

**C. (No. 2) and d. I. T. (No. 10)**

**v.**

**EPO**

**140th Session**

**Judgment No. 5075**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr T. C. (his second) and Mr D. d. I. T. (his tenth) against the European Patent Organisation (EPO) on 17 November 2014 and corrected on 17 February 2015, the EPO's single reply of 25 June 2015, the complainants' rejoinder of 21 September 2015, corrected on 10 and 27 October 2015, the EPO's surrejoinder of 2 February 2016, the complainants' further submissions of 11 July 2016 and the EPO's final comments thereon of 2 January 2017;

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 complainants challenge the introduction of a quality monitoring system as well as the adoption of the Practice and Procedure Notice (PPN) 09/11 and contest the validity of the internal appeals proceedings.

The Vice-President of Directorate-General 1 (DG1) announced, on 27 June 2011, the implementation of a quality monitoring system – “Opposition Quality Monitoring System” (OQMS) –, with the aim of “retrieving relevant information from the outcome and decisions of opposition procedures” at the European Patent Office, the secretariat of the EPO.

On 18 August 2011, PPN 09/11 was issued to provide examiners with instructions for communication with patent applicants.

At relevant times, the complainants were examiners at the Office and contested the introduction of the OQMS as well as the issuance of PPN 09/11 arguing, in essence, that the General Advisory Committee (GAC) was not consulted for either decision, in breach of Article 38(3) of the Service Regulations for permanent employees of the Office. On 5 September 2011, Mr C., in his capacity as a member of the Staff Committee, and Mr d. l. T., in his capacity as a GAC member, initiated the internal appeal procedure together with three other staff members, also acting in their capacity as staff representatives. The President of the Office informed the complainants of his decision to forward their appeal to the Internal Appeals Committee (IAC) for an opinion by separate letters dated 4 November 2011.

In July 2012, the EPO announced the decision to “sto[p] with immediate effect” the OQMS.

Between June and August 2013, the IAC secretariat and the complainants exchanged correspondence regarding the composition of the IAC for their appeal and the scheduling of the hearing. The complainants sought, in particular, clarifications concerning modifications in the IAC composition following the recusal of a committee member due to a conflict of interest.

During the IAC hearing, held on 11 September 2013, the complainants amended their claims in light of the discontinuation of the OQMS and raised concerns regarding the Committee’s composition. Additionally, they requested that the IAC opinion be transmitted to them at the same time it was submitted to the President.

On 15 May 2014, the majority of the IAC members adopted a decision providing that the Committee’s draft recommendations had to be sent to the President “no later than 2 months after a first draft [was] circulated by the Secretariat [of the IAC]”. It was further agreed that all IAC members would have a total of two months to provide feedback on each draft recommendation and to sign the final document. In the event of non-compliance, a member’s signature “[could] be replaced by a

brief note from the Chair by analogy to Article 25 (6) [of the Rules of Procedure of the IAC]”.

The IAC issued its opinion concerning the complainants’ appeal on 3 June 2014, after holding deliberations on 15 October 2013. It unanimously recommended to dismiss, as inadmissible, their request that a system similar to the OQMS would not be reintroduced in the future. The majority of the Committee recommended to reject, as unfounded, all the claims concerning PPN 09/11 as well as all the remaining claims concerning the OQMS. The IAC indicated that a minority of the Committee “[took] a differing view”, however, despite several reminders “and the repeated setting of time limits, no minority opinion [had] been received, and no such opinion [could] be appended to the [opinion]”. In a note attached to the opinion, the Chair of the IAC indicated that the minority members had failed to submit their dissenting opinion within the time limits established in the IAC decision dated 15 May 2014. Therefore, their signatures had been replaced in the opinion “by analogy to Article 25 (6) of the [Rules of Procedure of the IAC]”. By a separate decision, also dated 3 June 2014, the majority of the IAC rejected the complainants’ procedural request that its opinion be forwarded to them at the same time as the President.

The Vice-President of Directorate-General 4 (DG4), acting by delegation of power from the President of the Office, informed the complainants, by separate letters dated 12 August 2014, of his decision to endorse the IAC’s unanimous recommendation to reject their appeal as partly irreceivable, and to also endorse the majority recommendation to reject their appeal as unfounded. This is the impugned decision.

