

P. (No. 9)

v.

EPO

133rd Session

Judgment No. 4493

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr A. E. P. against the European Patent Organisation (EPO) on 24 July 2014 and corrected on 29 September 2014 and the EPO's reply of 20 October 2015, the complainant having failed to file a rejoinder within the allocated time;

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 challenges the decision not to award him moral damages for the length of the internal appeal procedure.

In his internal appeal filed on 23 August 2007 and registered by the Internal Appeals Committee on 16 October 2007, the complainant challenged a warning letter issued pursuant to Circular No. 246 informing him that his productivity was considered low. Circular No. 246 sets out "General Guidelines on Reporting", which detail the procedure to be followed by reporting officers in drawing up a staff report, including the issuance of a warning.

Following a hearing held on 18 February 2013, the majority of members of the Internal Appeals Committee found, in their opinion issued on 18 February 2014, that the appeal was receivable but unfounded, since the resulting staff report had maintained his productivity rating as "good" and the warning letter had been removed from his personal file.

As the issuance of the warning had been lawful and no damage had actually been sustained by the complainant, the majority of the Internal Appeals Committee recommended rejecting his claims for material and moral damages, as well as his claim for punitive damages. It also rejected his claim for costs. However, the Internal Appeals Committee unanimously recommended awarding the complainant moral damages for the excessive length of the internal appeal procedure. The majority recommended awarding him 500 euros in view of the overall length of the procedure and, in particular, the delay of five years prior to receipt of the EPO's position, while the minority recommended 6,500 euros in moral damages for the excessive delay and 500 euros in costs.

Meanwhile, in Judgment 3198, delivered in public on 4 July 2013, the Tribunal held that a warning issued pursuant to Circular No. 246 does not constitute a challengeable decision.

On 30 April 2014 the complainant was informed that his appeal was rejected as irreceivable pursuant to Judgment 3198. With respect to the complainant's claim for damages for the length of the internal appeal procedure the decision noted that, as the complainant had not suffered any consequences from the delay, no damages would be paid having regard to the Tribunal's case law, in particular Judgment 3160, at consideration 17. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to award him no less than 7,000 euros in moral damages for the excessive length of the internal appeal procedure. He further claims punitive damages and costs for both the internal appeal procedure and his complaint before the Tribunal.

The EPO requests the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant only impugns the EPO's decision of 30 April 2014 not to award him moral damages for the delay in the internal appeal procedure in which the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President of the Office, did not endorse the Internal Appeals Committee's majority recommendation of 18 February 2014 that the complainant should be awarded damages of 500 euros in view of the length of the procedure.

2. The complainant bases his complaint on the following grounds:

- (a) The manifestly excessive delay led to a lack of legal certainty and deprived the complainant of access to justice;
- (b) According to the Tribunal's case law excessive delay in internal appeal proceedings justifies the award of moral damages;
- (c) The amount of damages requested (7,000 euros) is in line with the European Court of Human Rights' case law;
- (d) The complainant should be awarded punitive damages because the EPO acted in bad faith by intentionally delaying the procedure;
- (e) The Tribunal provides abundant case law justifying the award of costs for both the internal appeal procedure and the complaint.

3. The Organisation asks the Tribunal to dismiss the complainant's claims for moral damages, punitive damages and costs on the following grounds:

- (a) The complainant fails to demonstrate the injury suffered due to the length of the internal appeal proceedings;
- (b) The disputed warning letter dated 25 May 2007, later removed from the complainant's file, did not have any negative consequences on the complainant;
- (c) On a subsidiary basis, the amount requested by the complainant is excessive, and the case law of the European Court of Human Rights is irrelevant;
- (d) It is purely speculative for the complainant to assert that the Organisation intentionally delayed the internal appeal proceedings;
- (e) Since the complaint is unfounded on the merits, the complainant is not entitled to an award of costs.

4. The internal appeal was registered on 16 October 2007, and the Internal Appeals Committee issued its opinion on 18 February 2014. Neither party disputed the fact that the internal appeal proceedings in the present case, which spanned seven years and four months, for reasons attributable to the EPO, is unreasonably long. This fact is in itself indeed indisputable.

