

116th Session

Judgment No. 3248

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 10 April 2010 and corrected on 13 July 2010, the EPO's reply of 22 February 2011, the complainant's rejoinder of 16 May and the Organisation's surrejoinder of 29 August 2011;

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 and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgment 3151, delivered on 4 July 2012. Suffice it to recall that the complainant filed three internal appeals with the Internal Appeals Committee challenging inter alia his staff report for the period 1 January 2002 to 31 January 2003, and the date of his promotion to grade A4.

In its opinion of 1 April 2009 the Committee, to which the three appeals had been referred, stated that it had decided to join them as they were interconnected. It unanimously recommended that a new

version of the complainant's staff report for the period from 1 January 2002 to 31 January 2003 should be drawn up, either by re-evaluating each aspect of his performance or, if he agreed, by using the version of the staff report established for the period 2000-2001 as a basis for the 2002-2003 evaluation. It added that the new staff report should be submitted to the Promotion Board to determine whether the complainant's date of promotion to grade A4 should be earlier than 1 July 2004, in which case he should be paid salary arrears with interest at the rate of 8 per cent per annum. The Committee also unanimously recommended reimbursing the complainant's reasonable costs upon presentation of bills. With respect to the claim for moral damages, the majority of the Committee's members recommended rejecting it, but one member recommended paying him 1,000 euros for each of his first two appeals, given that more than two years had elapsed since he had filed them.

By a letter dated 29 May 2009 the Director of Regulations and Change Management informed the complainant that the President of the European Patent Office had decided to endorse the Committee's recommendation to allow his appeals in part. Consequently, the complainant's former supervisor would re-evaluate his performance and complete a new staff report for the period from January 2002 to January 2003 by adding comments, particularly in Parts III and V. The appraisal would be countersigned by the Vice-President in charge of Directorate-General 1 (DG1). Furthermore, in accordance with the Committee's recommendation, the new version of the staff report would be forwarded to the Promotion Board and, in the event that the Board proposed that his promotion should take effect from a date earlier than 1 July 2004, the Office would pay him salary arrears together with interest at the rate of 8 per cent per annum. He would also be paid reasonable costs upon receipt of written evidence, but the President had decided to endorse the majority's recommendation not to award him moral damages.

The complainant impugned that decision in the first complaint he filed with the Tribunal on 18 August 2009. In his brief he requested that the EPO show that the decision of 29 May 2009 was taken by the

President or that the Director of Regulations and Change Management had received delegation of authority by the President. Consequently, in its reply of 10 December 2009 to the Tribunal concerning the first complaint, the EPO provided a copy of the decision form signed by the President on 29 May 2009 showing that she took the final decision concerning the complainant's three internal appeals; the complainant received that document on 11 January 2010 and decided to impugn it in his second complaint.

B. The complainant indicates that the subject matter of the second complaint is "intrinsically and substantially similar and even identical" to his first complaint. He contends that the signature on the decision form of 29 May 2009 is not "clear" and argues that it is not possible to assert that the decision was taken or at least endorsed by the President.

Alternatively, he submits that the decision of 29 May 2009 was taken on the basis of an incorrect application of the recommendations of the Internal Appeals Committee. Indeed, the Committee considered that the staff report for the period 1 January 2002 to 31 January 2003 was fundamentally flawed with respect to each aspect of his performance whereas the EPO decided that the comments made concerning some aspects – three out of five – of the complainant's performance should remain unchanged. He also alleges material error in that the contested decision refers to "the staff report" for 2002-2003 despite the fact that he received two different and separate staff reports for that period, and that the two reports were "diverging from each other". The staff report for 2003 was signed and approved by both parties.

He alleges undue delay in the internal appeal proceedings stressing that the staff report, which is the core of the dispute, was issued seven years ago.

The complainant asks the Tribunal to grant him moral damages and costs. He also asks for the "cancellation of the set of potential presidential final decisions, with regard to the three concerned internal appeals [...] insofar as it is considered as having been duly signed by the President", or alternatively a "formal decision to set aside [the]

said set of potential presidential final decisions, insofar as it is considered as having not been duly signed by the President”.

