

D. M. (No. 3)

v.

EPO

122nd Session

Judgment No. 3695

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr P. D. M. against the European Patent Organisation (EPO) on 14 October 2011 and corrected on 5 December 2011, the EPO's reply of 13 March 2012, the complainant's rejoinder of 20 June, corrected on 18 July, and the EPO's surrejoinder of 22 October 2012;

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:

In his third complaint before the Tribunal the complainant impugns EPO's rejection of his two internal appeals registered as RI/145/09 and RI/35/10, the first contesting the Ombudsman's failure to follow the formal procedure set out in Circular No. 286 in respect of his harassment complaint against Mr G. and Mr P. and the second contesting the President's decision to reject that harassment complaint.

Facts relevant to this case are to be found in Judgment 3337 on the complainant's first complaint. Suffice it to recall that in June 2008 the complainant requested the President of the Office to initiate a procedure similar to the dignity procedure set forth in Circular No. 286 in respect

of his allegations of harassment against Mr G. and Mr P., his Principal Director and Head of Department respectively. The complainant's harassment allegations were eventually referred to the Ombudsman but, before the latter issued his report, the complainant filed an internal appeal, registered under the reference RI/104/09. This appeal culminated in Judgment 3337, delivered on 9 July 2014, in which the Tribunal found that the EPO had failed in its duty to provide the complainant with a prompt resolution of his harassment complaint and awarded him moral damages and costs.

Prior to the delivery of Judgment 3337, on 14 September 2009, the complainant had filed a further internal appeal, registered under the reference RI/145/09, on the grounds that the Ombudsman had failed to conduct the procedure in respect of his harassment complaint against Mr G. and Mr P. in line with Circular No. 286 and requesting that he be instructed to submit his report by 1 November 2009. The Ombudsman submitted his report on 30 October 2009 concluding that it was not possible to ascertain whether there had been harassment and that no unequivocal conclusion could be drawn regarding the complainant's treatment. By a letter of 20 November 2009, the President informed the complainant of her decision to reject his complaint of harassment against Mr G. and Mr P. On 19 February 2010 the complainant contested this decision by means of an internal appeal, registered under reference RI/35/10, requesting inter alia that the decision of 20 November 2009 and the Ombudsman's report of 30 October 2009 be set aside, and that he be awarded moral damages and costs. Internal appeals RI/145/09 and RI/35/10 were referred to the Internal Appeals Committee (IAC).

The IAC joined the appeals and, after having held a hearing on 8 February 2011, it issued a single opinion on 2 August 2011. As regards internal appeal RI/145/09, it recommended that it be dismissed as inadmissible but that the complainant be reimbursed the legal costs he had incurred. As regards internal appeal RI/35/10, the IAC found that the Ombudsman's conduct of the procedure exhibited serious flaws, that he had demonstrated bias and that his report was flawed and unsuitable to serve as the basis for a final decision. It unanimously recommended that the President's decision of 20 November 2009 and the Ombudsman's

report be set aside and that the EPO endeavour to arrange for mediation between the complainant and Mr P. with a view to creating a sustainable basis for the complainant's future career. The IAC also unanimously recommended that the complainant be awarded moral damages and costs but there was disagreement among its members as regards the appropriate amount of damages. The majority recommended awarding him 6,000 euros for the breach of the duty by the EPO to conduct a proper investigation into his harassment allegations, 1,000 euros for the breach of the duty of confidentiality by the Ombudsman and 3,000 euros for the loss of the opportunity to have his harassment allegations investigated properly. The minority recommended awarding him 10,000 euros for the lack of an appropriate investigation into his allegations and an appropriate report by the Ombudsman, 3,000 euros for the serious breach of confidentiality by the Ombudsman and 12,000 euros for the loss of the opportunity to have his complaint being handled in an appropriate manner.

By an e-mail of 4 October 2011, the complainant was informed that the final decision on his internal appeals was still being considered and that he would receive it as soon as possible. On 14 October 2011 he filed the present complaint with the Tribunal impugning the implied rejection of internal appeals RI/145/09 and RI/35/10. Attempts were made by the parties in early 2012 to arrive at a global settlement of all outstanding issues but these proved unsuccessful.

The complainant requests that the present complaint be joined with his first complaint before the Tribunal. In addition to the relief sought in that first complaint, he asks the Tribunal to order the President to follow the minority recommendation regarding the award of moral damages for the EPO's breach of its duty to ensure proper proceedings. He claims material and punitive damages for the EPO's failure to provide him with a final decision within 60 days after the IAC delivered its opinion and he also claims costs. He seeks interest at the rate of 8 per cent per annum on all amounts awarded by the Tribunal and requests that the "capital of interest shall be monthly indexed based on the basis rate of the European Central Bank in order to maintain the real monetary value of the claim".

In its reply the EPO objects to the receivability of all of the complainant's claims and it asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as unfounded. In its surrejoinder it alters its position by revoking its objection to the receivability of the complainant's claims arising from internal appeal RI/35/10, noting that, the President took a final express decision on 11 October 2012 thus bringing the internal appeal procedure RI/35/10 to an end. Therefore, it no longer sees any procedural obstacle resulting from Article VII of the Tribunal's Statute and considers that there is no need for the complainant to file a further complaint against the express final decision. It produces the final express decision of 11 October 2012 in an annex to its surrejoinder.

