P. (No. 16)

v.

EPO

122nd Session **Judgment No. 3700**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr L. P. against the European Patent Organisation (EPO) on 14 October 2013, the EPO's reply of 11 June 2014, the complainant's rejoinder of 1 August, the EPO's surrejoinder of 10 November 2014 and the complainant's additional submissions of 20 February 2015;

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, who is an official of the European Patent Office, the EPO's secretariat, contests the EPO's refusal to provide him with a copy of the opinion of the Appeals Committee in relation to the internal appeal he had filed at the same time as the opinion was provided to the President of the Office.

Pursuant to decision CA/D 9/12 of the Administrative Council, Implementing Rules for Articles 106 to 113 of the Service Regulations for permanent employees of the European Patent Office were introduced with effect from 1 January 2013. Under the new provisions the opinion of the Appeals Committee is no longer communicated to the appellant

at the same time as it is communicated to the appointing authority (i.e. either to the Administrative Council or to the President of the Office) to take a final decision; it is instead communicated to the appellant together with the final decision.

On 4 March 2013 the complainant received a letter dated 27 February 2013 from the Secretariat of the Appeals Committee informing him that the Committee had issued its opinion concerning the appeal he had filed under reference RI/151/09 and that it had been sent to the competent appointing authority for a final decision. The complainant asked, on 4 March, to be provided with a copy of the opinion. His request was denied on the grounds that the new appeal procedure applied.

On 26 March the complainant filed a request for review with both the President of the Office and the Chairman of the Administrative Council. He asked the Administrative Council to review the Implementing Rules introduced by decision CA/D 9/12 and to maintain the previous "practice" concerning the communication of the Appeals Committee's opinion, indicating that if his request was rejected he would like the matter to be referred to the Appeals Committee. He asked the President of the Office to review the "policy" of not providing a copy of the Appeals Committee's opinion upon request, adding that he would appeal in the event of a negative outcome. The request for review filed with the President was forwarded to the Administrative Council on the basis that it related to a general decision which the Council was competent to review.

During its 136th meeting in June 2013, the Administrative Council decided to reject the complainant's request for review as manifestly irreceivable and to reject his request to have the matter referred to the Appeals Committee. The complainant was so informed by a letter of 15 July 2013 from the Chairman of the Administrative Council. That is the decision he impugns before the Tribunal.

In the meantime, on 28 May 2013 the President's final decision on internal appeal RI/151/09 was sent to the complainant together with a copy of the Appeals Committee's opinion of 26 February 2013. That decision was impugned in his fourteenth complaint, on which the Tribunal ruled in Judgment 3615, delivered on 3 February 2016.

The complainant asks the Tribunal to order the EPO to revert to its former practice of providing opinions of the Appeals Committee to the appellant and the appointing authority at the same time, to quash the "decision contained in CA/D 9/12, and […] the decision to apply it to [him]", and to award him moral damages and costs. He also claims exemplary damages on the grounds that the EPO made unprofessional remarks, distorted statements of the Tribunal, set procedural traps, and made veiled threats.

The EPO, which was authorised by the President of the Tribunal to confine its reply to the issue of receivability, asks the Tribunal to dismiss the complaint as irreceivable and to order the complainant to bear his costs as well as part of the costs of the EPO in an amount left to the Tribunal's discretion. It asks the Tribunal to reject the claim for exemplary damages.

CONSIDERATIONS

1. On 26 October 2012 the Administrative Council adopted decision CA/D 9/12 introducing Implementing Rules for Articles 106 to 113 of the Service Regulations for permanent employees of the European Patent Office which entered into force on 1 January 2013. Under these Implementing Rules, appellants would receive a copy of the Appeals Committee's opinion together with the final decision on the appeal taken by the competent appointing authority (Article 14(1) of the Implementing Rules). Under the previous scheme, appellants were notified of the Appeals Committee's opinion at the same time as the competent appointing authority.

