

D. M. (No. 6)

v.

EPO

127th Session

Judgment No. 4113

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr P. D. M. against the European Patent Organisation (EPO) on 27 March 2013, the EPO's reply dated 1 August 2013, the complainant's rejoinder dated 21 October 2013 and the EPO's surrejoinder of 3 February 2014;

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 was informed on 7 December 2012 that the President of the European Patent Office, the secretariat of the EPO, had decided not to endorse the recommendation of the Promotion Board to promote him to grade A4. On 5 February 2013 he filed an appeal with the Internal Appeals Committee (IAC) challenging that decision. On 8 March 2013 the complainant was informed by the secretariat of the IAC that the IAC had received his appeal and that it would be dealt with as quickly as possible.

That same day, the President wrote to the complainant stating that he had taken note of his request of 9 January 2013 to review the decision of 13 December 2012 concerning the composition of the IAC. The President considered that the IAC was not properly constituted from

1 January 2013 and was not in a position to give any opinion on any appeal from 1 January 2013 and until a new composition was decided. He added that, in order to avoid a legal vacuum, he would do his best to ensure that the IAC composition was modified as soon as possible.

On 27 March 2013 the complainant filed his complaint with the Tribunal impugning a decision of 8 March 2013.

In April 2013 the President announced to staff that members of the IAC had been appointed and that consequently the IAC could resume its activities.

The complainant asks the Tribunal to set aside the President's decision of 7 December 2012 not to promote him, to order his promotion to grade A4 with retroactive effect to 2008, and to award him 8 per cent interest on the amounts due to him since 2008. He also asks the Tribunal to order that the EPO refrain from violating his dignity. He seeks an award of punitive damages for having taken disciplinary actions against him, a former elected staff representative. He seeks further punitive damages together with "damages" for the "continued and prolonged attempts against [his] dignity". Lastly, he seeks costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress. It otherwise asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. On 27 March 2013 the complainant filed a complaint with the Tribunal. He was then a member of staff of the EPO. He identified in the complaint form the impugned decision as a decision of 8 March 2013. That is possibly a reference to a letter of that date from the secretariat of the IAC, acknowledging receipt of an appeal he had lodged which was dated 5 February 2013. The appeal was, in terms, an appeal against a decision of the President of 7 December 2012 not to promote the complainant to grade A4. The letter of 5 February 2013 concluded with a request for a "speeded up appeal procedure" and that the "appeal [...]" be treated according to Articles 106 – 108 [of the Service Regulations

for permanent employees of the European Patent Office] as they were in force in 2012”.

2. In the letter from the IAC’s secretariat dated 8 March 2013, the complainant was informed as follows: “Your appeal will be dealt with as quickly as possible and you will be informed of developments automatically. These will depend however on the [IAC]’s workload. Appeals are normally dealt with chronologically, so please refrain from queries about the status of your case.”

3. It is also possible that the impugned decision as identified in the complaint form is a letter of 8 March 2013 from the President of the Office responding to a request for review by the complainant of 9 January 2013 of a decision of the President of 13 December 2012. The subject matter of the decision and request for review concerned the composition of the IAC.

4. The relief identified in the complaint form includes the setting aside of a decision of the President of 7 December 2012 not to promote the complainant and an order promoting the complainant to grade A4 retroactively to 2008. The complainant also seeks damages, in various guises, for, in substance, the EPO’s breach of its duty to treat him with dignity, plus interest.

5. The complaint form and the complainant’s pleas (both his brief and rejoinder) do not identify with any particularity precisely what the decision is that he seeks to impugn in these proceedings. The EPO challenges the receivability of the complaint. Viewing the complaint form and the complainant’s pleas as benevolently as possible in the circumstances, his complaint either challenges the decision not to promote him or the decision not to accede to his request for an expedited hearing of his appeal or, perhaps, both. The latter decision is not a final administrative decision with operative legal effect. At best, it was a decision made as a step towards a final administrative decision, had one ever been made in his internal appeal (see Judgment 3890, consideration 5).

6. The former decision was not the subject of an internal appeal prosecuted by the complainant to finality. The complainant argues in his rejoinder dated 21 October 2013 that it was not possible to pursue any internal appeal as, at the time his complaint was filed, there was no IAC and, in addition, nothing had been done on the part of the EPO to advance the appeal in the preceding eight months. This second point is irrelevant in assessing the receivability of the complaint at the time it was filed. Even accepting, for present purposes, that because of issues about the composition of the IAC there was not, effectively, such an IAC at the time the complaint was filed, the real issue is whether there was any prospect, at that time, of an IAC being constituted within a reasonable period to hear the complainant's appeal. The complainant has not demonstrated there was no such prospect and, in fact, a newly constituted IAC was formed within a month of the filing of the complaint. The EPO is correct in contending that the complainant has not exhausted internal means of redress in challenging the decision not to promote him. Consequently, the EPO is correct in arguing the complaint is irreceivable in this respect.

7. The complaint is irreceivable either because it does not challenge a final administrative decision or because, in relation to such a decision concerning the promotion of the complainant, he has not exhausted internal means of redress, or both.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2018,
Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