

**K. (No. 42)**

**v.**

**EPO**

**131st Session**

**Judgment No. 4396**

THE ADMINISTRATIVE TRIBUNAL,

Considering the forty-second complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 16 May 2019, the EPO's reply of 28 August 2019, the complainant's rejoinder of 7 January 2020 and the EPO's surrejoinder of 9 April 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 challenges the decision not to reimburse him the notary fees which he incurred for the certification of his signature on the annual declaration required for recipients of an invalidity allowance.

The complainant is a former permanent employee of the European Patent Office (the EPO's secretariat) who, at the material time, was a recipient of an invalidity allowance. On 10 April 2013 the Administration sent him the Annual Declaration – a form to be completed by recipients of an invalidity allowance pursuant to Section XIV of the Implementing Rules for Article 62a of the Service Regulations for permanent employees of the European Patent Office. In the accompanying letter, the complainant was asked to complete and sign the Annual Declaration, and to have his signature thereon certified by a doctor, a notary, a lawyer or another competent authority, such as, for example, the residents' registration office, the police, an embassy, a consulate, or the EPO's Personnel Administration. The letter also specified that the Office could not

reimburse any costs incurred in connection with that certification. On 8 May 2013 the complainant returned the Annual Declaration duly completed and certified by a notary.

The complainant subsequently requested reimbursement of the notary costs incurred for the certification of his signature on the Annual Declaration form in the amount of 11.90 euros and he also requested a declaration by the Office that the requirement of certification of signature on the Annual Declaration was unlawful. Following the rejection of both his requests, the complainant filed requests for review, which were also rejected. On 20 August 2013 he filed an internal appeal requesting reimbursement of the notary costs incurred for the certification of his signature, legal assistance from the Office, moral damages, costs, and interest on all amounts. On 11 June 2014 he filed a second appeal requesting a declaration by the Office that the requirement of certification of signature on the Annual Declaration and the statement that the invalidity allowance would be withheld in the absence of such certification were unlawful. He also requested moral damages and costs. The two appeals were respectively registered under the references RI/96/13 and RI/81/14.

The Appeals Committee joined the two appeals in a single appeal procedure under the reference RI/96/13. It dealt with the appeal in a summary procedure and, in its opinion of 30 June 2016, unanimously recommended that the appeal be rejected as manifestly irreceivable. The Administration endorsed this recommendation and relevantly informed the complainant in a letter dated 1 September 2016. The complainant filed a complaint with the Tribunal against this decision (his thirty-second). Following the public delivery of Judgments 3694 and 3785, the President of the Office withdrew the 1 September 2016 decision and remitted the case to the Appeals Committee for a new consideration. The complainant was informed of this by a letter of 24 March 2017 and was invited to withdraw his thirty-second complaint, but he refused to do so. The complainant's thirty-second complaint was subsequently dismissed by the Tribunal in Judgment 4256, delivered in public on 10 February 2020.

Meanwhile, on 26 September 2018, the complainant was informed that the remitted internal appeal, registered under the reference R-RI/2017/116, would be dealt with in a summary procedure and he was invited to provide comments. In an email of 24 October 2018, the complainant objected to the President's decision to remit the case to the

Appeals Committee. He submitted further comments and he requested an oral hearing. In a further email of 9 November 2018, the complainant objected to the composition of the Appeals Committee on the ground that he did not consider the Vice-Chair to be impartial. This objection was rejected.

The Appeals Committee delivered its opinion on 29 January 2019. Considering the appeal to be manifestly irreceivable, it decided to deal with it in a summary procedure. The Committee held that the complainant's request for the reimbursement of the notary fees incurred for the certification of his signature was entirely unsubstantiated. As regards his request for a declaration regarding the unlawfulness of the requirement for a certified signature and the Office's announcement to withhold the invalidity allowance in the absence of such signature, the Appeals Committee held that it was beyond its competence and thus irreceivable. As for the auxiliary request for assistance from an EPO lawyer, the Appeals Committee considered that it was irreceivable as it fell outside the scope of its review. The Appeals Committee also held that the complainant's requests for moral damages, costs and interest should fail. It unanimously recommended that the appeal be rejected as manifestly irreceivable.

By a letter of 15 March 2019, the complainant was informed of the decision, taken on behalf of the President of the Office, to endorse the Appeals Committee's opinion for the reasons set out therein. That is the impugned decision.

