

**G. (No. 9)**

**v.**

**EPO**

**133rd Session**

**Judgment No. 4486**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr R. W. G. against the European Patent Organisation (EPO) on 18 February 2014 and corrected on 15 May, the EPO's reply of 15 October 2014, the complainant's rejoinder of 11 February 2015 and the EPO's surrejoinder of 21 May 2015;

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 composition of the Munich Staff Committee (MSC) and of the Central Staff Committee (CSC).

At the material time, the EPO's Staff Committee comprised a Central Committee and local sections for the different places of employment. On 19 October 2011 the MSC elections took place. Seven candidates were elected as full members, including the complainant (a category C staff member and the only representative for that category of staff), and four as alternate members. However a dispute between the two "factions" of the MSC rendered its constitution impossible. The first faction was comprised of four full members, including the complainant and the only representative for the category B staff, and three alternate members. The second faction was comprised of the three other full members and the last alternate member, all of whom were category A staff. On 18 November the complainant announced that he

“temporar[il]y withdr[e]w from [his] cooperation and representation” in the CSC until the situation of the MSC was settled. In view of the deadlock preventing the MSC from taking up its duties, a General Meeting was convened on 14 December 2011 on the initiative of the first faction. At the Meeting, it was decided by a large majority to accept the proposal to organise an electronic survey to find out if the Munich staff wanted new elections or not. The quorum was set at 50 per cent. The results of the survey were announced on 21 December: a majority (55.75 per cent) decided that new Staff Committee elections should be organised in Munich. The participation rate was 51.8 per cent.

On 22 December 2011 the members of the second faction wrote to the President of the European Patent Office, the EPO’s secretariat, asking for a legal opinion on the legality of the first faction’s call for new elections. On 19 January 2012 the President replied that, in light of the Tribunal’s case law, he did not consider it appropriate to intervene in the discussions which had arisen following the MSC elections. However, keeping in mind the interest of the Office that a solution be found as soon as possible to break the deadlock, he decided, on an exceptional basis, to share the Office’s views on the main issue raised in the 22 December 2011 letter. Relying on Article 35(6)(c) of the Service Regulations for permanent employees of the Office, he indicated that the principle of formal parallelism would require the same quorum, namely the participation of two-thirds of those entitled to vote, to validate the call for early elections. On 26 January 2012 the members of the first faction announced to the staff in Munich that, in view of the President’s opinion, the 50 per cent quorum of the December 2011 survey was not sufficient and that it would be unwise to call elections. They further stated that they resigned *en bloc* as Article 15 of the Rules of Procedure of the MSC requires that, if more than half of the originally elected full Committee members resign, the Committee shall be dissolved and new elections called.

On 3 February 2012 the members of the second faction wrote to the President and informed him that they had decided to apply the procedure laid down in Article 2 of the then Election Regulations and to proceed with the constitution of the MSC. The three full members were designated respectively as the Chairman, Deputy Chairman and Secretary of the MSC, the alternate member became a fourth full member of the MSC and three of the candidates for the October 2011 elections were designated as permanent experts in order for them to “fulfil duties

normally ascribed to full members” although they were deprived of any formal voting right. The new MSC was exclusively composed of category A staff members and its four new full members would be the Munich representatives in the CSC. That same day the complainant was informed that his access to the tools of communication available to staff committee members was withdrawn.

On 6 March 2012 the complainant wrote to the President, alleging that the composition of both the MSC and the CSC breached Article 35(2) of the Service Regulations, which provided that the membership of the Staff Committee should be such that all categories of employees shall be represented thereon. He stated that his rights as an employee and elected staff representative for the category C were violated. He asked the President to order new elections, ensure that all categories of staff were properly represented in both the MSC and the CSC and order the suspension of the nominations to the joint committees and working groups comprising staff representatives until the CSC and MSC were properly composed. Alternatively, he asked that, until the new election results were available, the President acknowledge his mandate on the CSC and appoint him as a member of the CSC; instruct the Administration to grant his request for access to the tools of communication of the Staff Committee and to assist him in their use; instruct the elected full members of the CSC to ensure that its composition complies with the Service Regulations and admit the participation of the full members representing categories B and C; ask all elected full members of the CSC to submit rules of procedure and election regulations for the CSC election and to have them checked by the EPO’s Legal Department; and refrain from commencing activities and consultation with joint committees and working groups comprising staff representatives. In the event that these requests were rejected, he also claimed moral damages and costs. The complainant’s letter was referred to the Internal Appeals Committee (IAC).

