

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

L.
v.
EPO

121st Session

Judgment No. 3618

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. L. against the European Patent Organisation (EPO) on 28 June 2013, the EPO's reply of 23 December 2013, the complainant's rejoinder of 31 January 2014 and the EPO's surrejoinder of 7 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, who at the material time was a member of the Internal Appeals Committee (IAC) nominated by the Staff Committee, challenges a provision of the implementing rules adopted in the context of a reform of the EPO's internal dispute-resolution system.

On 8 October 2012 the President of the European Patent Office – the EPO's secretariat – submitted a proposal to the Administrative Council concerning a reform of the internal appeal procedure. On 26 October 2012 the Council adopted two decisions aimed at reforming the internal appeals procedure: the first, CA/D 8/12, mainly amended articles 2, 37 and 106 to 113 of the Service Regulations, and

the second, CA/D 9/12, introduced Implementing Rules for articles 106 to 113. The new provisions entered into force on 1 January 2013.

On 18 January 2013 the complainant filed a request for review of decision CA/D 9/12, requesting that Article 6(4) of the Implementing Rules be deleted. This provision provides that where a party to internal appeal proceedings disagrees with the decision of the Internal Appeals Committee (IAC) as to the action to be taken following an objection to a member of the Committee, the matter is to be settled by a panel composed of the Vice-President of Directorate-General 3, the Head of Internal Audit and a former chairman or member of the Appeals Committee. The complainant submitted that this provision adversely affected him as a member of the IAC, because there was a risk that the Administration could unduly influence the composition of the IAC, and as a potential user of the new internal appeals system.

At its 135th meeting held on 20-21 March 2013, the Administrative Council unanimously decided to reject the complainant's request for review as manifestly irreceivable. This decision, which the complaint impugns before the Tribunal, was communicated to him in a letter of 9 April 2013. The letter further stated that the decision was final and could be challenged before the Tribunal.

The complainant asks the Tribunal to quash the decision to adopt Article 6(4) of the Implementing Rules, to annul any internal appeal proceedings in which he has been denied participation by a decision of the panel mentioned in that provision, and to award him moral damages and costs. He also asks the Tribunal to order that all challenges to decisions of the Administrative Council must be referred to the Appeals Committee, which, he says, is equivalent to repealing Article 109(6) of the Service Regulations.

The EPO, which was authorised by the President of the Tribunal to confine its reply to the issue of receivability, submits that the complaint should be dismissed as irreceivable because the complainant is challenging a decision of general application which does not directly affect him. It adds that he cannot avail himself of the case law applicable to staff representatives, as he filed his complaint with the Tribunal in an individual capacity. Furthermore, the EPO claims that

the complainant has not exhausted internal remedies with respect to some of his claims.

CONSIDERATIONS

1. The complainant joined the EPO on 1 September 1991. He was subsequently nominated by the Staff Committee to be a full member of the Internal Appeals Committee (IAC), where he has worked since 2011. In a letter dated 18 January 2013, the complainant contested the Administrative Council's decision CA/D 9/12, dated 26 October 2012, to adopt Article 6(4) of the Implementing Rules relating to Articles 106-113 of the Service Regulations. In the present complaint he impugns the Council's unanimous decision, notified to him in a letter dated 9 April 2013 from the Chairman of the Administrative Council, to reject his request for review of CA/D 9/12 as manifestly irreceivable and not to allow the possibility of an appeal to the Appeals Committee. He also impugns the provisions of Article 109(6) of the Service Regulations insofar as they provide that the Administrative Council's decision on the outcome of the review shall be final.

2. The complainant filed his complaint in his capacity as a permanent employee of the EPO, stating that he is adversely affected by the impugned decision and by the underlying contested decision CA/D 9/12. He bases his complaint on his membership of the IAC, which, he believes, entitles him to challenge a general provision in the general interest of the staff, and he also claims that the decision concerns him personally because it constitutes a change in his legal circumstances and directly affects his independence as an IAC member. The complainant submits that "the Tribunal ought to consider whether, in special circumstances, it should distinguish its usual requirements that, to be admissible, a decision must already have caused harm, and establish a practice according to which a 'pre-emptive strike' should be deemed admissible". He also claims that as he was not allowed to file an internal appeal, he was denied due process and the right to be heard. His claims for relief are set out above.

