

**H. (No. 6)**

**v.**

**EPO**

**130th Session**

**Judgment No. 4318**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 19 December 2017, the letter of 29 January 2018 from the President of the Tribunal, the EPO's reply of 2 March 2018 confined to the issue of the composition of the Appeals Committee, the complainant's rejoinder of 3 April and the EPO's surrejoinder of 9 May 2018;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant contests his objectives for the reporting exercise January to December 2015 and the composition of the Appeals Committee that issued the opinion on the basis of which the impugned decision was taken.

The complainant is a permanent employee of the European Patent Office – the EPO's secretariat. On 17 June 2015 he filed a request for review contesting the objectives for the reporting exercise 1 January 2015 to 31 December 2015. On 26 June 2015 he was informed that his request was rejected as manifestly irreceivable. The objective setting was merely a preparatory step in the appraisal exercise and did not constitute a challengeable decision within the meaning of Article 108 of the Service Regulations for permanent employees of the European

Patent Office. On 16 September 2015 he filed an appeal with the Appeals Committee.

On 19 September 2016 the secretariat of the Appeals Committee informed the complainant that his appeal could be dealt with in the summary procedure and that it was placed on the agenda for decision by the Appeals Committee at one of its upcoming meetings. He replied on 20 September 2016 stressing that, in Judgment 3694, the Tribunal had considered that the Appeals Committee was not properly constituted as it did not comprise members nominated by staff representatives. On 23 May 2017 the secretariat wrote again to him concerning the same appeal and stating again that it could be dealt with under the summary procedure; a few days later, the complainant replied in the same manner as on 20 September 2016.

The Appeals Committee issued its opinion on 26 July 2017. It noted that the complainant had raised objections concerning its composition but it considered that the Committee acted on the basis of the mandate conferred to it by the President of the Office by virtue of the Administrative Council's decision CA/D 18/16. The Chair and two members were appointed by the President as foreseen by Article 5, paragraphs (1) and (2), of the Implementing Rules for Articles 106 to 113 of the Service Regulations. The two other members were nominated in accordance with Article 36(2)(a) of the Service Regulations. The majority of the members of the Committee refrained from making further comments on the legality of its own composition. However, one member made some procedural remarks. He stated that his participation in the Appeals Committee was under protest and against his will. He stressed that he did not have the experience and competence expected from a "quasi-judge", and that he did not have the time and resources necessary to carry out adequately his tasks as a member of the Appeals Committee. The Appeals Committee unanimously considered that the appeal was manifestly irreceivable on the grounds that the setting of the objectives for 2015 did not constitute a challengeable decision within the meaning of Article 108(1) of the Service Regulations.

On 27 September 2017 the Principal Director of Human Resources, acting by delegation of power from the President, notified the complainant that his appeal was dismissed as manifestly irreceivable. She endorsed the finding that the Appeals Committee was composed in accordance with the applicable provisions, and considered that the

procedural remarks made by one member could not be followed. She noted that the Appeals Committee was composed of a Chair and two members appointed by the President as foreseen in Article 5, paragraphs (1) and (2), of the afore-mentioned Implementing Rules and, by way of exception and following the Central Staff Committee's failure to make the required appointments, two members appointed by calling for volunteers or drawing lots from among eligible staff members (in accordance with Article 36(2)(a) of the Service Regulations). That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision, to declare the opinion of the Appeals Committee null and void, to declare the assigned objectives for 2015 arbitrary and discriminatory and to recognise the partiality of the officers involved. He also asks the Tribunal to order the EPO to respect the European Patent Convention, to restore the career system and rewarding system, to refrain from exercising powers that go beyond those vested in the President by the Convention or which are incompatible with his duties and professional independence as an examiner. He seeks compensation for moral and material damages.

The EPO, which was asked by the President of the Tribunal to confine its submissions to the issue of the composition of the Appeals Committee, submits that the composition of the Committee was in line with applicable rules at the time. It also asks that the complainant be ordered to bear a part of its costs (1,000 euros) on the grounds that the complaint is clearly irreceivable and thus constitutes an abuse of process.

