

F. (No. 16)

v.

EPO

141st Session

Judgment No. 5198

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr S. C. F. against the European Patent Organisation (EPO) on 8 July 2019, the EPO's reply of 8 January 2020, the complainant's rejoinder of 7 February 2020 and the EPO's surrejoinder of 2 June 2020;

Considering the application to intervene filed by Mr H. H. on 7 October 2019 and the EPO's comments thereon dated 10 February 2020;

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 issuing of automatic communications to patent applicants on behalf of the examining division dealing with the application or a member thereof.

The complainant is a former permanent employee of the European Patent Office – the EPO's secretariat – who served as an examiner at its sub-office in Berlin, Germany. He retired on 1 December 2018.

At the material time, during the processing of patent applications, certain communications, such as the notification of a time limit, were sent to applicants automatically by an information technology system. These communications typically bore the name of the examiner and/or examining division dealing with the application. Some examiners, including the complainant, objected to this practice, particularly because they felt that such communications wrongly gave the impression that the examining division had already started the substantive examination procedure, and because they did not wish to be identified as the author of communications for which they were not responsible.

In 2012 a disagreement arose between the complainant and his director (the Director of Directorate 1524) concerning two patent applications for which he was the first examiner. In each case, a first communication had been sent to the applicant automatically. Thereafter, the complainant sent to each applicant a “summons for oral proceedings” in which he made a comment that appeared to call into question the Office’s established procedure of issuing automatic communications to applicants. By emails of 24 May 2012 and 1 June 2012, the director pointed out that these comments were inappropriate and he asked the complainant to reissue the summonses without them.

On 12 June 2012 the complainant lodged an appeal with the President of the Office, challenging the emails of 24 May 2012 and 1 June 2012 and denouncing what he regarded as an unlawful interference in the responsibilities vested in patent examiners under the European Patent Convention. He and the other members of the examining divisions concerned eventually cancelled the summonses that their director viewed as unacceptable, but they continued to express their disagreement with the director’s view. In an email of 15 June 2012, the director requested that the summonses be reissued by 22 June 2012, whereupon the complainant extended his appeal to include a challenge to that email. The Vice-President of Directorate-General 1 (VP1) then intervened and, by a letter of 31 July 2012, ordered the complainant and his colleagues to comply with their director’s instructions and to issue modified summonses by 21 August 2012.

In accordance with the unanimous recommendations of the Appeals Committee, the Principal Director of Human Resources, acting by delegation of power from the President, decided to reject the complainant's appeal as manifestly irreceivable. However, this final decision, which the complainant impugned in his fourth complaint, was subsequently withdrawn by the President because of a flaw in the composition of the Appeals Committee that came to light in another case also involving the present complainant (see Judgment 3785, delivered on 30 November 2016). The EPO informed the complainant on 1 March 2017 that his appeal had been remitted to a properly composed Appeals Committee for a new examination. His fourth complaint was, in due course, dismissed by the Tribunal as being without object (see Judgment 4256, delivered on 10 February 2020).

On 25 February 2019 the Appeals Committee issued a new opinion on the complainant's appeal, again recommending that it be rejected as manifestly irreceivable on the grounds that it was not directed against a decision that adversely affected him within the meaning of Article 108 (formerly Article 107) of the Service Regulations for permanent employees of the European Patent Office. The Committee nevertheless recommended that the complainant be awarded 600 euros in moral damages on account of the length of the internal proceedings.

By a decision of 9 April 2019, the Principal Director of Human Resources, acting by delegation of power from the President, rejected the complainant's appeal in accordance with the unanimous recommendation of the Appeals Committee but awarded him 600 euros for delay. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision *ab initio* and to declare that his director's emails of 24 May 2012, 1 June 2012 and 15 June 2012, as well as the VP1's letter of 31 July 2012 "and the corresponding orders and disciplinary threats", are "inapplicable". He also claims moral damages, further compensation for procedural violations and delays, costs, and interest at an annual rate of 8 per cent on all sums awarded. Subsidiarily, he asks the Tribunal to declare the opinion of the Appeals Committee and the entire appeal procedure null and void, to refer the appeal back to a newly composed

Appeals Committee to be examined on the merits, and to award him compensation for procedural delays and violations.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded. It also asks the Tribunal to order the complainant to pay costs in the amount of 1,000 euros, on the grounds that this complaint is an abuse of process.

CONSIDERATIONS

1. The complainant has filed several complaints with the Tribunal. They include the complaint to which this judgment relates, his sixteenth complaint, and another related complaint, his seventeenth complaint.

2. One procedural issue which should be addressed at the outset, is whether the sixteenth and seventeenth complaints should be joined creating the one proceeding so that one judgment is rendered. This is proposed by the complainant (as part of a proposal for the joinder of a number of his complaints) and is not opposed by the EPO.

3. The question of whether complaints should be joined and the principles guiding a decision concerning joinder have been addressed in a number of recent judgments. An illustration is found in Judgment 4822, consideration 4:

“[...] The principles applied by the Tribunal on the general issue of joinder have developed over a period of more than 45 years. As discussed in Judgment 4753, consideration 3:

‘Plainly the Tribunal can, and often does, consider related complaints at the same session and by the same panel of judges. The joinder of two complaints is a legal device deployed by the Tribunal in order that one judgment can be rendered, and orders then made disposing of the joined complaints. [...] [There is a] need for such orders to be made only in quite explicit circumstances and to be guided by focused principles and not loosely expressed generalities. [...]’

And later in consideration 6:

‘The question that arises is whether it is appropriate to join the two complaints. The touchstone for formal joinder has historically been that the complaints involve the same or, more recently, similar questions of

fact and law, and it is not sufficient that they stem from the same continuum of events. [...]"

