

R. (No. 12)

v.

EPO

121st Session

Judgment No. 3621

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr L. R. against the European Patent Organisation (EPO) on 22 June 2013 and corrected on 10 August 2013, the EPO's reply of 11 July 2014, the complainant's rejoinder of 1 September and the EPO's surrejoinder of 8 December 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 is a permanent employee of the European Patent Office, the EPO's secretariat. He challenges two appointments of the President of the Office to the Internal Appeals Committee (IAC) on the grounds that they were not preceded by consultation of the General Advisory Committee (GAC).

On 26 October 2012 the Administrative Council adopted decision CA/D 9/12, incorporating the implementing rules for Articles 106 to 113 of the Service Regulations for permanent employees of the European Patent Office, which relate to the internal appeal system. This decision

provided in particular that, as of 1 January 2013, the President no longer needed to consult the GAC to appoint members to the IAC.

Mid-December 2012 the President announced that he had appointed Ms K.-Z. and Mr L. to the IAC for 2013. On 21 December 2012 the complainant, acting in his capacity as a member of the GAC, filed an internal appeal in which he challenged the lawfulness of the President's decision of mid-December 2012 on the basis that the GAC had not been consulted prior to the appointments in question, in breach of the provisions of Article 110(4) of the Service Regulations then in force. This appeal was referred to the IAC for an opinion and registered as RI/222/12.

In March 2013, when the complainant inquired about the status of his appeal, he was informed by the Director of Directorate 0.4 (hereinafter the Director of the IAC) that, following a similar appeal filed by another member of the GAC against the same decision, the President had accepted that the IAC was not properly constituted for 2013 and had therefore cancelled the appointments of mid-December. The Director of the IAC asked the complainant whether, in view of this development, he wished to withdraw appeal RI/222/12. By an e-mail of 18 March 2013, the complainant replied that the appeal file could be closed. The Director of the IAC confirmed that same day that the "appeal file [was] now closed".

On 8 April 2013 the President issued Communiqué No. 24, in which he explained that his decision of mid-December 2012 involved a procedural error. As a result, the IAC had not been properly constituted for 2013 and could not function until a new decision regarding its composition had been issued. In order to enable the IAC to resume its activities, the President therefore announced his "new appointments" to the IAC, which included Ms K.-Z. and Mr L. He noted that consultation of the GAC was no longer required with respect to these appointments. That is the decision impugned by the complainant.

The complainant asks the Tribunal to quash the decision of 8 April 2013 *ab initio*; to declare that any recommendations on internal appeals issued during 2013 with the involvement of Ms K.-Z. or Mr L. are null and void; to quash any final decision based on such recommendations;

to order the EPO to submit the President's nominations to the IAC for 2013 and for any subsequent year to the GAC for consultation, irrespective of the new text of Article 111 of the Service Regulations; to award 10 euros in moral damages to every staff member who was "in place in the Office" and represented by him on 8 April 2013; and to award him costs.

The EPO, which was authorised by the President of the Tribunal to limit its reply to the issue of receivability, requests that the complaint be dismissed in its entirety as irreceivable due to non-exhaustion of internal remedies, as the complainant is challenging a new decision which was not the subject of an internal appeal. It also asks the Tribunal to order that the complainant bear his costs.

CONSIDERATIONS

1. The EPO raises receivability as a threshold issue contending that the complaint is irreceivable because the complainant did not exhaust the internal means of redress available to him before he lodged his complaint before the Tribunal. Receivability is the only issue that is being considered at this stage, as the President of the Tribunal had directed the parties.

2. The Tribunal has consistently emphasised, for example in Judgments 1141, under 17, and 2811, under 11, that the purpose of the requirement that internal means of redress be exhausted is not only to ensure that staff members do actually avail themselves of any opportunities they may have within an organisation for obtaining redress before filing a complaint with the Tribunal, but also to enable the Tribunal, in the event that a staff member lodges a complaint, to have at its disposal a file supplemented by information from the records of the internal appeal procedure.

3. The record shows that having announced his two appointments to the IAC for 2013 in mid-December 2012, the President of the Office subsequently accepted that the appointments were irregular because

he had not first consulted the GAC as Article 110(4) of the Service Regulations then in force required. The complainant was then asked by the Director of the IAC whether in light of these developments he would agree to “close the appeal file and conclude the appeal procedure”. The complainant accepted this and in an e-mail of 18 March 2013 agreed that “[t]he appeal file (RI/222/12) may now be closed”. Later that day the Director of the IAC confirmed that the file was accordingly closed as far as the complainant’s internal appeal was concerned.

4. In the meantime, on 26 October 2012, the Administrative Council had adopted decision CA/D 9/12, thereby deciding, among other things, that the President was not required to consult with the GAC before he appointed members to the IAC. This decision entered into force on 1 January 2013.

5. In the foregoing circumstances, the President’s announcement of new appointments to the IAC on 8 April 2013, by Communiqué No. 24, was a new decision. The complainant filed the present complaint against that decision directly before the Tribunal.

6. Article 113 of the EPO’s Service Regulations states that a complaint may be filed with the Tribunal in accordance with the Tribunal’s Statute once the decision which a complainant intends to impugn is final. Under this provision a decision is final when internal procedures are either exhausted or specifically excluded. Article 109(1) of the Service Regulations makes a request for the review of a decision prior to the lodging of an internal appeal mandatory unless Article 109(3) excludes the matter from the review procedure. The decision relating to the appointments contained in Communiqué No. 24 is not a decision that is excluded from the review procedure but the complainant did not apply to have it reviewed. Accordingly, the decision which the complainant seeks to impugn before the Tribunal is not a final decision and he did not exhaust the internal means of redress as Article VII, paragraph 1, of the Tribunal’s Statute requires. The complaint is therefore irreceivable and should be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2015, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, 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

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