

E. (Nos. 15 and 16)

v.

EPO

132nd Session

Judgment No. 4417

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth and sixteenth complaints filed by Ms M. E. against the European Patent Organisation (EPO) on 12 August 2019 and corrected on 19 September 2019, the EPO's replies of 15 January 2020, the complainant's rejoinders of 27 April and the EPO's surrejoinders of 29 September 2020;

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 contests instructions she received concerning patent applications.

The complainant was an examiner at the European Patent Office – the EPO's secretariat. On 15 June 2012, her supervisor asked her and the other members of her examining division to modify the text of automatic communications sent to patent applicants. He added that his request should be considered as an order, and that failure to comply with it may lead to disciplinary measures. The Vice-President of Directorate-General 1 (DG1) confirmed the supervisor's position in a letter of 31 July 2012.

In August 2012 the complainant initiated the internal appeal proceedings by writing to the President of the Office. Referring to the communications of 15 June and 31 July, she contested the interference with the responsibilities directly vested in the examining division under

the European Patent Convention (EPC). She requested protection from arbitrary treatment, the withdrawal of the afore-mentioned communications, moral damages and reimbursement of her costs. In October 2015 she was informed that the matter had been referred to the Appeals Committee.

In the meantime, in April 2014, the complainant's director informed her that the decision of the panel to which she belonged, not to grant a specific patent application, had not been forwarded to the applicant. On 8 September her director instructed her to issue a communication under Article 94(3) of the EPC, that is to say to invite the applicant to provide further observations and to amend the said application. The complainant replied on 10 September that she would implement his instructions but asked for clarifications stressing that the other members of the panel had already issued their decision on that patent application. The director explained the following day how she should proceed. On 12 September the complainant informed the President of the instructions she had received, and requested him to stop any interference with the responsibilities vested under the EPC in the examining division for the patent application at stake. She added that her independence as an examiner for that particular patent application was impaired. The Vice-President of DG1 replied to her letter on 10 November 2014 stating that he had not identified any abuse of authority on the part of management. In February 2015 the complainant requested the President to review the decision of 10 November 2014 and to ensure that the Office would stop interfering with decisions for which the examining divisions were responsible. She also requested that her name and/or seal, or that of any panel of which she was a member, not be used without having been authenticated by her. In addition, she sought protection against arbitrary treatment and hidden disciplinary measures, moral damages and costs. Her request was denied and she filed an appeal with the Appeals Committee alleging interferences in her work as a patent examiner, in breach of the EPC, and maintaining the claims she had made in her request for review.

On 10 May 2016 she was informed that her appeal (hereinafter "first appeal") against the communications of 15 June and 31 July 2012 was dismissed as manifestly irreceivable in accordance with the Appeals Committee's recommendation. She impugned that decision in her second complaint before the Tribunal. On the same day, she was also informed that her appeal (hereinafter "second appeal") against the interferences in the work of the examining division for the specific patent application was manifestly irreceivable in accordance with the Committee's

recommendation. She impugned that decision in her third complaint before the Tribunal.

In light of Judgment 3785, delivered on 30 November 2016, the President considered that his final decisions of 10 May 2016 were flawed as they were based on the opinion of an Appeals Committee that was not properly constituted. He therefore decided to withdraw them and to refer the matters back to the Appeals Committee for a new examination. In March 2017, the complainant was so informed. Over a year later, in October 2018, the secretariat of the Appeals Committee notified her that her appeals were pending before the Committee for a new examination in accordance with applicable rules.

On 15 March 2019 the Appeals Committee issued a separate opinion on each appeal making some common findings. With respect to both appeals, it applied the summary procedure as it considered the appeals to be manifestly irreceivable, and it rejected the complainant's criticisms concerning the composition of the Committee. It found that she had failed to show in concrete terms that she was harmed by the contested communications or the underlying "working instructions". It also considered that the claim for protection against arbitrary treatment and hidden disciplinary sanction was too vague and not sufficiently substantiated. However, it considered that the length of the internal procedure was unreasonable, and therefore recommended awarding her moral damages, although in different amounts.

More specifically, in relation to the first appeal, the Appeals Committee held that the contested "working instructions" were not appealable decisions as they did not constitute acts adversely affecting the complainant. Indeed, the "working instructions" she received dealt with patent procedures, which did not, in principle, affect her terms of appointment and had no direct effect on her legal relationship with the Office. Concerning the second appeal, the Committee considered that the contested letter of 10 November 2014 did not include an individual decision directed to the complainant or a ruling on her administrative status; it merely explained the Office's position with regard to the treatment of a specific patent application and the President's competence regarding the patent granting procedure in general. Therefore, these "working instructions" were not appealable decisions in the sense of Article 108 of the Service Regulations.

