period constituting an implied decision rejecting it. Therefore, in requesting that his queries be answered within five days, as he did in each of the two emails referred to above, the complainant

himself clearly intended them to be governed by a legal context other than the one used for requesting a decision.

In the circumstances, it must be pointed out that neither the fact that the email of 10 February went unanswered, nor the fact that the administration failed to send the complainant a follow-up response to his email of 2 February, despite having indicated – albeit somewhat clumsily – in its reply of 6 February that it would do so, can be regarded as an implied rejection decision that is capable of challenge.

4. Furthermore, the Tribunal considers that, in making the observations referred to above in her email of 6 February 2014, the Principal Director of Human Resources, far from taking a decision, was merely expressing her opinion on the draft letter in question, as requested by the complainant on 2 February, and offering him some advice.

In particular, the complainant cannot legitimately point to an identifiable decision in the Director's suggestion that he should carefully consider his intended course of action. Contrary to what he asserts in his written submissions, this recommendation cannot, in itself, be regarded as a threat of disciplinary sanctions and, even supposing that it could, the mere threat of a sanction – as opposed to the actual imposition of a sanction – cannot be regarded as a decision.

It must also be noted that, whatever reservations may have been expressed about the content of the letter drafted by the complainant, there was nothing in the email of 6 February to prevent him from sending that letter to the French representative on the Administrative Council if he believed he was entitled to do so.

Therefore, the email in question did not have any legal effect, meaning that, in accordance with the case law cited in consideration 2 above, it cannot be regarded as a challengeable decision. Furthermore, the Tribunal notes that the same conclusion follows from Article 108(1) of the Service Regulations which provides that a staff member can only use the review procedure or internal appeal procedure to challenge “an individual decision adversely affecting him”.

Lastly, the complainant's argument that an administrative decision relating to him was taken when a decision on his request for review was made on 29 July 2014 is irrelevant. The fact that the competent authority examined that request, as it was required to do, in the context of the review procedure governed by Article 109 of the Service Regulations, can obviously do nothing to remedy the lack of an initial challengeable decision.

5. Nevertheless, notwithstanding the foregoing, it must be held that the Principal Director of Human Resources did take a decision in relation to one specific point. In the final paragraph of the email of 10 February 2014, the complainant had requested her to send the draft letter in question, along with a copy of the messages exchanged about it, to the French representative on the Administrative Council. Therefore, by failing to take action on that request, the Director must be regarded as having implicitly rejected it, which, in this instance, does constitute such a decision.

However, the complainant has no cause of action to challenge that decision. Nothing in the terms of his appointment or in the Service Regulations confers on him the right to require the EPO to convey a letter on his behalf to the representative of a Member State on the Administrative Council or, *a fortiori*, to that individual in his capacity as a high-ranking official of that State. This is all the more true given that, in view of the content of the draft letter in question which, in the name of a collective of citizens of a State, voiced criticism to a national authority of that State about a reform adopted by the Organisation and which clearly sought to put pressure on that authority, the Tribunal considers that the complainant's action was, in the present case, at the very least, incompatible with the duty of discretion by which employees of the Office are bound under Articles 14(1) and 16(1) of the Service Regulations (see for example, for a similar case, Judgment 2114, consideration 10).

The Tribunal also notes that, in his email of 2 February 2014, the complainant himself stated that the right on the basis of which the employees he represented sought to justify their action was the right to

“participate in the public affairs of [their] country as French citizens”. However legitimate the exercise of such a right may be – provided it remains within the limits referred to above – it is clearly not based on the contractual terms or provisions of the Service Regulations governing the situation of those employees. Therefore, in view of the case law recalled in consideration 2 above, it does not confer on the complainant the cause of action he claims to possess.

6. It follows from these considerations that, as the EPO rightly contends, the complainant’s claims for the impugned decision of 15 January 2018 and the aforementioned decision of 29 July 2014 to be set aside must be dismissed as irreceivable.

7. Since these claims fail, the complainant’s subsidiary claims based on the alleged unlawfulness of those decisions must also fail.

The Tribunal notes that some of the claims in question are, in addition, irreceivable on grounds of their own. Thus, although the complainant asks the Tribunal to order that the aforementioned letter be sent to the French delegation to the Administrative Council, the Tribunal is not, in any event, competent to make orders of that kind against an international organisation (see, for example, Judgments 4601, consideration 14, or 2058, consideration 13). Furthermore, the evidence shows that the compensation claim specifically relating to moral harassment, which, according to the complainant, involves the contested act, was not mentioned in his internal appeal. It is therefore a new claim before the Tribunal, which, as such, does not satisfy the requirement to exhaust internal remedies laid down by Article VII, paragraph 1, of the Tribunal’s Statute.

8. The complainant asks the Tribunal to order the EPO to pay him damages for the excessive length of the internal appeal procedure.

In this regard, it must be recalled that international civil servants are entitled to expect that their cases will be considered by internal appeal bodies within a reasonable timeframe and that failure to comply with this requirement of expeditious proceedings constitutes a failing

on the part of the employer organisation (see, for example, aforementioned Judgment 3510, consideration 24, or Judgment 2116, consideration 11). According to the Tribunal's case law, the amount of compensation liable to be granted under this head ordinarily depends on two considerations, one being the length of the delay and the other the effect of the delay on the employee concerned (see, for example, Judgments 4635, consideration 8, 4178, consideration 15, 4100, consideration 7, or 3160, consideration 17).

In the present case, the period of almost 39 months between the submission of the internal appeal on 28 October 2014 and the decision on it of 15 January 2018 is, in itself, clearly excessive. However, given that, as explained, the internal appeal was not directed against an act adversely affecting the complainant, the Tribunal finds that the delay did not have any actual adverse consequence for the complainant and, therefore, did not cause him any injury warranting compensation (see in particular, for a similar case, Judgment 4493, considerations 5 to 9). Therefore, in the specific circumstances of the case, the Tribunal will not make an order under this head.

9. In claims subsidiary to the ones addressed above, the complainant asks the Tribunal to set aside the impugned decision and to send the case back to the EPO to be examined afresh by the Appeals Committee. He submits that the opinion delivered by the Committee on 14 November 2017 was null and void as the latter was not properly constituted.

However, the Tribunal cannot in any event entertain such claims since, as already stated, the complainant is not entitled to ask for the impugned decision to be set aside.

Furthermore, it must be noted that the arguments raised by the complainant in this regard in his written submissions is unfounded. These arguments are based on the minority opinion expressed by one of the members of the Appeals Committee – which did not deviate from the opinion of the other members except on this sole point – and essentially criticise the fact that the Committee included staff representatives who had volunteered or had been determined by

drawing lots. While it is true that the use of such methods of appointment was previously censured by the Tribunal, at a time when it was not allowed under the relevant provisions of the Service Regulations (see Judgment 3785, consideration 7), an amendment of those provisions with effect from 1 January 2017 changed this, leading to it being recognised as valid by the case law from then on (see Judgment 4049, considerations 5 and 6).

10. The complainant requested oral proceedings, at which he wished the President of the Administrative Council of the EPO to be heard. However, in view of the above finding that his complaint is irreceivable, which cannot, in this case, be effectively challenged in oral proceedings and the effect of which is to render pointless any discussion about the merits of the case, this request must be dismissed as being without object.

11. It follows from the foregoing that the complaint must be dismissed in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

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

*(Signed)*

PATRICK FRYDMAN    JACQUES JAUMOTTE    CLEMENT GASCON

MIRKA DREGER