2. In the present complaint, his sixteenth, the complainant impugns the Administrative Council's decision to reject his request for review of decision CA/D 9/12 as manifestly irreceivable, as well as the rejection of his request for a copy of the Appeals Committee's opinion on his appeal RI/151/09 after it had been sent to the President of the Office and before the decision on his appeal was taken by the President. The complainant was notified on 4 March 2013 that the Appeals

Committee's opinion on his appeal RI/151/09 had been forwarded to the competent appointing authority (President of the Office) for a final decision. On 26 March he submitted a request for review to the Administrative Council asking it to revert to the previous practice of communicating the Appeals Committee's opinion simultaneously to both parties. He requested that the matter be referred to the Appeals Committee in accordance with Article 109(6)(b) of the Service Regulations in the event that his request for review was rejected.

On the same day he submitted another request for review to the President, who forwarded it, along with similar requests made by other employees, to the Administrative Council on the grounds that the complainant and these other employees were challenging a general decision (decision CA/D 9/12) taken by the Administrative Council. The President advised the Administrative Council that the request should be declared manifestly irreceivable and prepared a draft opinion to that effect for the Administrative Council's approval.

The complainant was notified in a letter dated 15 July 2013 of the decision of the Administrative Council to reject his request for review of decision CA/D 9/12 as manifestly irreceivable, and to refuse the request to refer the matter to the Appeals Committee on the basis of Article 109(6)(b) of the Service Regulations.

3. In a letter dated 28 May 2013, the complainant was notified that the Vice-President of Directorate-General 4, acting with delegation of authority from the President, had decided to reject his appeal RI/151/09 as inadmissible and subsidiarily unfounded. The complainant impugned that decision in his fourteenth complaint, which led to Judgment 3615 delivered on 3 February 2016.

4. The complainant requests the Tribunal to quash decision CA/D 9/12 as well as the decision refusing to send him the Appeals Committee's opinion on his appeal RI/151/09 at the time it was sent to the President, to order the EPO to resume sending the Appeals Committee's opinion to the appellants and to the appointing authority

at the same time, to award him moral and exemplary damages as well as costs.

5. The EPO was allowed by the President of the Tribunal to limit its submissions to the issue of receivability. It argues that the complainant cannot directly challenge decision CA/D 9/12 as it is a general decision. It also submits that the present complaint derives from appeal RI/151/09, the outcome of which has already been challenged in a complaint before the Tribunal (see Judgment 3615) and therefore the complainant should have raised his arguments concerning the rejection of his request for a copy of the Appeals Committee's opinion prior to the delivery of the final decision, in the context of his fourteenth complaint. On a subsidiary basis, it contends that the complainant's request for review of decision CA/D 9/12 of 26 March 2013 was time-barred as that decision was adopted on 26 October 2012 and published on 5 November 2012, and he did not challenge it within the three-month period stipulated in the Service Regulations. The EPO makes a counterclaim for costs in an amount to be set by the Tribunal.

6. It should first be noted that the complainant initially sought to challenge decision CA/D 9/12 by two separate means. On the one hand he filed a request for review with the Administrative Council, directly challenging general decision CA/D 9/12. On the other hand, he filed a request for review with the President of the Office in which he challenged not only the individual application of decision CA/D 9/12, which was evidenced by the refusal of his request of 4 March 2013 to be provided with a copy of the Appeals Committee's opinion on appeal RI/151/09 ahead of the President's final decision on the appeal, but also decision CA/D 9/12 itself.

7. As indicated earlier, notwithstanding the complainant's attempt to frame his request to the President as a challenge to an individual decision, the President "redirected" it to the Administrative Council on the grounds that it related to a general decision which the Council was

competent to review. No conclusory decision was taken on that request for review.

8. The Administrative Council rejected the request for review as "manifestly irreceivable" by its decision of 15 July 2013. It may be assumed that by that decision the Administrative Council endorsed the view expressed by the President of the Office in document CA/39/13, according to which the decision at issue could not be challenged because it was a general decision that had no direct adverse effect on the employees who sought to challenge it.

9. The Tribunal finds that the impugned decision conveyed to the complainant on 15 July 2013 by the Chairman of the Administrative Council, who indicated that it could be challenged directly before the Tribunal as it constituted a final decision in accordance with Article 109(6) of the Service Regulations, is unlawful.