Having heard the parties on 5 December 2012, the IAC issued its opinion on 16 May 2013. A majority of the IAC approved the President’s decision not to interfere with staff representation matters and recommended to dismiss the complainant’s claims as inadmissible *ratione temporis*, *personae* or *materiae* and unfounded in any event. The minority recommended to instruct the CSC to identify and include in its activities a suitable representative from category C and, for the rest, declared that

it agreed with the majority. The IAC forwarded its opinion to the President on 17 May.

In a letter of 14 November 2013 the President informed the complainant that he endorsed the IAC's unanimous opinion that the complainant had no capacity to appeal as a staff representative since he had resigned from the MSC and had no mandate from the CSC. The President therefore considered that the appeal was irreceivable *ratione personae* in this respect. The President considered that he had no authority to intervene in the electoral process, that the rights the complainant sought to assert did not relate to his terms of appointment and that the appeal was therefore irreceivable *ratione materiae*. Regarding the merits of the appeal, the President considered that it was unfounded since he had no obligation to intervene in such a case and that he had acted correctly by declining to do so. In conclusion, he dismissed the complainant's appeal. That is the impugned decision.

The complainant asks the Tribunal to order the EPO to provide an English translation of all documents relating to his internal appeal. He also asks that the President's 19 January 2012 "decision" be set aside, that the composition of the MSC between 26 January 2012 and 18 October 2013 (the end of the MSC's mandate) be declared void, that the composition of the CSC since 19 October 2011 be declared void, that the "denial" of his mandate with the CSC be declared unlawful and void and that the blocking of his access to the tools of communication for members of the staff committees be set aside. He asks that the EPO be ordered 1) to provide election regulations for all local sections that are compliant with the Service Regulations, and 2) to instruct the CSC and all the local sections to submit rules of procedure, to have them checked by the Legal Department in order to ensure their conformity with the Service Regulations and to apply them. Additionally, the complainant seeks the award of 5,000 euros moral damages to each elective staff member at the time of the 2011 elections in Munich for the violation of their right to vote and 5,000 euros additional moral damages to each elective staff member from the categories B and C at the time of the 2011 elections in Munich for the violation of their representation and consultation rights. He asks to be awarded 40,000 euros moral damages under several heads, including the delay in the appeal proceedings, punitive damages and costs. He states that in view of the passage of time and the end of the MSC mandate in October 2013, the majority of the requests he made in his internal appeal can no longer be fully

implemented. He therefore leaves to the Tribunal to decide how to deal with them.

The EPO submits that the complaint is irreceivable on several grounds. Subsidiarily, it asks the Tribunal to dismiss it as unfounded.

### CONSIDERATIONS

1. The central question which this complaint raises for determination is whether the President of the Office erred in accepting the majority opinion of the IAC to dismiss all of the complainant's claims in the impugned decision dated 14 November 2013. The complainant alleges that the MSC and the CSC were incorrectly composed because: (a) pursuant to Article 35(2) of the Service Regulations, all categories of employees must be represented on the CSC and the MSC; however, the MSC members did not comprise representatives from category B and category C; (b) pursuant to Article 35(1), (2), (3) and (6) of the Service Regulations, which overrode Article 2 of the then Election Regulations, the incorrectly constituted MSC had no power to determine members of the CSC; (c) Article 15 of the MSC's Rules of Procedure provided for the dissolution of the MSC and new election if more than half of the originally elected full members abandoned their mandate; and (d) the nomination of "permanent experts" who had no electoral mandate to the MSC breached Article 22 of the then Election Regulations and Article 15 of the MSC's Rules of Procedure. By relying on Article 35(5) and (6) of the Service Regulations and referring to rulings of the Court of Justice of the European Union, he argues that the President had not only the right but also the duty to intervene in order to guarantee legal certainty of all decisions affected by the consultation and functioning of the staff committees as well as the right of representation, the right to vote and to be elected. He also alleges that the President's inadmissible interference on 19 January 2012 violated the right to vote and to be elected under Article 35(3). He further alleges that the Administration's acceptance of the formation of the MSC and the CSC as well as its denial of his mandate from the CSC violated the prohibition of non-discrimination\* and general principles of equality and equal treatment.