The complainant asks the Tribunal to set aside the EPO's decisions on his internal appeals, respectively registered under the references RI/96/13 and RI/81/14, as well as the EPO's decision on his internal appeal remitted to the Appeals Committee under the reference R-RI/2017/116. He also asks the Tribunal to set aside all general decisions underlying those individual decisions, in particular the amendment of Articles 106 to 113 of the Service Regulations and the Implementing Rules thereto or, subsidiarily, to order the EPO to no longer apply these underlying general decisions. He seeks reimbursement of the notary fees which he incurred for the certification of his signature on the annual declaration required for recipients of an invalidity allowance and an order remitting his case to the competent criminal prosecution authorities in Germany. He claims moral and punitive damages on several counts, including the failure to respect his dignity and his right to be heard, the Appeals

Committee's unlawful composition and its failure to diligently deal with the partiality objection he raised, the excessive delay in the internal appeal proceedings, and the unlawful referral of his complaint back to the EPO. He claims costs as well as interest at the rate of 6 per cent per annum on all amounts awarded.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded in its entirety. Considering the complaint to be an abuse of process, it enters a counterclaim requesting that the complainant be ordered to pay the EPO 1,000 euros in costs.

#### CONSIDERATIONS

1. The complainant requests that this complaint be joined with his thirty-second complaint, as both complaints are directed against the same original administrative decisions rejecting his request for the reimbursement of the notary fees he incurred for the certification of his signature on his obligatory Annual Declaration required by the Office for the payment of his invalidity allowance. The request is rejected as the Tribunal dismissed his thirty-second complaint in Judgment 4256, delivered in public on 10 February 2020.

2. The complainant's request for oral proceedings is also rejected, as the Tribunal is sufficiently informed of all aspects of the case to consider it fully on the written submissions and documents which the parties have provided.

3. The central issue which this complaint raises is whether it was in error that the impugned decision of 15 March 2019 accepted the Appeals Committee's unanimous recommendation to reject as manifestly irreceivable the complainant's remitted internal appeal, registered under the reference R-RI/2017/116, consolidating his internal appeals RI/96/13 and RI/81/14. Appeal RI/96/13 had challenged the initial administrative decision to reject the complainant's request for the reimbursement of the costs which he had incurred for the notarial certification of his signature on his obligatory Annual Declaration as a recipient of an invalidity allowance, pursuant to Section XIV of the Implementing Rules for Article 62a of the Service Regulations. In appeal RI/81/14 the complainant had sought a declaration that the

certification requirement was unlawful. The complainant had also claimed moral damages for the delay in resolving the matter and costs.

4. Section XIV of the Implementing Rules for Article 62a of the Service Regulations (in force at the material time) stated as follows:

**“XIV. Requirement of evidence**

- (1) A person eligible for an invalidity allowance under these Rules shall furnish such supporting evidence as may be required by the Office and inform it of any facts which may affect his entitlement to benefit, such as any change in his address or in his civil status or the composition of his family in so far as such latter change alters the numbers of persons entitled under him. Such statement shall in any case be required to be renewed during the month of December each year. For this purpose, the Office shall send a form to the person concerned each year.
- (2) Should the recipient of an invalidity allowance fail to comply with these obligations, he may be deprived of the right to the invalidity allowance; save exceptional circumstances, he shall refund any sums received to which he was not entitled.”

5. In its opinion, dated 29 January 2019, the Appeals Committee relevantly summarized the bases for its recommendation as follows:

“The Appeals Committee unanimously considered the appeal to be manifestly irreceivable and therefore decided to treat it in a summary procedure according to Article 9 [of the Implementing Rules for Articles 106 to 113 of the Service Regulations].

The appellant does not sufficiently substantiate his request for the reimbursement of notary costs; he, in particular, fails to state the legal grounds the request is based on.

The request for declaratory findings is irreceivable as the Appeals Committee is not competent to entertain such requests.

The Committee unanimously recommended rejecting the appeal as manifestly irreceivable. In view of the small amount of [...] 11.90 [euros] at stake the Appeals Committee is satisfied that no substantial prejudice has been caused to the appellant which would warrant an award of moral damages for delay.”

6. The EPO raises receivability as a threshold issue. Observing the nature of the complainant’s pleadings, including the remedies which he seeks in this complaint, the Tribunal finds it necessary to state at the outset that the complainant’s request to set aside the EPO’s decisions on his internal appeals RI/96/13 and RI/81/14 will be rejected as moot since those appeals were consolidated in internal appeal R-RI/2017/116.

Accordingly, the scope of this complaint is limited to the subject matter of appeal R-RI/2017/116, which raise the pivotal issues: (1) whether it was unlawful for the Administration to require the certification of signature on the Annual Declaration; (2) whether the Administration wrongly refused to reimburse the complainant's subject notary costs; and (3) whether the complainant is entitled to the consequential relief which he sought in his internal appeals. Other submissions and claims concerning the complainant's internal appeal RI/96/13, other internal appeals, or other complaints filed with the Tribunal, fall outside the scope of internal appeal R-RI/2017/116 and are accordingly irreceivable.