The complainants request the Tribunal to set aside, in their entirety and *ab initio*, the decision to reject their appeal, as well as the decisions to implement the OQMS and PPN 09/11, which they also identify as the impugned decisions. The complainants also request that both the IAC’s opinion and decision dated 3 June 2014 rejecting their procedural request be declared null and void. They request the Tribunal to declare the entire appeals procedure null and void *ab initio* and to refer their appeal back to the IAC to be treated “in a new [...] composition”. In the alternative, they request that PPN 09/11 be submitted for consultation

to the GAC. The complainants request moral damages to be paid to each “Chairman of an Opposition Division” obliged to fill in the questionnaire underlying the OQMS, in the amount of 500 euros for each case, as well as moral damages for examiners “forced to issue a second communication” under PPN 09/11, in the amount of 250 euros for each case. Moreover, each complainant also requests to be granted moral damages in the amount of 50,000 euros, as well as costs.

The EPO requests the Tribunal to dismiss the complaints as unfounded.

In their rejoinder, the complainants amend some of their claims and ask the Tribunal not to refer their case to the IAC, but to treat the case “newly, from the beginning”. They also request the Tribunal to grant them an oral hearing and to allow them to submit additional written submissions. In addition, they modify the amount of compensation for moral damages for each complainant to the amount of 150,000 euros. On a subsidiary basis, they request the Tribunal to refer the case back to the IAC in a completely new composition without any member involved in the previous procedure.

In its surrejoinder, the EPO requests the Tribunal to reject the complainants’ request to amend their claims as irreceivable. It also asks the Tribunal to declare that it lacks jurisdiction to rule on the decisions to implement the OQMS and PPN 09/11.

## CONSIDERATIONS

1. The two complainants impugn the same decision and raise the same questions of law, which stem from the same facts. They rely on the same arguments, presented in a common brief. Accordingly, the complaints should be joined so one judgment can be rendered. In their rejoinder, the complainants apply for oral proceedings. The Tribunal observes that the parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Thus, the request is rejected.

2. The complainants challenge the 12 August 2014 decision by which the Vice-President of DG4, acting by delegation of power from the President of the Office, dismissed their internal appeal lodged against:

- (i) the 27 June 2011 decision of the Vice-President of DG1 to adopt an OQMS for retrieving relevant information from the outcome and decisions of opposition procedures;
- (ii) the 18 August 2011 decision of the Vice-Presidents of DG1 and Directorate-General 2 which adopted PPN 09/11, providing EPO examiners with working instructions; namely, PPN 09/11 gave the examiners of DG1 the instructions to send an intermediate written opinion (Form 408) before the issuance of a negative International Preliminary Examination Report.

At relevant times, Mr C. was a member of the Staff Committee of Berlin, Germany, whilst Mr d. l. T. was a member of the GAC.

The complainants advance a number of pleas concerning the composition of the IAC and the proceedings before it, and, on the merits, allege that both the 27 June 2011 and the 18 August 2011 decisions affected the employment relationship between the patent examiners and the Organisation. Therefore, the decisions should have been subject to a GAC consultation prior to their issuance.

3. As to the 27 June 2011 decision, it is uncontroverted between the parties that the OQMS was discontinued as of 13 July 2012. Thus, the claim that this decision be annulled is moot. As to the claim for moral damages caused by this decision for the time it was in force, it must be dismissed, as staff representatives are not entitled to an award of moral damages for proceedings brought before the Tribunal in that capacity (see Judgments 4797, consideration 11, and 4575, consideration 9). In any event, the alleged moral prejudice has not been proven.

4. As to the 18 August 2011 decision, the complainants contend, on the merits, that it is flawed for failure to consult the GAC, in breach of Article 38(3) of the Service Regulations.

Article 38(3) of the Service Regulations relevantly specified, at the time in question, the matters in respect of which a reasoned opinion of the GAC should be called for and given. It provided that such reasoned opinion was to be given, *inter alia*, on: “any proposal to amend [the] Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom [the] Service Regulations apply or the recipients of pensions”.