#### CONSIDERATIONS

1. In September 2015, the complainant appealed internally against the rejection of his request for review of the objectives for the reporting exercise for the period from 1 January to 31 December 2015. In its opinion issued on 26 July 2017, the Appeals Committee noted, by majority, that it acted on the basis of the mandate conferred by the President of the Office by virtue of decision CA/D 18/16, and that accordingly, the composition of the Appeals Committee was lawful. It unanimously found that the setting of objectives for 2015 did not constitute a challengeable decision within the meaning of Article 108(1) of the Service Regulations as it was merely a step in the process which leads to an appraisal report. Accordingly, the Appeals Committee

unanimously found that the appeal was manifestly irreceivable and treated it in a summary procedure in accordance with Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations. One member of the Appeals Committee issued a concurring opinion in which he agreed with the findings and conclusions of the other members, except with respect to the issue of the composition of the Appeals Committee.

2. On 27 September 2017, the Principal Director of Human Resources, acting by delegation of power from the President, rejected in its entirety the complainant's appeal as manifestly irreceivable in accordance with the Appeals Committee's unanimous recommendation. With respect to the composition of the Appeals Committee, she endorsed the majority opinion. This is the impugned decision.

3. By letter dated 29 January 2018, the President of the Tribunal requested the EPO to limit the scope of its submissions to the issue of the lawfulness of the composition of the Appeals Committee. In the result, the Tribunal will only address the complainant's preliminary requests for joinder and oral hearings, and the alleged flaws in the composition of the Appeals Committee. This is without prejudice to the complainant's interest as the substantial remainder of his complaint is the object of another of his complaints before the Tribunal. Thus, the request for joinder of the present complaint with that other complaint, which challenges the outcome of the reporting exercise for the period from 1 January to 31 December 2015, is rejected as the two complaints no longer address similar issues.

4. The complainant requests oral proceedings. However, the Tribunal notes that the parties have presented the case extensively and comprehensively in their written submissions, which are sufficient to enable the Tribunal to reach a reasoned and informed decision. The request for oral proceedings is therefore rejected.

5. The grounds for complaint regarding the unlawful composition of the Appeals Committee are the following:

- (a) The composition of the Appeals Committee was not balanced as required under applicable rules and the Tribunal's case law;
- (b) The provisions on the composition of the Appeals Committee are unlawful as they put the complainant in "permanent disadvantage

and violate[d] the equality of arms” due to the unbalanced composition;

- (c) A member of the Appeals Committee, Mr G., stated in a concurring opinion that he examined the appeal against his will and was forced to give his opinion despite the fact that he felt he did not have the necessary experience and the time and resources necessary to carry out the task adequately; and
- (d) The Chair of the Appeals Committee was not impartial as she twice put his internal appeal on the agenda for summary proceedings.

6. The complaint, as limited in scope, is unfounded. The main question raised in the present complaint, regarding the composition of the Appeals Committee, is the same as that which was decided in Judgment 4049, delivered on 26 June 2018. In that judgment the Tribunal found, under considerations 5 and 6, as follows:

“5. [...] The Tribunal’s examination is limited to considering the provision in force at the material time (Administrative Council decision CA/D 18/16 amending Article 36(2)(a) of the Service Regulations in force on 1 January 2017 until 30 June 2017) and the issues, cited above, raised by the complainant with the Tribunal. Article 36(2)(a) of the Service Regulations was not violated as the list of nominees for 2017 communicated to the Office by the Central Staff Committee did not comply with Article 36(2)(a) because three of the proposed appointees were not elected members of the Staff Committee. The proposed appointments were made subject to a number of conditions and were, as the President repeatedly explained to staff representatives, made ‘[b]y way of exception’ in line with Article 36(2)(a) of the Service Regulations.

6. At the material time, Article 5 of the Implementing Rules concerning the appointment of members of the Appeals Committee provided for the appointment of full members and alternate members.

