

L. (Nos. 6 and 8)

v.

EPO

140th Session

Judgment No. 5080

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth and eighth complaints filed by Mr M. L. against the European Patent Organisation (EPO) on 24 February 2020 and 24 July 2020 respectively, the EPO's single reply of 18 January 2021, the complainant's rejoinder of 19 March 2021 and the EPO's surrejoinder of 21 June 2021;

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 challenges the publication of two Communiqués raising concerns about the functioning of the Appeals Committee, of which he was a member.

In March 2014 the Administrative Council adopted decision CA/D 2/14, introducing a reform of the social dialogue framework within the EPO. This reform, which became known as the "social democracy reform", involved, amongst other things, changes to the rules governing the appointment of members of the Appeals Committee, some of whom were nominated by the Central Staff Committee (CSC). Prior to the entry into force of decision CA/D 2/14 on 1 April 2014, the CSC could choose the persons whom it wished to appoint as members

of the Appeals Committee from amongst all staff. Under the new rules, however, the CSC appointees had to be elected members of the CSC itself or of one of the Local Staff Committees. The pool of potential appointees was thus greatly reduced. The lawfulness of this measure was successfully challenged by the complainant in his ninth complaint, which was the subject of Judgment 4550, delivered on 6 July 2022.

Decision CA/D 2/14 also changed the rules governing the election of staff representatives – a matter on which the Tribunal ruled in Judgment 4482, delivered on 27 January 2022. New elections under the amended rules were to be held in June 2014. Thereafter, the CSC was to nominate new members of the Appeals Committee by 1 October 2014, but it refused to do so as it considered that the measures introduced by decision CA/D 2/14 were unlawful in several respects.

On 30 September 2014 the Vice-Presidents of Directorate-General 4 and Directorate-General 5 (VP4 and VP5) issued a Communiqué “to inform staff on recent problems encountered in the Office’s dispute settlement system, most notably in the appeals procedure”. Without naming anyone, they criticised the staff representatives and “the CSC appointees” for effectively obstructing the work of the Appeals Committee in various ways. The complainant was not a staff representative, but he had been appointed by the CSC as a full member of the Appeals Committee for 2014, prior to the entry into force of decision CA/D 2/14. On 2 October 2014 he wrote to the President of the Office requesting that the Communiqué of 30 September 2014 be withdrawn by 10 October 2014, failing which he would cease to perform his duties as a member of the Appeals Committee. The President did not respond to this request.

On 10 October 2014 the President met with the CSC to discuss the claims put forward in a petition to call for a strike that had recently been submitted to him. On 13 October 2014 he issued Communiqué No. 61, in which he reported on the outcome of that meeting and echoed the view expressed by VP4 and VP5 in their Communiqué of 30 September 2014, that “recent circumstances cast serious doubt on the motives of some staff representatives involved in the settlement of disputes system”.

On 19 December 2014 the complainant submitted a request for management review seeking the withdrawal of both Communiqués. The President rejected this request by a decision of 18 February 2015 and the complainant then lodged an appeal with the Appeals Committee. The written procedure before the Appeals Committee ended in September 2019. On 2 October 2019 the complainant was informed that his appeal would be dealt with “at one of the upcoming meetings of the Appeals Committee”. The complainant responded on 10 October 2019, requesting that a final decision be taken on his appeal by 30 November 2019 at the latest. On 24 February 2020, having not yet received such a decision, he filed his sixth complaint with the Tribunal, impugning what he characterised as an implied refusal to take a final decision on his appeal.

The Appeals Committee issued its opinion on 12 March 2020. It unanimously held that the complainant’s claim for the withdrawal of the two Communiqués and his related claims for damages should be rejected as irreceivable, for lack of a cause of action. In this regard, the Committee referred to Judgment 4050, delivered in public on 26 June 2018 on the complainant’s third complaint, which concerned a disciplinary measure imposed on him. In consideration 14(d) of that judgment, the Tribunal found that “[t]he Communiqués contain[ed] a general presentation of facts regarding the functioning of the internal appeals process and the delays in the settlement of disputes system and did not name the complainant nor mention any specific allegations of misconduct”. In view of that finding, the Appeals Committee considered that the Communiqués could not be regarded as having adversely affected the complainant directly and individually. Noting that his remaining claims were either irreceivable or moot, it recommended that the appeal be rejected in its entirety.

On 7 May 2020 the Chief Corporate Policies Officer notified the complainant of her final decision on his appeal, taken by delegation of power from the President. The appeal was rejected as partly moot and irreceivable for the remainder, for the reasons set out in the opinion of the Appeals Committee. This is the decision impugned by the complainant in his eighth complaint.

The complainant, who puts forward identical claims for relief in his sixth and eighth complaints, asks the Tribunal to order the EPO to withdraw the Communiqué issued by VP4 and VP5 on 30 September 2014, as well as the President's Communiqué No. 61 of 13 October 2014. He claims moral damages in the amount of 10,000 euros, compensation for excessive procedural delays, "additional/exemplary compensation of moral damages" in the amount of 9,000 euros, costs in the amount of 1,000 euros and "other relief found, in law and equity, to be just, fair and appropriate".

The EPO asks the Tribunal to dismiss both complaints as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant's sixth and eighth complaints relate to the same internal appeal and contain identical claims for relief supported by the same arguments. The Tribunal considers it appropriate to join the two complaints, as requested by the defendant organisation, so that they may be the subject of a single judgment.