3. The EPO, as authorised by the Tribunal, confines its reply to the issue of receivability. It submits that the claim to quash the Administrative Council's decision to adopt Article 6(4) of the Implementing Rules is clearly irreceivable because the complainant has no cause of action, as Article 6(4) is a provision of general application that has not yet been individually applied in a manner that is prejudicial to him. It also asserts that the complainant cannot avail himself of the case law applicable to members of the Staff Committee as he is not a member of that body. Subsidiarily, it submits that the complainant has not exhausted all internal means of redress with regard to the requests ordering the EPO to repeal Article 109(6) of the Service Regulations in the part where it states that the Administrative Council's decision on the outcome of the review "shall be final within the meaning of Article 113" and to comply with due process in all future cases and to refer to the IAC any challenge to a Council decision, as this claim was not presented in the initial request for review leading to the present complaint.

4. The Tribunal finds that the Administrative Council's decision to reject "as manifestly irreceivable" the complainant's request for review of Article 6(4) of the Implementing Rules, as introduced by CA/D 9/12, was lawful. CA/D 9/12 introduced implementing rules for the norms set out in Articles 106-113 of the Service Regulations, as amended by CA/D 8/12; these articles form Title VIII of the Service Regulations (entitled "Settlement of Disputes"), which governs the internal appeals procedure. Article 6 of the Implementing Rules is the normative source primarily impugned by the complainant.

5. Article 6 of the Implementing Rules, regarding the "Impartiality of the Appeals Committee", provides:

"(1) If for one of the reasons mentioned in Article 112(2) of the Service Regulations, or for any other reason which might prejudice the impartiality of their judgement, the chairman or any member of the Appeals Committee considers that he should not take part in a case, he shall inform the Committee accordingly.

- (2) The chairman and any member of the Appeals Committee may be objected to by either party for one of the reasons mentioned in Article 112(2) of the Service Regulations, or if suspected of partiality.
- (3) The Appeals Committee shall decide as to the action to be taken in the cases specified in paragraphs 1 and 2, without the participation of the chairman or member concerned. For the purposes of taking this decision the chairman or member concerned shall be replaced by an alternate.
- (4) If a party disagrees with the decision of the Appeals Committee taken pursuant to paragraph 3, the matter shall be settled by an independent panel of three members to be appointed by the President of the Office for each calendar year. This panel shall be composed of the Vice-President DG3, the Head of Internal Audit, and a former chairman or member of the Appeals Committee.”

6. The complainant is impugning the rejection of his request for review of Article 6(4) of the Implementing Rules and, simultaneously, is impugning the norm itself. Article 6(4) is a general regulatory provision which establishes a procedural rule for objecting to the chairman or a member of the IAC. It does not directly or immediately affect the complainant, either in his capacity as a member of the IAC, or as an employee. As the complainant recognizes, he has suffered no injury (“what is at stake is not a damage already occurred but a damage certain (or very likely) to occur”). A future and uncertain alleged injury cannot establish a cause of action. The Tribunal’s case law is consistent as to the fact that a complainant cannot impugn a rule of general application unless and until it is applied in a manner prejudicial to her/him (see Judgments 1618, under 4, 1786, under 5, 1852, under 3, and 3291, under 8).

7. Article 109(6) of the Service Regulations provides:

“Where the competent authority is the Administrative Council, the decision on the outcome of the review shall be taken within two months as from the date on which the request was submitted to the first meeting of the Council after its receipt, taking due account of any specific provisions applicable for the submission of documents to the Council laid down in Article 9 of the Rules of Procedure of the Administrative Council. Such decision shall be final within the meaning of Article 113, unless:

- (a) it relates to a dispute concerning appointment by the Administrative Council, in which case it may be challenged through an internal appeal under the conditions laid down in Article 110;
- (b) the Administrative Council exceptionally decides otherwise following a request by the person concerned.”

8. The claims against the Administrative Council’s individual decision not to allow the complainant to file an internal appeal, and against the provisions of Article 109(6) of the Service Regulations (in the part regarding the finality of the decision on the outcome of the requested review) are irreceivable in accordance with Article VII, paragraph 1, of the Tribunal’s Statute for failure to exhaust all internal means of redress. The complainant did not include these claims in his internal request for review under Article 108(1)(a) of the Service Regulations. Consistent case law provides that “the scope of the case before the Tribunal may not exceed the limits of the internal appeal” (see Judgments 2649, under 6, and 2308, under 12).

9. In light of the above, the claim that the Tribunal should make a general declaration of law that henceforth any challenge to a Council decision should be referred to the IAC is irreceivable. In any case, it is not for the Tribunal to make declarations of law such as the complainant requests (see Judgment 2649, under 5 and 6).

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 27 October 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