

P. (L.) (No. 14)

v.

EPO

121st Session

Judgment No. 3615

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr L. P. against the European Patent Organisation (EPO) on 15 July 2013, the EPO's reply of 3 January 2014, the complainant's rejoinder of 17 February and the EPO's surrejoinder of 26 May 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 challenges, in his capacity as a staff representative, the EPO's practice on outsourcing.

On 16 September 2009 the complainant jointly filed an appeal with Ms K., after the latter, who had worked at the European Patent Office – the EPO's secretariat – through a consulting firm, applied unsuccessfully for a position whose functions she claimed she had been performing for several years as an external contractor. In the internal appeal, Ms K. sought to be appointed to the position in question, whereas the complainant, acting in his capacity as a staff representative, challenged the EPO's outsourcing practice. In his view, Ms K.'s case illustrated how the EPO's practice was contrary to

the Service Regulations for permanent employees of the European Patent Office (hereinafter “the Service Regulations”). He requested that Ms K. be appointed to the post in question or to an equivalent one and claimed damages on her behalf. He also asked for the “immediate decision to stop staffing practices contrary to the letter and spirit of the Service Regulations”, and claimed moral damages in the amount of 10,000 euros, as well as costs.

Ms K.’s appeal led to Judgment 3459, in which the Tribunal summarily dismissed her complaint on the grounds that, as she was not an official of the EPO within the meaning of the Tribunal’s Statute, the Tribunal was not competent to hear her complaint.

With respect to the complainant’s appeal, in its opinion of 26 February 2013, the Internal Appeals Committee (IAC) unanimously considered that it was receivable to the extent that he was representing the general interests of staff potentially affected by the EPO’s practice concerning the use of external contractors. To the extent that he sought to represent the individual interests of Ms K. a majority found that it was irreceivable, whilst a minority took the opposite view. On the merits, a majority found that the appeal was well founded because, although the President had since adopted an Outsourcing Policy after consultation of the General Advisory Committee (GAC), this policy did not exist at the time when Ms K. was working at the EPO as an external contractor. She and other external contractors had thus been working under unclear legal conditions. The majority recommended payment of an award of 3,000 euros in damages and 500 euros in costs. The minority recommended dismissing the complainant’s appeal as unfounded, on the ground that his request that the EPO discontinue its outsourcing practice was not defined sufficiently clearly, as he had not set out in detail what measures he was challenging.

The Vice-President of Directorate-General 4, acting with delegation of authority from the President, informed the complainant by a letter of 28 May 2013 that he had decided to reject his appeal as both irreceivable and unfounded. In accordance with the majority opinion of the IAC, his appeal was considered irreceivable to the extent that he sought to represent Ms K.’s individual interests. However, contrary

to the IAC's unanimous opinion, it was also considered irreceivable insofar as it was directed against the EPO's outsourcing practice, notwithstanding that he was acting in his capacity as a staff representative. Finally, the appeal was considered to be unfounded on the merits, in accordance with the IAC's minority opinion. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision. He seeks "an immediate decision to stop staffing practices contrary to the letter and spirit of the Service Regulations" and an order similar to that which was made in Judgment 2919, namely that the President of the EPO be required to consult the GAC on the issue of outsourcing within 60 days of the delivery of the judgment, with a penalty for delay of 1,000 euros per week. He claims moral damages, including for the excessive delay in the internal appeal proceedings, as well as costs.

The EPO, which was authorised by the President of the Tribunal to limit its reply to the issue of receivability, asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and *ratione personae*. It also submits that the complaint is partly irreceivable for failure to exhaust internal remedies, the complainant having broadened the scope of his claims.

CONSIDERATIONS

1. Receivability, which is a purely legal issue, is the only issue that is being considered at this stage. The President of the Tribunal had authorised the EPO to confine its reply to this issue.

2. The complainant instituted this case in his capacity as a staff representative. In part he challenges the decision to reject his internal appeal as irreceivable insofar as it challenged the EPO's outsourcing practice by using external contractors to fill some staffing positions. He had asked in his internal appeal for the immediate cessation of this practice. The President decided that this claim was irreceivable. In doing so he had rejected the unanimous recommendation by the IAC

that it was receivable to the extent that the complainant was representing the general interest of staff members who were affected by the outsourcing practice. In his complaint, he asks the Tribunal to render an immediate decision to stop such staffing practices as being contrary to the letter and spirit of the Service Regulations. The receivability of this claim will be considered later in this judgment.

