

**H. (No. 2)**

**v.**

**EPO**

**120th Session**

**Judgment No. 3514**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. H. against the European Patent Organisation (EPO) on 3 November 2010 and corrected on 20 January 2011, the EPO's reply dated 2 May, the complainant's rejoinder of 27 June and the EPO's surrejoinder dated 15 July 2011;

Considering the applications to intervene filed by Mr T. H., Mr A. C. K., Mr I. H. T. and Mr P. O. A. T. on 29 July 2011 and the EPO's comments thereon of 26 September 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Article 13 of its Rules;

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 former permanent employee of the European Patent Office, the secretariat of the EPO. At the material time, he was acting as an Ombudsman contact person (hereinafter "OCP").

Circular No. 286 of May 2005 on the protection of the dignity of staff was issued to prevent behaviour which negatively affected the dignity of those working at or for the Office and to provide a means of dealing with problems should they occur. The policy on the protection

of the dignity of staff was laid down in part I of the Circular whereas part II provided guidelines on the same matter. The guidelines provided for a formal procedure of settlement of harassment-related grievances if the informal resolution was unsuccessful. The formal complaint was to be initiated by a written complaint addressed to the President, who would then assign an Ombudsman to investigate the case and submit a report to the President for final decision. Article 17 of the Circular provided that the President and the Staff Committee would each nominate one employee to act as OCP between the Ombudsmen and the Office and to provide such assistance as was necessary to ensure that the Ombudsmen were able to carry out their duties.

In April 2006 an EPO employee initiated a formal complaint of harassment under Circular No. 286. In May 2006 the President of the Office, in accordance with Article 9(3) of the Circular, assigned the Ombudsman responsible for conducting the investigation.

By a letter of 8 January 2007 the President wrote to the Ombudsman “kindly request[ing him] to write [his] final report” on the findings he had made so far and to forward the report to him at his “earliest convenience”. He noted that, in light of the atmosphere of distrust and hostile tension between the parties involved, any future collaboration between the parties would be very difficult, and he therefore considered it “best to end the formal procedure as soon as possible and to take a final decision” on the harassment complaint.

On 16 January 2007, in his function as OCP nominated by the Staff Committee, the complainant requested the President to review his decision. He emphasised that he was the liaison officer between the Office and the Ombudsman and that, according to Article 17(1) of Circular No. 286, he should have been consulted or at least informed before the President contacted the Ombudsman; he felt the President had bypassed him. He also submitted that the President had interfered with the Ombudsman’s independence. Having received no reply, on 26 January 2007, the complainant wrote a letter to the President requesting him again to review the decision of 8 January. He indicated that the letter should be considered as the lodging of an internal appeal

under Article 108 of the Service Regulations for Permanent Employees of the Office. He was informed on 16 May 2007 that his request could not be granted and that the matter had been referred to the Internal Appeals Committee (IAC).

In its opinion of 1 June 2010, the IAC recommended by a majority that the appeal be dismissed as unfounded. The majority considered that the President's letter to the Ombudsman was legally sound, stressing that the President was responsible for ensuring that a harassment grievance was dealt with diligently. Indeed, Article 10(2)(a) of the European Patent Convention provides that the President shall take "all necessary steps" to ensure the functioning of the Office. The President was therefore entitled to contact the Ombudsman, and his letter could not be considered as an interference with the Ombudsman's independence. The majority further considered, in light of the wording of the President's letter, that the Ombudsman was not bound by the President's letter, which merely aimed at drawing the Ombudsman's attention to the circumstances of the case, the possible consequences and the necessary steps to be taken. It noted that the Ombudsman did not challenge or refuse the President's request that he finalise his recommendations. In its view, the wording of Article 17 of Circular No. 286 should be understood as meaning that the OCPs who are assisting the Ombudsman take a central part in the process when the Ombudsman expressly asks them to do so, which was not the case here. The majority also found that the President had acted at all times in good faith. The minority however considered that the appeal was well founded on the grounds that the President had interfered with the responsibilities conferred on the Ombudsman. In its view, by using the terms "kindly requested" and "at your earliest convenience" the President asked the Ombudsman, albeit in polite terms, to end the investigation and to finalise his report. Article 10 of the European Patent Convention did not allow the President to interfere with the responsibilities assigned to the Ombudsman and such interference could not be considered as necessary to ensure the functioning of the Office. The President could easily have avoided the fear of interference by complying with Article 17(1) of Circular No. 286 and sending the letter to the OCP, i.e. the complainant. The minority added that the President had failed to reply

to the complainant's letter of 16 January 2007, which showed that he had deliberately violated the Circular.

Given the lapse of time, the minority considered that the removal of the letter was no longer necessary. It recommended that the complainant be awarded one euro for each staff member he represented, as he had filed his appeal in his capacity as a staff representative, and that he be awarded the same amount for the personal prejudice suffered for the violation of his rights as OCP.

By a letter of 30 July 2010 the complainant was informed that the President had decided to follow the IAC's majority opinion and to dismiss his appeal as unfounded. That is the impugned decision.

He filed his complaint before the Tribunal on 3 November 2010 asking the Tribunal to quash the impugned decision, to cancel the decision of 8 January 2007 and to award him moral damages and costs.

The EPO asks the Tribunal to find that the complaint is unfounded and to order the complainant to bear his costs. It objects to the applications to intervene on the grounds that the four interveners have not demonstrated that they were in a similar situation as the complainant. It stresses that the complaint filed by the complainant concerns his role as an OCP and that none of the interveners is an OCP.