7. The claims which the complainant proffers for the first time in his rejoinder for punitive damages in the amount of 10,000 euros, and to remit the case to the competent criminal prosecution authorities in Germany, are also irreceivable. This is in accordance with the Tribunal's case law that a complainant may not, in her or his rejoinder, enter new claims not contained in the original complaint (see, in particular, Judgment 3086, under 3(d), as well as Judgment 4092, under 10).

8. The Tribunal notes that the decision contained in the letter of 10 April 2013 was an individual decision insofar as it was specifically addressed to the complainant and required him to sign, authenticate and return the subject Annual Declaration. Accordingly, the complainant's challenge of that decision as unlawful was a challenge directed at an individual decision. The Tribunal's case law has it that a staff member who challenges an individual decision may, at the same time and in the same appeal, challenge the related underlying decision and that a staff member may, in challenging a decision that affects her or him directly, plead the unlawfulness of any general measure that affords the basis for it in law. A staff member may therefore impugn an administrative decision only if it directly affects her or him, but is not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which generated their cause of action (see Judgment 3291, under 6 and 8).

9. The Appeals Committee's recommendation (accepted in the impugned decision) to reject internal appeal R-RI/2017/116 as manifestly irreceivable for lack of substantiation was made under its summary procedure pursuant to Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations. This provision, which is under the rubric "Summary procedure", 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. Such decision shall be adopted by a majority.
- (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.”

10. In its opinion of 29 January 2019, after it set out Section XIV of the Implementing Rules for Article 62a of the Service Regulations (reproduced in consideration 4 of this judgment), the Appeals Committee stated the reasons for its conclusion, and concomitant recommendation, on the complainant’s claim for the reimbursement of the notary costs as follows:

“The [complainant]’s claim for reimbursement of costs is entirely unsubstantiated and therefore irreceivable. [He] does not specify what the legal basis for the reimbursement of the notary fees for the certification of his signature is. He merely requests the reimbursement without arguing why the Office is obliged to carry these costs. Contrary to what [he] seems to suggest it is not sufficient that he merely disputes the lack of a legal basis for reimbursing the costs. [He] was advised from the moment he received the form for the annual declaration that costs incurred for a certification would not be borne by the Office. Additionally, [he] was not obliged to have a notary certify his signature. In the Office’s letter, whereby [he] was asked to fill in the form for the annual declaration, it is stated that a certification is necessary, however, not necessarily by a notary. The notary is only mentioned as one of [the] various possibilities.”

11. This reasoning is mistaken on two bases. First, substantiation or non-substantiation of a claim goes to the merits of the claim. It is not a function of receivability or irreceivability. In the second place, even applying the *ejusdem generis* rule to construe Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, as the criteria for manifest irreceivability therein are expansive, there is no basis on which the Appeals Committee could have treated the subject internal appeal as manifestly irreceivable. Accordingly, the Appeals Committee should have permitted the matter to proceed in the usual course of the internal appeal proceedings ensuring a fair procedure and due process, as the matter required, rather than concluding that the appeal was manifestly irreceivable. The result is that the impugned decision, dated 15 March 2019, endorsing the Appeals Committee's recommendation to dismiss the complainant's request for the reimbursement of the notary costs he incurred for certifying his signature on his Annual Declaration relating to his invalidity allowance, will be set aside. However, as the complainant has not articulated the effects of the breach of the applicable rules upon him, he will not be awarded the incidental moral damages which he seeks.

12. Notwithstanding that there was unreasonable delay in the internal appeal process, the moral damages which the complainant seeks under this head will not be awarded, as he has not articulated the effects which the delay has caused (see, for example, Judgment 4100, consideration 7).

13. As he prevails on the central issue raised in this complaint, the complainant will be awarded 2,000 euros in costs. The EPO's counterclaim for costs will be rejected.

There is no legal basis for awarding the complainant additional costs for out of pocket expenses, the drafting of submissions and other incidental expenditure that he requests.

14. However, notwithstanding the complainant's request to the contrary, the matter will be remitted to the Appeals Committee for it to consider the complainant's consolidated internal appeal R-RI/2017/116, as it failed to properly do so in the underlying internal process. This will also permit the parties to fully develop their pleadings in the internal appeal process, which was incomplete when the Appeals Committee

recommended that the complainant's request for the reimbursement of his notary costs be rejected on the basis of manifest irreceivability.

### DECISION

For the above reasons,

1. The impugned decision dated 15 March 2019 is set aside.
2. The case is remitted to the Appeals Committee on the basis of consideration 14 of this judgment.
3. The EPO shall pay the complainant costs in the amount of 2,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 26 March 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 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