CONSIDERATIONS

1. The complainant is employed by the European Patent Office, the EPO's secretariat. On 14 October 2011 he filed the present complaint with the Tribunal (his third). He did not, in the complaint form, identify an express decision he seeks to impugn. Rather he impugns an implied decision dealing with the internal appeal he lodged on 19 February 2010 and an implied rejection of his internal appeal.

2. The complainant seeks the joinder of this complaint with another complaint filed by him on 16 June 2010. However that other complaint is now the subject of a judgment delivered in public on 9 July 2014 (Judgment 3337) and accordingly no question of joinder can now arise.

3. In order to explain the orders the Tribunal makes in these proceedings, it is only necessary to briefly outline the events leading to the filing of this complaint. On 2 August 2011 the IAC issued a report concerning two internal appeals arising from or related to allegations the complainant had made about harassment. It recommended that one of the internal appeals (RI/145/09) be dismissed as "inadmissible" though, in relation to that appeal, the complainant (as appellant) be reimbursed some legal costs. As to the other internal appeal (RI/35/10) there was a divergence of opinion between the majority and minority about the

terms of the IAC's recommendations. In substance, there was a difference of opinion about the quantification of the damages which should be awarded to the complainant.

4. There was, however, unanimity about the central recommendation. As gleaned from the IAC's report, the complainant's complaint of harassment (that is to say, the complaint being considered by the IAC) had been the subject of a report by the Ombudsman dated 30 October 2009. That report's central thesis was that it was not possible to ascertain whether there had been mobbing and harassment as alleged by the complainant. This report led to a decision of the President of 20 November 2009 effectively dismissing the complainant's harassment complaint. The IAC recommended unanimously that both the Ombudsman's report and the President's decision be revoked. The latter was based on the former and, so the IAC concluded, the procedures adopted by the Ombudsman had been seriously flawed and, it appears, tainted by ostensible bias. The majority recommended payment of 6,000 euros moral damages for a breach of the EPO's duty to properly investigate the allegations of harassment, a further 1,000 euros moral damages for breach of the duty of confidentiality and, lastly, 3,000 euros moral damages for the complainant's loss of the opportunity to have his allegations investigated properly. The minority made similar recommendations though the amounts were larger.

5. No final decision had been made by the President having regard to the IAC's report and recommendations when the complainant filed his complaint with the Tribunal on 14 October 2011.

6. In its reply the EPO challenges the receivability of the complaint as it concerns the subject matter of both internal appeals though, in its surrejoinder, it abandons the argument about receivability insofar as it concerns the subject matter of internal appeal RI/35/10.

7. However the final express decision of 11 October 2012 (which was included in the EPO's surrejoinder dated 22 October 2012 but made after the complainant filed his rejoinder on 20 June 2012) assumes some

considerable importance in dealing with this complaint. It is to be recalled that the IAC made a number of recommendations, including that the complainant be paid a not insignificant sum, in total, by way of moral damages.

8. It is open to the Tribunal to treat the express decision as replacing the implied decision (see for example Judgment 3184, consideration 3), on the basis that the belated express decision is the decision the Tribunal should consider (see Judgment 3161, considerations 1 and 2). However, if the express decision is only provided by the defendant organization in its surrejoinder (as happened in this case) then the Tribunal needs to ensure that the complainant has an opportunity to comment on that decision in appropriate cases to ensure that the complainant is afforded procedural fairness. However, in the present case, the complainant is not prejudiced by the late reliance on the express decision and the fact that he has not had the opportunity to comment on it because the express decision, which does not in substance constitute a decision dealing with the issues raised in the internal appeal, is manifestly flawed and will be set aside in any event.

9. The IAC's report of 2 August 2011 appears to be the product of a balanced, rational and thoughtful consideration of the evidence and arguments advanced by the parties in the internal appeals. In the final express decision of 11 October 2012 (communicated by the Vice-President of Directorate General 4), the reasoning of the President as regards internal appeal RI/35/10 was that "in view of the fact that the investigation of [the complainant's] complaint from 2008 [could] not be repeated, taking into account the ongoing efforts to find a balanced and global solution to [his] different requests and grievances, [the President had decided] to reject this appeal as well and refrain from any payments". An executive head of an organisation has a duty to substantiate a final decision departing from the recommendations of an appeal committee (see, for example, Judgments 2339, consideration 5, 2699, consideration 24, and 3208, consideration 11). The reasons of the President singularly fail to come to grips with the reasoning of the IAC and fail to explain, in any satisfactory and persuasive way, why the recommendations of the

IAC, whether the majority or the minority, should be rejected. For this reason alone the impugned decision rejecting the complainant's appeal in internal appeal RI/35/10 should be set aside. The complainant is entitled to costs.

10. The complainant does not come to grips with the reasoning of the IAC and the argument of the EPO in these proceedings that the issue raised in his internal appeal RI/145/09 is moot. This appears to be correct and nothing further need be said.

11. Whether and, if so, to what extent, the Tribunal's decision in Judgment 3337 has a bearing on any final decision the President might make in relation to internal appeal RI/35/10 is initially a matter for the President presumably acting on legal advice. However, the Tribunal does note that the subject matter of that judgment concerned events and issues which, at most, overlap in a limited way with events and issues raised in internal appeal RI/35/10.

DECISION

For the above reasons,

1. The impugned decision of 11 October 2012 is set aside.
2. The matter is remitted to the President of the European Patent Office to make a decision in relation to internal appeal RI/35/10 in accordance with considerations 9 to 11 above.
3. The EPO shall pay the complainant 2,000 euros in costs.

In witness of this judgment, adopted on 11 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