The Tribunal is satisfied that two of the four members were appointed by the President (A.L. and G.V.D.) and two were chosen ‘[b]y way of exception’ among eligible staff members (S.F. and C.P.), and considers that the Committee’s balanced composition was guaranteed in accordance with the provisions of Article 36(2)(a) of the Service Regulations, which are not ambiguous. The Appeals Committee was competent to rule on the legality of its composition, which is a condition for its competence. [...]”

7. The complainant, for the first time in his rejoinder, raises the question of which version of Article 36(2)(a) of the Service Regulations was in force at the time of his appeal. Although the Appeals Committee’s opinion is dated 26 July 2017, the Committee

deliberated on his appeal on 22 June 2017 in accordance with the provisions of Article 84, paragraphs (1) and (2), of decision CA/D 7/17 which provide:

“(1) The Appeals Committee established pursuant to the provisions applicable prior to 1 July 2017 (‘Former Appeals Committee’) shall continue to function in its current composition until the Appeals Committee established pursuant to Article 111 of the Service Regulations as amended by the present decision (‘New Appeals Committee’) is operational. During this transitional period, the Former Appeals Committee shall continue to apply the appeals procedure in force prior to 1 July 2017.

(2) Irrespective of when the New Appeals Committee becomes operational, the Former Appeals Committee shall continue to deal in its current composition with any appeals on which it has already deliberated. Such appeals shall be dealt with in accordance with the appeals procedure in force prior to 1 July 2017.”

Considering the above, the Tribunal finds that the appeal was comprehended by Article 36(2)(a) of the Service Regulations as amended by decision CA/D 18/16, which was in force from 1 January to 30 June 2017, and which reads as follows:

“(2) The Central Staff Committee shall be responsible for:

- (a) making appointments to the bodies under the Service Regulations or as requested by the President of the Office. Save for the members of Disciplinary Committees and Selection Boards, the respective appointments shall be made from among elected Staff Committee members at either local or central level. By way of exception, if the Central Staff Committee, despite an invitation to do so, fails to make appointments to these bodies, the President shall take appropriate steps to ensure and make the necessary appointments, by calling for volunteers or drawing lots from among eligible staff members.”

The Tribunal is satisfied that the members of the Appeals Committee who examined the complainant’s appeal were appointed in line with the Service Regulations and considers, as it stated in Judgment 4049, that the Committee’s balanced composition was guaranteed in accordance with the provisions of Article 36(2)(a) of the Service Regulations.

8. The complainant asserts that the Chair of the Appeals Committee was not impartial as she twice put his internal appeal on the agenda for summary proceedings. The Tribunal finds this claim of lack of impartiality to be unsubstantiated. The Appeals Committee is entitled to use the summary procedure in accordance with the Implementing Rules for Articles 106 to 113 of the Service Regulations

when it finds an appeal to be manifestly irreceivable. Resorting to that procedure is a proper exercise of the Appeals Committee's powers (see Judgment 4049, under 6), and it does not manifest bias.

9. The allegation that the Appeals Committee was improperly composed due to three of the members having been members of the Committee which was found to be unlawfully composed in Judgment 3785, is unfounded. The composition of that prior Committee was found to be unlawful as it breached the applicable rules in force at the material time, not for any reason relating to the individual members.

10. Regarding the assertion that Mr G. examined the appeal against his will, the Tribunal determines that having been selected through the lawful process for appointing members of the Appeals Committee, and having not substantiated any conflict of interest or proven incompetence, he had a duty to fulfil the obligations of the appointment.

11. In light of the above considerations, the Tribunal, deciding the complaint in part, must reject the complainant's challenge to the composition of the Appeals Committee.

The EPO's counterclaim for costs must also be dismissed as the complaint, insofar as it addresses the composition of the Appeals Committee, is not vexatious.

12. The EPO shall submit its reply on the remaining arguments raised by the complainant within a time limit to be determined by the President of the Tribunal.

## DECISION

For the above reasons,

1. The complainant's challenge to the composition of the Appeals Committee is rejected, as is the EPO's counterclaim for costs.
2. The judicial proceeding will continue as indicated in consideration 12 above.

In witness of this judgment, adopted on 10 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