The Tribunal, in interpreting the scope of this provision, held that: “What the expression [‘concerns [...] staff to whom [the] Service Regulations apply’] directs is that the proposal or decision in question should in some way affect the relationship of staff members with the Organisation, 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. Proposals and/or decisions relating to the law and/or procedures applicable to patent applications do not directly affect that relationship although, as recognised in Judgment 2874, decisions or proposals as to the implementation of changes to the law and/or procedures may well do so” (see Judgments 4797, consideration 7, and 3053, consideration 10).

In an earlier case similarly concerning the challenge of a Notice related to the procedures applicable to patent applications (PPN 03/11), the Tribunal held that the Notice concerned the work to be performed and the way it was performed as comprehended by the observations of the Tribunal in Judgment 3053 quoted above, and that, accordingly, the GAC should, on a possible very wide reading of Article 38(3) of the Service Regulations, have been consulted (see Judgment 4797, consideration 9).

Similarly, in the present case, PPN 09/11 describes the opinion to be issued by the examiners and the related time limits and, to this extent, it concerns the work to be performed and the way it is performed, and, accordingly, the GAC should have been consulted.

5. However, as already noted by the Tribunal in Judgment 4797 concerning PPN 03/11, the failure to consult the GAC does not imply that the impugned decision should be annulled. Cases arise in the Tribunal where the defendant organisation has failed to consult a person or a body, which should have been consulted under the relevant rules, and the Tribunal may make orders which require that consultation take place and the Tribunal may also set aside the decision made without consultation (see, for example, Judgment 4230). However, setting aside the decision is not an inevitable outcome following a conclusion that consultation should have taken place, but did not. As explained by the Tribunal in Judgment 3883, considerations 22 and 23:

“22. However, more important, is the question of what flows from this unlawful conduct [a failure to consult]. In Judgment 3736, just cited, which concerned deductions from pension payments to individual former staff members based on a general decision made without appropriate consultation, the Tribunal concluded that the individual decisions to deduct the payments should be set aside and the organisation ordered to reimburse the complainants the amounts deducted.

23. However ultimately what relief can be granted by the Tribunal is governed by Article VIII of the Tribunal’s Statute that confers and defines its jurisdiction. That provision clearly contemplates that if a complainant establishes that a decision was unlawfully made, the decision can be rescinded. Equally, however, it contemplates that if the rescission of a decision is not ‘advisable’, then the Tribunal ‘shall award the complainant compensation for the injury caused to her or him’. Plainly enough following this latter course depends on the opinion and assessment of the Tribunal in the exercise of what, in substance, is a discretionary power (see Judgment 1419, consideration 24).”

In the present case, the failure to consult the GAC occurred over a decade ago. Indeed, the GAC was abolished in 2014, and, thus, it cannot now be consulted. It is not apparent to the Tribunal that the continued implementation of PPN 09/11 would cause any real prejudice or injury to the complainants or the staff of the Office more generally. In these circumstances, it is clearly not advisable to rescind the decision adopting and promulgating PPN 09/11 notwithstanding the failure to consult the GAC (see Judgment 4797, consideration 11). However, while Article VIII of the Tribunal’s Statute contemplates the awarding of compensation, there should be none in the present case. As already

said in consideration 3 above, a staff representative is not entitled to an award of moral damages for proceedings brought before the Tribunal in that capacity.

6. The complainants have succeeded in establishing the legal point they have agitated for over a decade, but as no relief should be granted, the complaints should be dismissed (see Judgment 4797, consideration 12).

7. Considering the outcome of the complaints on the merits, it is unnecessary to address the myriad of detailed legal arguments concerning the earlier consideration of the complainants' grievance and, in particular, the way it was dealt with by the IAC, including the composition of the Committee, and to address their challenge to the lawfulness of changes made to the system of appeals within the EPO in the period following the submission of their grievance to the appeal process. Indeed, mostly the issues concerning the changes to the system and the transitional measures adopted have already been addressed in judgments of this Tribunal (see Judgment 4797, consideration 13). Moreover, there is no evidence of moral prejudice. In any event, as already said in consideration 3 above, a staff representative is not entitled to an award of moral damages for proceedings brought before the Tribunal in that capacity.

8. In the circumstances of the case, the complainants are not entitled to costs.

#### DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

RENÉ M. VARGAS M.