On 15 May 2019, the Principal Director of Human Resources, acting on delegation of authority from the President, wrote two letters to the complainant. In the first one, the Director informed her that she endorsed the recommendation and reasons of the Appeals Committee concerning her first appeal which related to modifications the complainant was asked to make with respect to automatic communications on patent applications. She awarded her 600 euros in moral damages for the length of the internal appeal procedure. That is the decision the complainant impugns in her fifteenth complaint. In the second letter, the Principal Director endorsed the recommendation and reasons of the Appeals Committee on the complainant's second appeal, in which she contested the instructions she had received in relation to the specific patent application. The Director awarded her 150 euros in moral damages for the length of the internal appeal procedure. That is the decision the complainant impugns in her sixteenth complaint.

In both complaints, the complainant asks the Tribunal to quash the impugned decision, to declare the Appeals Committee's opinion null and void, to complement the fact-finding and "taking of evidence", and to give her the opportunity to comment on any facts or evidence, or grounds submitted by the EPO in the reply. She also asks the Tribunal to declare the use of her name or seal, or the use of the seal of any panel of the examining division of which she is a member, on any document as unlawful if there is no proper authorisation for using it. She claims moral damages, compensation for undue delay in the internal appeal proceedings and "procedural violations", compound interest on all amounts due at the rate of 6 per cent per annum and costs.

She makes further claims that are specific to each complaint. In her fifteenth complaint she asks the Tribunal to acknowledge that the "order" of 15 June 2012 and the decision of 31 July 2012 were taken *ultra vires*. In her sixteenth complaint she asks the Tribunal to acknowledge that the "order" of 8 September 2014 and the decision of 10 November 2014 were taken *ultra vires*.

In both complaints, the complainant makes alternative and subsidiary claims in the event the Tribunal does not consider it "expedient" to "finally decide" the case. She asks the Tribunal to quash the impugned decision *ab initio*, to declare the Appeals Committee's opinion null and void, to declare the "whole appeals procedures" null and void *ab initio* and to remit the matter to the EPO so that the appeal be examined on

the merits by a duly composed and balanced Appeals Committee which does not include members who have so far taken part in the procedure. She also claims compensation for undue delay in the internal appeal proceedings and “procedural violations”, compound interest on all amount due at the rate of 6 per cent per annum together with costs.

The EPO asks the Tribunal to dismiss the fifteenth and sixteenth complaints as irreceivable because the complainant did not contest an individual administrative decision. Subsidiarily, it asks the Tribunal to reject her complaints as unfounded. It makes a counterclaim for costs on the ground that the complaints amount to an abuse of process.

CONSIDERATIONS

1. In her internal appeal underlying her fifteenth complaint, the complainant contested working instructions issued to her and the other members of an examining division of which she was a member by their director, as well as the confirmation of those instructions by the Vice-President of DG1. Those instructions requested the withdrawal of statements made in two summonses for oral proceedings that were sent to applicants, which were drafted by the first examiner with whom the complainant worked in the examining division. In the summonses, the first examiner questioned an EPO established procedure in issuing automatic communications to applicants under Article 94(3) of the EPC. The director stated, among other things, that discussing and questioning EPO procedures, although possible internally, should be avoided in communications with attorney/applicants and the public. The director requested the first examiner to re-write the summonses removing from them all paragraphs questioning the procedure and to refrain from making such statements in future communications. In his message confirming the instructions, the Vice-President stated, among other things, that such criticism of the Office’s administrative procedures breached examiners’ duties under Article 20 of the Service Regulations and would damage the interests of the EPO. He also stated that an order from a supervisor who represents the authority of the President enshrined in Article 10 of the EPC did not interfere with the responsibilities of examiners or the examining division.

2. In her internal appeal, the complainant insisted that the working instructions were irregular and had an undesirable consequence of a serious nature for her personal reputation and the reputation of the examining division. She appealed against “any interference with the responsibilities directly vested under the [EPC] in the examining division of which [she was] a member [and] against any abusive exercise of powers derived from Article 10 EPC [...] or Article 24 [of the Service Regulations]”. She requested protection against arbitrary treatment by the Administration or by the officials who had issued and confirmed the instructions, as well as consequential relief.