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\* *Recte*: the principle of non-discrimination.

2. The complainant requested an oral hearing with witnesses “to ensure full clarification and illustration of the facts of the case”. Considering that the written submissions and the facts of the case are clear, the Tribunal sees no reason for an oral hearing and consequently rejects the complainant’s request.

3. The EPO raises receivability as a threshold issue. It firstly submits that the complaint is irreceivable *ratione personae* inasmuch as the complainant acts as an alleged member of the Staff Committees since he resigned from the MSC and did not adduce evidence that the MSC appointed him as a CSC member. Referring to Judgments 2636 and 496, it submits that the claims to challenge the legality of the composition of the MSC and the CSC and to request the President to order new elections and to ensure that all career groups are properly represented are irreceivable *ratione materiae* because under the then applicable legal framework the President was not granted competence to organise staff committee elections, and neither the President nor the Tribunal has any authority to interfere with the electoral process. It points out that the complaint and the internal appeal do not have the same object, and the claim to challenge the President’s letter of 19 January 2012 was not made in the internal appeal. In addition, the President’s 19 January 2012 letter is not a “decision”. It further submits that the complaint is also inadmissible insofar as the complainant filed it in his capacity as a staff member, in that all of his arguments are based on or derived from his alleged status as a member of the CSC and he did not identify any non-observance of his terms of employment.

4. With regard to his standing as an alleged member of the MSC and the CSC, as rightly pointed out by the IAC and endorsed by the President, at the time of the appeal, the complainant was not a member of the MSC because he had resigned from it, regardless of the purpose underlying his resignation. He was not a member of the CSC either. Pursuant to Article 2 of the then Election Regulations, “[t]he local section [that is to say the MSC] shall appoint the Munich members of the [CSC]”. Therefore, his election to the MSC did not automatically mean that he was also elected to the CSC. On the contrary, a separate appointment is a prerequisite according to the above provision. The complainant did not produce any evidence that the MSC appointed him as a member of the CSC. Thus, his claims as a staff representative of either the MSC or

the CSC, including claims for declaring the composition of the MSC and the CSC void, for recognising his mandate to represent in the CSC the category C employees and for accessing the tools of communication for Staff Committee's members, are irreceivable *ratione personae*. Accordingly, his allegation that the denial of his participation in the CSC activities constitutes a violation of the prohibition of non-discrimination\* and of equal treatment is not receivable either.

5. With regard to his claims as a staff member, the complainant alleges that not only has he an interest in being represented adequately by the MSC and the CSC but also the President has a duty to intervene, given the irregularities that occurred in the electoral process, to ensure the right of representation and to respect the right of staff to vote and to be elected. It is to be recalled that there is established jurisprudence of the Tribunal that generally the Tribunal has no jurisdiction to adjudicate on electoral processes relating to staff associations (see, for example, Judgments 78 and 2636). The legal issue that arises in relation to the receivability of a complaint is whether the subject matter of the complaint concerns non-observance in substance or in form of the terms of appointment of the complainant or the provisions of the applicable Staff Regulations, as provided in Article II of the Tribunal's Statute.

6. It is convenient, at this point, to set out the material terms regarding the election of the MSC and the CSC. Article 35 of the Service Regulations, in the version in force at the material time, relevantly provided:

**“Article 35  
Composition of the Staff Committee**

[...]

- (2) The membership of the Staff Committee shall be such that all categories of employees shall be represented thereon. This principle shall apply to the local sections only to the extent that employees in the various categories are employed in the places in question.

[...]

- (6) The following shall apply to the election of staff representatives:

[...]

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\* *Recte*: the principle of non-discrimination.