5. The Tribunal notes that the litigated issue in the internal appeal proceedings was the unlawfulness of the warning letter and its belated removal from the complainant's personal file. In Judgment 3198, delivered in public on 4 July 2013, the Tribunal clarified that the warning letter issued pursuant to Circular No. 246 does not constitute an appealable final decision (see Judgment 3198, considerations 15 and 16). The complainant himself has abandoned his original claims pertaining to the warning letter, as he was well aware that these claims were irreceivable. The Tribunal will limit itself to examining the claims regarding moral damages for the excessive delay in the internal appeal proceedings, punitive damages for intentional delay, costs for the internal proceedings, and costs for the Tribunal's proceedings.

6. This Tribunal has articulated the following test to determine whether excessive delay will justify an award of damages and to determine its amount (see, for example, Judgment 4229, consideration 5):

“The complainant claims moral damages for excessive delay. It is well settled in the case law that internal appeals must be conducted with due diligence and in a manner consistent with the duty of care an international organization owes to its staff members. It is also settled that the amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. The effect of the delay will usually depend on, amongst other things, the subject matter of the appeal (see, for example, Judgment 4100, consideration 7).”

7. The Tribunal's case law has consistently stated that the complainant shall produce evidence of the injury suffered and of the causal link between the length of the procedure and the injury (see Judgment 4306, at consideration 19, recalling the principle also set out in Judgment 1942, consideration 6):

“[The complainant] provides no evidence of emotional distress or of any other injury or loss suffered. The case law, for example in consideration 5 of Judgment 4156, requires a complainant to provide evidence of the injury suffered as a result of alleged unlawful acts. In the premises, the Tribunal finds that the complainant is not entitled to an award of moral damages [...]”

8. According to the Tribunal's case law, the Tribunal does not automatically grant moral damages for excessive delay. The complainant has to articulate the adverse effects of the delay and support them with

evidence. The Tribunal observes that in the present case, the complainant eventually achieved the expected productivity factor and his productivity was thus evaluated as “good” in his staff report for 2006-2007. The warning letter was also removed from the complainant’s personal file in October 2012. There is no evidence showing that the length of the appeal proceedings had an adverse consequence on the complainant’s career, or caused the complainant to sustain psychological pressure, stress, anxiety, or other moral injury in his professional and personal life. It is obviously not sufficient for the complainant merely to adduce his testimony to allege the injury.

9. The Tribunal notes that the majority of the Internal Appeals Committee recommended granting moral damages of 500 euros in view of the length of the procedure. However, the Committee’s deliberations took place prior to the delivery in public of Judgment 3198. In that judgment, the Tribunal held that the warning was “a mere declaration of intent” that caused no injury. As explained in the impugned decision, the recommendation was not endorsed since the complainant’s appeal was irreceivable according to Judgment 3198 and the complainant suffered no consequences from the delay. The Tribunal considers that, in the particular circumstances of the case, the Vice-President’s rejection of the Committee’s recommendation was justified.

10. With regard to the complainant’s reference to the case law of the European Court of Human Rights, it has to be recalled that this Tribunal is not bound by the case law of other international or regional courts (see Judgments 3138, consideration 7, and 4363, consideration 12). The Tribunal also held in Judgment 3815 that “the [European] Convention [on Human Rights] is not in any event applicable as such to international organisations within the legal system to which the Tribunal belongs” (see Judgment 3815, consideration 3, and Judgments 2236, consideration 11, 2611, consideration 8, and 2662, consideration 12). Therefore, the reference by the complainant to the case law of the European Court of Human Rights should not be applied in the present case.

11. With regard to the complainant’s request for punitive damages, the Tribunal notes that the purpose of punitive damages is not compensation. They are awarded as a punishment and deterrent. It is

not the unlawful act itself that will result in such an award, but rather the intention to harm that accompanies it. The complainant alleges that the Organisation intentionally delayed the procedure by raising an objection of conflict of interest in regard to the Chair of the Internal Appeals Committee, two days before the date of the hearing scheduled on 30 November 2012. It must be noted that the objection was not frivolous since the Chair withdrew from the case. Thus, the alleged bad faith and intentional delaying tactics on the part of the Organisation is purely speculative and unsubstantiated.

12. It follows from the foregoing that the complainant is not entitled to moral or punitive damages, and accordingly, the dismissal of the complainant's principal claims necessarily leads to the dismissal of his claim for costs in the proceedings before this Tribunal and in the internal appeal proceedings (see Judgment 3561, consideration 11).

13. In light of the above considerations, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 October 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