10. The Administrative Council's decision as well as the President's decision to redirect the complainant's request for review to the Administrative Council did not pay regard to the fact that the complainant had impugned both general decision CA/D 9/12 and its individual application to him (i.e. the decision to reject his request for a copy of the Appeals Committee's opinion prior to receiving the final decision on his appeal RI/151/09). That oversight involved an error of law, as the competent authority to deal with the request for review was the President, who had adopted the individual decision (see Judgment 3146, consideration 11).

11. In the present case the Administrative Council was not the "competent authority", within the meaning of Title VIII of the Service Regulations concerning settlement of disputes, as amended by the Administrative Council's decision CA/D 8/12, to examine the complainant's request for review.

In this respect, the Tribunal notes that unlike most international organisations the EPO has two appointing authorities pursuant to Articles 10 and 11 of the European Patent Convention : the President, who appoints the vast majority of the staff (approximately 6,700) and the Administrative Council, which appoints the President, the Vice-Presidents (currently 5) and approximately 170 other employees who are members of the boards of appeal and whose independence is guaranteed by the fact that they are appointed by the Administrative Council. In reality, most decisions affecting staff members appointed by the Administrative Council are taken by the President, because these staff members are also subject to most of the provisions of the Service Regulations and are referred to under the generic expression "employees". The only individual administrative decisions concerning these staff members that are taken by the Administrative Council are those relating to appointment and disciplinary matters. Decisions on all other matters are taken by the President, which is why the Service Regulations provide for the possibility that some staff may file appeals with different appointing authorities depending on which authority took the decision challenged.

It must also be borne in mind that the appeal system is essentially an individual one in nature and that, broadly speaking, a general decision may only be challenged in the context of an appeal against an individual decision implementing the general decision. In this context Article 107(1) of the Service Regulations, under Title VIII on settlement of disputes as amended by decision CA/D 8/12, identifies the appointing authority to whom a request for review of an individual decision may be submitted and the competent authority to deal with the review procedure by providing that "[a]n employee, a former employee, or rightful claimant on his behalf may submit a written request that an individual decision relating to him be taken by the appointing authority which is competent to take such decision".

12. In light of the above considerations, the meaning of the expressions "competent appointing authority" (Articles 107(2) and 109(4) of the Service Regulations) and "appointing authority which took

the decision challenged" (Articles 109(2) and 110(1) of the Service Regulations), while not clear, should, having regard to the language and logic of Title VIII of the Service Regulations, be interpreted as meaning: (a) for employees appointed by the President, all requests for review must be lodged with the President and must be decided by the President; (b) for employees appointed by the Administrative Council, requests for review of individual decisions concerning them that were taken by the Administrative Council must be lodged with the Council and must be decided by the Council, whereas requests for review of individual decisions concerning them that were taken by the President must be lodged with the President and must be decided by the President. In the present case, as the complainant was appointed by the President, his request for review had to be lodged with the President.

13. The two flaws identified above would ordinarily warrant remitting the matter to the Organisation in order for the competent authority to take a decision. In the present case it is however unnecessary to make such an order as the complaint is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute.

14. The individual application of general decision CA/D 9/12 to the complainant (i.e. the rejection of the complainant's request for a copy of the Appeals Committee's opinion prior to receiving the final decision on his appeal) was not a final decision in accordance with Article VII of the Statute of the Tribunal. It was merely an administrative step in the proceeding leading to the final decision on his appeal RI/151/09 and as such, that rejection, and the challenge to the general decision on which the rejection was based, should have been contested within the complainant's fourteenth complaint challenging the outcome of that appeal, which led to Judgment 3615. According to the Tribunal's case law, "[o]rdinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as part of a challenge to the final decision but they themselves, cannot be the subject of a complaint to the Tribunal." (See Judgment 2366,

under 16, confirmed in Judgments 3433, under 19, and 3512, under 3.) Consequently, the complaint will be dismissed.

15. With regard to the EPO's counterclaim for costs, the Tribunal notes that this counterclaim is based on the assertion that the complaint is irreceivable as the complainant cannot challenge a general decision. The complainant is in fact challenging a general decision which was applied to him (and thus directly affected him), but the complaint is found to be irreceivable for the reasons stated in the above considerations. The Tribunal finds, therefore, that the complaint was not abusive and it will dismiss the EPO's counterclaim for costs.

DECISION

For the above reasons,

The complaint is dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 12 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