- (b) Election of members of the Central Committee: the regulations regarding the election of the members of the Central Committee for each place of employment shall be determined by a general meeting of the permanent employees of the Office in service at the place of employment in question. At least half of those elected must also be members of the local section concerned and all of them must be permanent employees of the Office in service at the place of employment in question. The Central Committee shall be deemed to have been validly constituted upon election of the majority of its members.”

Articles 2 and 22 of the then Election Regulations provided:

**“Article 2**

The Munich local section of the Staff Committee shall comprise seven full members and, unless Article 22 gives rise to a higher number, four alternates; the latter shall replace, in a sequence to be determined by analogous application of Article 22, any full members who definitively cease to serve. The local section shall appoint the Munich members of the Central Staff Committee.

[...]

**Article 22**

After the count, the Election Committee shall draw up a list of candidates in descending order of the number of votes received.

Where two or more candidates have received the same number of votes, they shall appear on the list in descending order of length of service at the European Patent Office. In the case of equal length of service, lots shall be drawn.

Subject to Articles 25 and 26, the seven candidates who have obtained the greatest number of votes shall be deemed elected as full members, provided they include at least one permanent employee in each of categories A, B and C.

If this composition has not been achieved, the seven full members shall be determined as follows:

The seventh candidate in order of number of votes shall yield his place to the candidate from the category which is not represented. If the seventh candidate is the sole representative of his category, the sixth candidate shall yield his place instead, and so on. In the absence of representatives of two categories the procedure shall be analogous.

The four candidates with the most votes after the first seven and who have not become full members under the above procedure shall be considered elected as alternates, together with any candidates required to yield their places under the above procedure.”

7. It is true that Article 35(2) of the Service Regulations provided that “[t]he membership of the Staff Committee shall be such that all categories of employees shall be represented thereon”, but the Service Regulations left how such affairs should be organised to the Staff Committee. Furthermore, Article 22 of the then Election Regulations stipulated how to the greatest extent the purpose of Article 35(2) could be achieved. It is also true that Article 35(6)(b) of the Service Regulations provided that “[t]he Central Committee shall be deemed to have been validly constituted upon election of the majority of its members”, but the Service Regulations did not say how the majority of Central Committee’s members should be elected, leaving regulations regarding the election of those members to be determined by a general meeting. Even if there were a potential conflict between Article 35(2) and 35(6)(b) of the Service Regulations and Article 2 of the then Election Regulations, as alleged by the complainant, it would remain within the authority of the general meeting, not of the President. In the present case, there was neither a provision in the Service Regulations granting power and imposing a duty upon the President to intervene in the election of the MSC and the CSC, nor a provision creating for a staff member an enforceable right against the Organisation.

8. The Tribunal’s case law has stated the meaning of “non-observance” of the Service Regulations of the EPO in the context of the electoral process relating to a staff association as follows:

“It is true that [...] the Service Regulations provide that a person in the position of the complainant is elected to office for two years. However Article 35(1) does not create a right enforceable against the EPO. Article II of the Tribunal’s Statute is fundamentally concerned with non-observance of staff regulations by the organisation, which is the employer. The present case does not raise for consideration the infringement of the complainant’s rights by the EPO. That can be illustrated by the relief he seeks, which is a declaration that the October 2008 elections were null and void and consequential orders including damages. But that is not relief against the EPO in vindication of the violation of a right conferred on the complainant as against the EPO.

The complaint is irreceivable and should be dismissed.”

(See Judgment 3526, consideration 5.)

Analogously, the present case does not raise for consideration the infringement of the complainant’s rights by the EPO, and the relief the complainant seeks as a staff member is not against the EPO in

vindication of the violation of a right conferred on the complainant as against the EPO. His claims are therefore irreceivable *ratione materiae*, and must be dismissed.

9. The complainant claims moral damages for the delay in the internal appeal proceedings and punitive damages for both the delay in the internal proceedings and the withholding of the IAC's recommendation. The delay was not inordinate and damages should not be awarded.

Accordingly, the complaint should be dismissed in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2021, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HONGYU SHEN

DRAŽEN PETROVIĆ