## CONSIDERATIONS

1. In April 2006 a staff member, Mr M., filed a formal complaint in accordance with the provisions of Circular No. 286 (the Circular) that had been promulgated by the President of the Office. The Circular concerned the "Protection of the dignity of staff" and contained procedures for the informal and formal resolution of harassment-related grievances. The formal procedure involved a written complaint to the President who, "without delay", was to assign the complaint to an Ombudsman: Article 9 of the Circular. The Circular then contemplated investigation by the Ombudsman: Article 10, and a report by the Ombudsman to the President within three months of the date of the written complaint: Article 11(1). However under Article 11(1) the

Ombudsman could seek an extension “[i]n exceptional cases” but had to provide reasons. The Article was silent as to whom the request for an extension should be addressed. Upon receipt of the report, the President was then required to take one of a number of decisions within two months of receipt of the Ombudsman’s report.

2. In the present case, the Ombudsman sought an extension from the appropriate contact person on 1 August 2006 until 10 November 2006 to report, which was granted on 8 August 2006. In his reasons requesting the extension, the Ombudsman identified as one reason for the extension, his interactions with the individual who was the subject of the complaint. On 11 November 2006 the Ombudsman wrote to another appropriate contact person recounting how, from his perspective, his investigation was rendered more complicated by the conduct of the individual the subject of the complaint and someone acting, it appears, as his advocate. The correspondence did not, in terms, seek a further extension. However at some stage a further extension was sought and granted for a further four weeks. The terms of the request for a further extension are not in the material before the Tribunal.

3. On 8 January 2007 the President wrote to the Ombudsman in the following terms:

“With regret I noticed that due to the recent developments in the present case an atmosphere of distrust and hostile tension between the parties involved has been established. Since it is very likely that any future collaboration between the parties involved becomes either very difficult or has no chances of success, I consider it best to end the formal procedure as soon as possible and take a final decision according to Article 12(1) of Circular no. 286.

In the light of the abovementioned consideration, you are therefore kindly requested to write your final report pursuant to Article 11(1) of Circular no. 286 on the findings you made so far and to forward this report to me at your earliest convenience.”

4. The complainant challenged this “decision” in an internal appeal that culminated in a recommendation of the IAC dated 1 June 2010 to the President. The majority recommended the rejection of the appeal as unfounded. The minority concluded that the letter of 8 January 2007

had to be seen “as interfering with the responsibilities conferred on the appointed Ombudsman, thereby exposing him inappropriately to possible charges of insufficient impartiality and independence in the exercise of his duties and leading to a failure to adequately co-operate with the contact persons charged with monitoring the implementation of the guidelines”.

In a letter to the complainant of 30 July 2010 written on behalf of the President, the appeal was rejected as unfounded, noting that the letter of 8 January 2007 “was legally justified and made in good faith, with a view to ensuring that due process was followed”. This is the impugned decision.

5. References have been made earlier in this judgment to the appropriate contact person. Article 17 of the Circular provided:

“Article 17 – Ombudsmen contact persons

- (1) The President and the Staff Committee shall each nominate one employee to act as contact persons between the Ombudsmen and the Office and to provide such assistance as is necessary to ensure the Ombudsmen are able to carry out their duties under these guidelines. The contact persons shall be required, in particular, to:
  - (a) assist the Ombudsmen in their contacts with the Office and help them to carry out their tasks under the guidelines;
  - (b) report to the President any obstruction to the implementation of the guidelines that may prevent an Ombudsman from performing his tasks;
  - (c) submit the ‘Annual report on the procedure to protect staff dignity’ to the President, based on the annual report of the Ombudsmen. [...]

One further provision of the Circular should be mentioned. Article 7(6) provided that in exercising his duties, the Ombudsman shall be independent of any employee or department of the Office and shall act with full autonomy.

It appears, from the material before the Tribunal, that the complainant was, at relevant times, “a contact person” for the purposes of Article 17.

6. The central issue in these proceedings is whether it was open to the President to write the letter of 8 January 2007 and whether, in so doing, he was compromising the independence of the Ombudsman.

Plainly enough, one task of the contact person was to report to the President any obstruction that prevented the Ombudsman from performing his or her tasks under the guidelines. The guidelines were, themselves, unclear about what the President could do, if anything, faced with such a report. However it is tolerably clear that the Circular contemplated some role for the President in the event that the Ombudsman was prevented from performing his tasks. Thus the contentious letter from the President was, in the circumstances, not at odds with the role of independence and autonomy created by the Circular for the Ombudsman. Those circumstances included the inordinate delay in the investigation of the complaint which, at least from the Ombudsman's perspective, was significantly attributable to the conduct of the person against whom the complaint had been made and a supporter. That said, it was inappropriate and contrary to the Guidelines for the President to write to the Ombudsman without a report from a contact person of the type referred to in Article 17(1)(b). That contact person was intended to be the interface between the Ombudsman and the Office.

7. However this transgression was, in the circumstances, of no great moment. The letter was expressed in moderate and temperate terms. While the President should not have done so, his attempt to bring to a point of resolution the investigation and consideration of Mr M.'s complaint of harassment was understandable in the circumstances.

8. The complainant seeks, by way of relief, the "cancellation" of the contentious letter, moral damages and costs in the internal appeal and in these proceedings. No utility is served by making an order in relation to the letter. There is no warrant for ordering moral damages. Costs will be ordered in the sum of 3,000 euros.

9. Four staff members applied to intervene. They do not identify a similar factual or legal situation to that of the complainant to warrant the intervention. Accordingly their applications should be dismissed.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The EPO shall pay the complainant 3,000 euros in costs.
3. The complainant's claims are otherwise dismissed.
4. The applications to intervene are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