C. The EPO submits that the complaint is irreceivable as time-barred. It indicates that the decision form dated 29 May 2009 that the complainant impugns in his second complaint and the letter of 29 May 2009 that he impugned in his first complaint constitute a single decision. The decision form signed by the President of the Office was provided to the complainant to prove that it was not the Director of Regulations and Change Management who took the decision concerning his three internal appeals but the President of the Office.

On the merits, it submits that there is no doubt as to the fact that the President herself signed the decision form of 29 May. Hence, the final decision on the complainant’s internal appeals was taken with full authority and with full knowledge of the case. It adds that, in the letter of 29 May, the Director of Regulations and Change Management clearly indicated that the President had considered the complainant’s internal appeals. It adds that it is normal practice within the EPO that the aforementioned Director informs an official of the President’s final decision on his or her internal appeal.

It asserts that the final decision of 29 May is clear and follows “dutifully” the unanimous opinion of the Internal Appeals Committee in indicating that a new version of the staff report for 2002-2003 should be prepared and forwarded to the Promotion Board. It emphasises that in the new version of the staff report, which was established in July 2009, none of the five ratings regarding the various aspects of the complainant’s performance was modified and that the reporting officer added positive comments concerning two aspects of the complainant’s performance; the new version of the staff report therefore fully complied with the Committee’s recommendation.

The EPO denies any delay in the processing of the complainant’s internal appeals stressing that a final decision was taken in that respect on 29 May 2009, i.e. within the prescribed two months following receipt of the recommendation of the Internal Appeals Committee of

1 April 2009. The claim for moral damages should therefore be rejected. It also considers that the complainant is not entitled to an award of costs because the complaint is unfounded.

D. In his rejoinder the complainant reiterates that the impugned decision was taken *ultra vires*. He contends that it is impossible to assert that the “strange curved graphic” on the decision form represents the President’s initials or signature. He argues that the EPO has not yet provided evidence of delegation of authority regarding the contested decision of 29 May 2009.

E. In its surrejoinder the EPO maintains that the impugned decision was taken by the President who was the competent authority to do so; therefore it submits that the request for proof of delegation of authority is irrelevant.

CONSIDERATIONS

1. The facts of the case can be found detailed in Judgment 3151, delivered on 4 July 2012. Essentially, in his first complaint the complainant challenged the validity of the President’s decision to follow the first recommendation of the Internal Appeals Committee with regard to his three joined appeals. This decision was notified to him by a letter from the Director of Regulations and Change Management and the complainant asserted that it was taken *ultra vires* and that there was no proof that the President had taken the decision. He also contested the decision not to award him moral damages for the lengthy appeals process. The Tribunal found that the decision was properly taken and notified to the complainant and that there was no unreasonable delay in the internal appeals process. It found, however, that an award of moral damages was appropriate with respect to the two unlawful staff reports.

“The first staff report was implicitly annulled by the second staff report of September 2007 and the second, which was signed by the Principal Director acting as both reporting officer and countersigning officer, was annulled by the impugned decision communicated by the letter of 29 May 2009. The Tribunal considers that the Organisation itself, by amending the

two staff reports, considered them unlawful. Therefore, an award of moral damages is appropriate, even if the new version of the staff report reaches the same or a similar conclusion to the previous reports.” (See Judgment 3151, under 9.)

2. The complainant filed the present complaint (his second) on 10 April 2010, requesting the Tribunal to order the cancellation of the “potential [...] final decisions” taken by the President with regard to his three joined appeals if the Tribunal finds that they had been duly signed by the President, or alternatively, to set aside the “potential [...] final decisions” regarding his three joined appeals if the Tribunal finds they had been taken *ultra vires*. He also requests an award of moral damages and costs.

3. As this complaint is essentially identical to his previous complaint, and given that the complainant does not raise any new arguments which could be seen to vitiate the Tribunal’s previous decision, the Tribunal considers that this complaint is inadmissible according to the principle of *res judicata*. “[T]he principle of ‘[r]es judicata operates to bar a subsequent proceeding if the issue submitted for decision in that proceeding has already been the subject of a final and binding decision as to the rights and liabilities of the parties in that regard’. The principle applies when the parties, the purpose of the suit and the cause of action are the same as in the earlier case (see Judgments 1216, under 3, and 1263, under 4).” (See Judgment 2993, under 6.)

4. As the complaint is inadmissible according to the principle of *res judicata*, it is unnecessary to consider the Organisation’s submission that it is irreceivable as time-barred.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet