H. (No. 14)

v.

EPO

120th Session **Judgment No. 3519**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mrs E. H. against the European Patent Organisation (EPO) on 11 October 2010, the EPO's reply dated 16 February 2011 and the complainant's letter of 15 March 2011 informing the Registrar that she refrained from filing a rejoinder;

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 joined the European Patent Office, the secretariat of the EPO, in 1988 as an examiner. At the material time, she was also a member of the Central Occupational Health, Safety and Ergonomics Committee (COHSEC), which was created in 2007 when the EPO adopted a comprehensive health policy. Article 38a, paragraph 3, of the Service Regulations for Permanent Employees of the Office provides that the COHSEC

"shall be responsible for:

- formulating, on its own initiative and on an unrestricted basis, proposals on all aspects of occupational health, safety and ergonomics affecting the staff at more than one place of employment;

- giving a reasoned opinion on all measures and reports relating to occupational health, safety and ergonomics on all premises of the Office".

The COHSEC is composed of members nominated by the President of the Office and by the Central Staff Committee.

In 2009 the EPO set up the Single Patent Process (SPP) programme as a benefit-driven business change process supported by automation tools and organisational change, a new patent business process aiming at identifying legal, business and organisational measures that could make the patent process more efficient.

On 18 May 2010 the complainant together with other members of the COHSEC nominated by the Central Staff Committee wrote to the Vice-President of Directorate-General 1 in that capacity. They indicated that the members of the COHSEC had only had a very general presentation about the health aspects of the SPP, which did not allow them to form an opinion on the potential health impact of the SPP programme on staff. They stressed that the COHSEC should have been consulted before the decision to implement the SPP programme was taken; but given that the EPO had failed to do so they requested that the COHSEC be consulted on all aspects of the SPP programme that were likely to affect the health of concerned staff very soon and at the latest in September 2010. They indicated the specific areas for which information was requested. They also stated that the letter was to be considered as the lodging of an internal appeal if their requests were denied.

By a letter of 15 June 2010 the Vice-President replied to the complainant that any staff health issues arising from the SPP programme would be fully discussed and addressed during the implementation of each project developed in the framework of the programme and that the COHSEC would be consulted at that time. He added that, at a more general level, he would welcome input from the COHSEC at an earlier stage and therefore invited the complainant to arrange a meeting during the second half of 2010 with members of the COHSEC and staff working on the implementation of the SPP programme. He suggested, in light of her concerns with respect to the consultation of the COHSEC, that during the meeting they work on incorporating a

standard COHSEC consultation check-list into the SSP Operating Manual so as to ensure that a planning is set up with respect to consultation.

Considering that she had received none of the information requested in the letter of 18 May and no indication as to when information would be given, on 11 October 2010, the complainant filed a complaint with the Tribunal against the implied rejection of her request of 18 May 2010. She asks the Tribunal to order that the COHSEC be consulted on all aspects of the SPP programme that are likely to affect the health of staff in Directorate-General 1, Directorate-General 2 and, if applicable, Directorate-General 3 within the shortest possible delay.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and unfounded.

CONSIDERATIONS

1. On 11 October 2010, the complainant filed a complaint with this Tribunal. She was, at the relevant time, a staff member of the Office and a Central Staff Committee appointee to the COHSEC. The decision the complainant challenges was the implied decision of the Vice-President of Directorate-General 1 (DG1) to reject a request made in writing on 18 May 2010 that COHSEC be provided "with sufficient information to allow it to form an opinion on the potential impact of the SPP project on the health of the staff involved". The reference to "SPP" is to a bundle of projects within the EPO called the Single Patent Process. It is, for present purposes, unnecessary to describe in any detail those projects. The letter concluded that "[p]urely as a precautionary measure, this letter is to be considered as an internal appeal within the meaning of [Articles 106 to 108 of the Service Regulations]". The relief sought in the complaint is an order requiring consultation with COHSEC on all aspects of the SPP that are likely to affect the health of staff in specified areas and do so "within the shortest possible delay".

2. The EPO challenges the receivability of the complaint on the footing that the complainant had not exhausted internal means of redress. One further fact should be mentioned. On 15 June 2010 the Vice-President of DG1 wrote to the members of the Central Staff Committee (including to the complainant) indicating firstly that health issues arising from SPP projects would be fully discussed and addressed throughout the life of the programme, secondly as part of the implementation planning for each individual project COHSEC would be consulted as appropriately, and thirdly (and at a more general level) that he would welcome input from COHSEC at an early stage and invited the Central Staff Committee to arrange a meeting.

3. On the question of internal means of redress, the complainant simply notes in her brief that "[a]n internal appeal has not been registered". In its reply, the EPO refers to Article 106, paragraph 2, of the Service Regulations according to which the appointing authority has two months to reply to a request for a decision. Failure to give such reply can be considered an implied decision of rejection. After such an implied rejection Article 107 of the Service Regulations comes into play and allows for an internal appeal. The EPO notes that no such internal appeal was subsequently lodged. The complainant has not filed a rejoinder leaving unanswered the plea of the EPO on the issue of receivability.

The sequence contemplated by Articles 106 to 108 of the Service Regulations is the giving of a decision, express or implied, and then the lodging of an internal appeal. Foreshadowing an appeal, as occurred in the letter of 18 May 2010, does not, at least in this case, constitute the lodging of an appeal against a decision that had not then been made (either expressly or impliedly). As no appeal was lodged, Article VII of the Tribunal's Statute precludes consideration of the complaint.

4. It may be thought that by 11 October 2010 when the complaint was filed there had been an implied refusal to consult as requested in the letter of 18 May 2010 and nothing more. The EPO's reply appears to proceed on the assumption that this is so. In those circumstances Article VII, paragraph 3, of the Tribunal's Statute might apply. However

it is tolerably clear it is not correct to say there was no decision. There was having regard to the letter of 15 June 2010. It was a direct response to the complainant's letter of 18 May 2010 in which there is no indication of agreement with her request. That is so even accepting that the complainant did not view it as a satisfactory response. The complainant has not exhausted internal means of redress and Article VII of the Tribunal's Statute renders the complaint irreceivable.

The complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, 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 30 June 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