3. The foregoing claim arose in conjunction with the complainant's challenge, in his capacity as staff representative, of Ms K.'s non-selection to a position whose functions she had performed for some four and a half years while she was working at the EPO. In Judgment 3459, the Tribunal summarily dismissed her complaint seeking to be appointed to the position as being irreceivable, because at the material time she was not an official of the EPO within the meaning of Article II of the Tribunal's Statute. She was an external contractor whom a consulting firm had made available to the EPO by virtue of a contract between that firm and the EPO. The complainant has accepted that aspect of the impugned decision in which the Vice-President of Directorate-General 4, endorsing the recommendation of the majority of the IAC, decided that this claim on behalf of Ms K. was irreceivable. He states that "[t]his finding is accepted, and the corresponding claims are now abandoned".

4. The Tribunal notes that the complainant seeks the following relief in his complaint, which he did not seek in his internal appeal: "An order for redress akin to that handed down in Judgment 2919, i.e. elaboration of a sensible outsourcing practice [...] accompanied by exemplary damages of 1,000 [euros] per week of delay in submitting the matter to the GAC beyond 60 days from the day of the Judgment." The claim for this relief is irreceivable and must accordingly be dismissed as it is in breach of Article VII, paragraph 1, of the Tribunal's Statute. This provision requires a complainant to exhaust internal remedies before bringing a claim to the Tribunal. Even though it can be viewed as a different relief based on the same facts, the complaint is irreceivable for reasons discussed shortly.

5. On the issue of receivability, which is raised in relation to the EPO's outsourcing practice, the complainant puts his case into the following context in his brief:

- “6. Aside from Ms [K.]’s own grievance in this respect, this incident also raised serious questions of policy and the compliance of the EPO with its own regulations.
7. I was at the relevant time (and still am) an elected staff representative. Pursuant to Article 34 of the Service regulations, staff representatives have the right (and the duty) to see to it that the Administration respects Staff Regulations, and are entitled to represent the interests of staff.
8. I observed that Ms [K.]’s case was only one of many. I considered that contracts, in particular short-term contracts, are meant to provide relief only for temporary staff shortages. The string of contracts to which Ms [K.], and other staff, has been subjected flies in the face of this principle.”

6. The complainant argues, in effect, that he is entitled to challenge the EPO's outsourcing practice in his capacity as staff representative, because that practice profoundly affects all staff. He submits that this claim is therefore receivable on the authority of Judgment 2919. In that Judgment, under 5, the Tribunal stated that there are instances in which a staff representative may institute proceedings in the general interests of staff members as follows:

“In Judgment 1618, under 4, 5 and 6, the Tribunal observed that members of the Staff Committee could challenge a general decision that is not implemented at the individual level and affects all staff. Further, as stated in Judgment 1451, under 18, it is often more efficient to have the members of the Staff Committee bring these types of matters forward rather than the individual staff members. This is equally applicable to this complaint. While it is true that the members of the Staff Committee may take action in the general interests of the staff, it is equally true that an individual staff member who claims to be adversely affected by a decision may take action to protect his or her individual rights. However, where decisions allegedly have a broad adverse impact on a large number of permanent employees, in the interests of efficiency, consistency in decision making and the timely resolution of disputes, it may be that the members of the Staff Committee have a legitimate role in bringing the issue forward. [...]”

It is however noteworthy that recently, in Judgment 3515, consideration 3, the Tribunal explained this statement from Judgment 2919 as follows:

“The general decision in CA/D 17/12 is plainly a decision that would have required implementation. When that occurred staff aggrieved by the implementation could have pursued their grievances internally with the possibility, if the grievance was unresolved, of pursuing it before the Tribunal. However a staff representative cannot challenge a general decision governing all officials which will require individual implementing decisions. Judgment 3427 (at considerations 35 and 36) is a recent illustration of a case in which complaints were dismissed as irreceivable on this basis. To the extent that Judgment 2919 [...] indicates otherwise, it is at odds with the general jurisprudence of the Tribunal.”

7. The complainant’s challenge to the outsourcing practice of the EPO is irreceivable, and must accordingly be dismissed as he has not established that the practice in question amounted to a general decision. In any event, even if it were a general decision, it could not be challenged by the complainant as the foregoing statement in Judgment 3515 shows.

8. The internal appeal proceedings were excessively lengthy. The appeal was lodged in September 2009. The impugned decision rejecting the appeal was taken in May 2013. However, considering the lack of negative impact on the complainant, the Tribunal sets the amount of moral damages at 400 euros for the excessive delay in the internal appeal proceedings (see, for example, Judgments 3527, under 7 and 8, and 3528, under 4 and 5). As he succeeds in part, he is entitled to an award of costs which the Tribunal sets at 200 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 400 euros in moral damages.
2. The EPO shall pay the complainant 200 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 4 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Giuseppe Barbagallo, Vice-President, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

CLAUDE ROUILLER

MICHAEL F. MOORE

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

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