4. The seventeenth complaint and the pleas advanced by the parties raise, as a generality, the same or substantially the same questions of fact and law as this, the complainant's sixteenth complaint (with one exception) and the pleas advanced in it by the parties. Thus, there is a case of substance for the joinder of the two complaints. However, in each proceeding the defendant organisation seeks a costs order in its favour on the basis that the proceeding arising from the complaint is an abuse of process. The grounds advanced by the EPO for characterizing each proceeding as irreceivable and an abuse of process are not the same in both matters. While costs orders against complainants have not, historically, been a feature of the Tribunal's jurisprudence, they are increasingly sought by organisations in the face of complaints which are arguably frivolous, vexatious and repeated. As the Tribunal observed in Judgment 3568, consideration 5:

"[...]"

The Tribunal may indeed award costs against the authors of frivolous, vexatious and repeated complaints which absorb its resources and those of the defendant organisations and hamper the Tribunal's ability to deal expeditiously with other complaints. Any such award must, however, remain exceptional, since it is essential that international civil servants' access to an independent and impartial judicial body is not impeded by the prospect of an adverse award of costs if their complaint were to prove unfounded (see Judgments 1962, under 4, and 3196, under 7).

"[...]"

Whether the final observation in this quotation is apt to apply in situations where a complainant has filed a very significant number of complaints of dubious material significance must be an open question.

5. If the two complaints of the complainant presently being considered are joined, it will make it substantially more difficult to assess and decide whether the joined proceedings are irreceivable and an abuse of process given that, as just discussed, the reasons for this characterization advanced by the EPO in relation to each are not the same. This, in the Tribunal's view, is a reason for not joining them.

6. The EPO advances a number of arguments concerning the receivability of this complaint and its merits. However, one issue raised by the EPO is clearly decisive. It is to the effect that the complaint is irreceivable because it concerns decisions with respect to the law and/or procedures applicable to patent applications which do not affect a staff member's relationship with the organisation nor do they adversely affect staff members. The same applies to managerial instructions relating to the patent granting procedure. In its pleas the EPO refers to Judgment 3053, consideration 11, in support of these propositions. That was a judgment delivered on 8 February 2012.

7. A specific issue being addressed by the Tribunal in that case was whether the subject matter of two decisions of the Administrative Council of the EPO should have been the subject of consultation with the General Advisory Committee and that body giving an opinion. In the course of addressing the arguments raised, the Tribunal had to consider whether the provision requiring consultation, and the giving of an opinion, had been engaged having regard to that subject matter. That in turn raised the question of what was the scope of the provision. The Tribunal's answer was that it concerned proposals or decisions which in some way affected the relationship of staff members with the organisation, whether in terms of the work to be performed or the way in which it is to be performed, the method by which it is to be evaluated and the like. The provision did not comprehend proposals or decisions relating to the law and procedures applicable to patent applications which do not directly affect that relationship. These considerations also informed the Tribunal's conclusion about what might be the subject of an internal appeal where the relevant provision conferred a right of appeal "against an act adversely affecting" staff members. This did not comprehend decisions with respect to the law and procedures applicable to patent applications.

8. The reasoning in the above judgment was more recently considered by the Tribunal in Judgment 4417 delivered on 7 July 2021, that is to say, after the pleas in the complainant's sixteenth complaint had concluded. The import of this latter judgment was that proposals or

decisions relating to the law and procedures applicable to patent applications and which do not directly affect the relationship of staff members with the organisation were not appealable to the internal appeals body, namely the Appeals Committee.

9. On the facts of this case, the decision challenged was a decision that the complainant's appeal directed against the emails of 24 May and 1 June 2012 was irreceivable. The emails were, as a matter of form, managerial instructions to the complainant to take certain steps in relation to summonses he had issued. In substance, however, those instructions were in support of a new procedure challenged by the complainant involving communications being sent to patent applicants without his involvement. The precise issue founding the conclusion that the appeal was irreceivable was whether the appeal was against "an act adversely affecting him" as provided in Article 107 of the Service Regulations. It is true that the instructions affected him in the sense that he was required to take steps specified in the emails. Thus, there was an "act" in the form of an instruction. However, it cannot be said that this act adversely affected him. Its effect on him was entirely benign even though it did not align with his views about what practices should be followed. The impugned decision that his internal appeal was irreceivable was correct and the complaint should be dismissed. It follows that Mr H.'s application to intervene must also be dismissed.

10. As mentioned earlier, the defendant organisation seeks a costs order against the complainant on the footing that the complaint is an abuse of process. It gives several reasons. One is that the complainant declined a settlement proposal advanced by the EPO. This consideration is irrelevant. While the Tribunal is actively supportive of parties endeavouring to settle complaints by agreement, the fact that discussions have occurred but have not borne fruit cannot, of itself, sustain an order for costs against one of the parties. Other factors would need to be present.

11. In support of its counterclaim, the EPO also argues that the complaint was irreceivable on several bases and was, in any event moot. It also relies on the legal principles discussed in considerations 7 and 8 above. While it is true that the high probability would have been that the complaint, at the time of its filing, would be dismissed having regard to the issues raised by the complainant, his arguments in aggregate were not manifestly entirely devoid of substance. Accordingly, the complaint cannot be characterized as an abuse of process and no costs order should be made.

DECISION

For the above reasons,

1. The complaint is dismissed, as is the application to intervene.
2. The EPO's counterclaim for costs is rejected.

In witness of this judgment, adopted on 20 October 2025, Mr Michael F. Moore, 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 10 February 2026 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

RENÉ M. VARGAS M.