2. As the facts reveal, the complainant's request for review underlying both his sixth and eighth complaints was directed against the Communiqué of 30 September 2014 issued by VP4 and VP5, as well as Communiqué No. 61 issued by the President of the Office on 13 October 2014, which the complainant alleges were defamatory. The complainant further considered that the first issued Communiqué also involved a breach of confidentiality.

3. The complainant's sixth complaint is directed against what he alleges is the President's implicit refusal to take a final decision on his internal appeal in which he had challenged the dismissal of his request for review. He filed it on 24 February 2020, after having requested in vain that the final decision be communicated to him by 30 November 2019. The final decision, which was issued by the Chief Corporate Policies Officer by sub-delegation of power, is dated 7 May 2020. The

complainant states that he received it by email on that day. The Appeals Committee's report to the President underlying that final decision is dated 12 March 2020. The complainant impugns the decision of 7 May 2020 in his eighth complaint, filed on 24 July 2020.

4. The EPO submits that the complainant's sixth complaint is irreceivable because he filed it without having exhausted the internal means of redress that were open to him. This submission is correct. The sixth complaint does not comply with the requirements of Article VII, paragraph 1, of the Tribunal's Statute, which required the complaint to be lodged against the final decision on the internal appeal. It is true that, in some exceptional cases, the Tribunal will allow a complaint to be brought directly to it where the internal means of redress have not been exhausted but the complainant is able to establish that her or his rights in the internal appeal process have effectively been paralysed (see Judgments 4226, consideration 4, and 3331, consideration 7). However, that was clearly not the case at the time when the complainant filed his sixth complaint. As noted above, he had been informed on 2 October 2019 that his appeal would be dealt with at one of the upcoming meetings of the Appeals Committee – as indeed it was – and the fact that his request to receive a final decision by 30 November 2019 proved unsuccessful did not allow him to proceed directly to the Tribunal (see Judgment 4140, consideration 9, and the case law cited therein). Moreover, inasmuch as the Administration had acted to deal with the complainant's internal appeal by forwarding it to the Appeals Committee, that step constituted a decision upon the claim within the meaning of Article VII, paragraph 3, of the Tribunal's Statute, which forestalled an implied rejection of the internal appeal that could have been referred to this Tribunal (see, for example, Judgment 3975, consideration 5).

5. Regarding the complainant's eighth complaint, his argument that the express final decision “appears to have been issued without proper authority” is rejected as he provides no evidence, as against mere conjecture, that the impugned decision was not properly taken by sub-delegation of power by the Vice-President to the Chief Corporate Policies Officer. The record shows that by instrument dated 4 November 2019,

the President of the Office had delegated to the Vice-President of Directorate-General 4 the power to take on his behalf decisions on opinions of the Appeals Committee, among other powers. The following day, that Vice-President sub-delegated to the Chief Corporate Policies Officer the power to take decisions where a unanimous decision on opinions of the Appeals Committee was to be followed.

6. Neither can the complainant maintain, as he argues, that the internal appeals system was irregular because the Appeals Committee was not lawfully constituted and members of the Committee were biased against him. The complainant provides no convincing evidence that substantiates these allegations.

7. In its opinion, the Appeals Committee recommended that the complainant's main request that the EPO be ordered to withdraw the two subject Communiqués "be rejected as irreceivable on the ground of a lack of a justiciable cause of action", as were his ancillary claims by extension. In so finding, the Committee relied on the Tribunal's statement in consideration 14(d) of Judgment 4050, in which it dismissed the complainant's submission that disciplinary proceedings the EPO had taken against him had been infected by partiality because of the two subject Communiqués. The Tribunal had stated the following in consideration 14(d):

"The complainant claims that the Communiqué of 30 September 2014 and a Communiqué of 13 October 2014 negatively affected the impartiality of the disciplinary proceedings. This claim is unfounded. The Communiqués contain a general presentation of facts regarding the functioning of the internal appeals process and the delays in the settlement of disputes system and did not name the complainant nor mention any specific allegations of misconduct."

8. Citing this conclusion, as well as Articles II, paragraph 6, and VII of the Tribunal's Statute, among other references, the EPO submits that the complainant's main request to order it to withdraw the Communiqués is irreceivable (as are his ancillary claims) because the complainant does not challenge an individual administrative decision which directly and adversely affected him.

9. Notably, in relation to its competence to hear complaints, the Tribunal stated the following in consideration 16 of Judgment 3426:

“As the Tribunal stated in Judgment 1756, under 5, ‘[t]o be receivable a complaint must disclose a cause of action’. There are two aspects to receivability – the procedural aspect found in Article VII of the Statute and the substantive aspect found in Article II. That is, whether the Tribunal is competent to hear the case *ratione personae* and *ratione materiae*. Framed another way, Article II requires that a complaint must reveal a cause of action and that the impugned decision is one which is subject to challenge. Under Article II, two thresholds must be met for there to be a cause of action. First, the complainant must be an official of the defendant organization or other person described in Article II, paragraph 6. Second, Article II, 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’ (Judgment 3136, under 11).”

Stated another way, as the Tribunal did in consideration 11 of Judgment 4675, “[i]t is well settled by the Tribunal’s case law that a decision that does not alter the legal situation of an official is not a decision that adversely affects her or him and it cannot, therefore, be challenged before the Tribunal [...]”.

10. It follows from the foregoing that the Appeals Committee correctly determined that in light of the Tribunal’s conclusion in consideration 14(d) of Judgment 4050, the complainant had no cause of action to challenge the disputed Communiqués in his underlying internal appeal. His eighth complaint is therefore likewise irreceivable and must be dismissed in its entirety.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 12 May 2025, 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, René M. Vargas M., Registrar.

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

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.