3. In the internal appeal underlying her sixteenth complaint, the complainant also contested her director’s working instruction issued to her and the other members of the examining division after a panel of that division refused to grant a patent application in April 2014. She contested the instruction to withdraw the refusal in essentially similar terms to those on which she contested the instructions in her internal appeal underlying her fifteenth complaint. The Appeals Committee considered both internal appeals under the summary procedure of Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, which states as follows:

- “(1) If the Appeals Committee considers an appeal to be manifestly irreceivable or manifestly unfounded, it may decide to apply a summary procedure without any hearing. [...]
- (2) An internal appeal may be considered to be manifestly irreceivable *inter alia* if it:
 - (a) is not submitted by a person referred to in Article 106, paragraph 1, of the Service Regulations or rightful claimant on his behalf;
 - (b) does not challenge an individual decision within the meaning of Article 108 of the Service Regulations;
 - (c) is submitted outside the time limits foreseen in Article 110, paragraph 1, of the Service Regulations;
 - (d) challenges a decision having the authority of *res judicata* or a final decision within the meaning of Article 110, paragraph 4, of the Service Regulations;
 - (e) challenges an individual decision which should have been subject to the review procedure pursuant to Article 109, paragraph 1, of the Service Regulations;

- (f) challenges a decision which cannot be challenged through the internal appeal procedure pursuant to Article 110, paragraph 2, of the Service Regulations.
- (3) In such a case, the Appeals Committee may deliver an opinion limited to the receivability of the appeal.”

4. In each of these complaints the complainant centrally contends that the working instructions which two of her directors separately issued to her and other members of the examining division (confirmed by the superior officials) were *ultra vires*; involved an abuse of power; compromised the independence of examiners and interfered with the responsibilities which the EPC directly vested in her as an examiner and member of the examining division. Inasmuch as these complaints raise the same central issue for determination, the Tribunal joins them to be the subject of a single judgment.

The complainant had initially requested the joinder of her fifteenth complaint with her second complaint, and her sixteenth complaint with her third complaint. She has however subsequently noted that these requests have become moot as her second and third complaints were considered in Judgment 4256, delivered in public on 10 February 2020.

5. The complainant’s request for oral proceedings is rejected as the Tribunal is sufficiently informed of all aspects of the case to consider it fully on the material which the parties provide.

6. In the impugned decisions, both dated 15 May 2019, the Principal Director of Human Resources, by delegation of power from the President, accepted the Appeals Committee’s unanimous recommendations to reject both of the complainant’s internal appeals as manifestly irreceivable on the basis that they were not directed against appealable decisions under Article 108 of the Service Regulations as the complainant had not demonstrated that the working instructions adversely affected her relationship with the EPO and her terms of appointment. The Appeals Committee further unanimously concluded, relying on consideration 11 of Judgment 3053, that working instructions issued by the complainant’s hierarchical superiors regarding internal working procedures concerning the subject patent applications were managerial decisions relating to administrative procedure, which were not appealable decisions by virtue of Article 108 of the Service Regulations as the complainant failed to show that her rights stemming from the terms of her employment or

her reputation were negatively affected by the instructions. In effect, the Committee concluded that the appeals were manifestly irreceivable pursuant to Article 9(2)(b) of the Implementing Rules for Articles 106 to 113 of the Service Regulations.

7. Article 108(1) of the Service Regulations, which was Article 107(1) when it was considered in Judgment 3053, provides that an EPO staff member may lodge an internal appeal, inter alia, against an act adversely affecting her or him. In consideration 11 of Judgment 3053, the Tribunal held, among other things, 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. The Tribunal also held, in consideration 10 of Judgment 3053, that proposals and/or decisions relating to the law and/or procedures applicable to patent applications do not directly affect the relationship of staff members with the Organisation, 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.

8. The Tribunal does not see any reason to depart from the conclusions stated in the foregoing consideration. The impugned decisions correctly accepted the Appeals Committee’s recommendations to dismiss the subject internal appeals as manifestly irreceivable. The decisions which the complainant contested did not adversely affect her working relationship with the EPO in the sense of Article 108 of the Service Regulations. Her internal appeals were accordingly manifestly irreceivable pursuant to Article 9(2)(b) of the Implementing Rules for Articles 106 to 113 of the Service Regulations.

9. In the foregoing premises, the complaints must be dismissed in their entirety. However, as there was no abuse of process, the EPO’s counterclaims for costs will be dismissed.

DECISION

For the above reasons,

The complaints are dismissed, as are the EPO's counterclaims for costs.

In witness of this judgment, adopted on 7 June 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