

**P. (No. 8) and B. (No. 13)**

*v.*

**EPO**

**120th Session**

**Judgment No. 3530**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr A. P. against the European Patent Organisation (EPO) on 8 March 2013, the EPO's reply of 8 November, the complainant's rejoinder of 19 December 2013 and the EPO's surrejoinder of 7 April 2014;

Considering the thirteenth complaint filed by Mr K. B. against the EPO on 9 April 2013, the EPO's reply of 8 November, the complainant's rejoinder of 21 December 2013 and the EPO's surrejoinder of 7 April 2014;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

In both complaints, the complainants challenge the EPO's refusal to award them moral damages on account of the length of the internal appeal proceedings.

In September 2007 the complainants challenged a Note dated 15 June 2007 inviting staff members who intended to participate in a strike to use an electronic registration tool and requesting examiners who were due to participate in oral proceedings on the days of

the strike to perform their duties until further notice. Mr P., who is a member of the Internal Appeals Committee (IAC), challenged the Note in his capacity as an employee of the European Patent Office, the secretariat of the EPO, while Mr B. challenged it as a “potential member” of the Executive Committee of the local section of the Staff Union of the European Patent Office. The complainants requested the immediate withdrawal of the Note, arguing that it was in breach of the right to strike. They claimed different amounts in moral damages for the injury caused to themselves, compensation for every examiner who had oral proceedings on the strike days, as well as costs.

On 6 November 2007 the complainants were informed that, as the President considered that the Note was lawful, their appeals had been referred to the IAC. The EPO submitted its position paper in July 2011 and a hearing was held on 26 October 2011. During the hearing the complainants modified their claims and additionally requested an award of at least 3,000 euros for the length of the internal appeal proceedings, as well as punitive damages on the grounds that the appeals had been deliberately delayed.

In its single opinion of November 2012 the IAC majority recommended that the appeals be dismissed as unfounded and that moral damages be awarded for the excessive length of the internal appeal proceedings in the amount of 1,000 euros. A minority recommended that the appeals be allowed and that moral damages in the amount of 2,500 euros be awarded for the excessive delay in producing the EPO position paper.

By letters of 8 January 2013, the complainants were informed that the Vice-President in charge of Administration, by delegation of power from the President, had decided to reject the appeals as entirely unfounded, in accordance with the IAC majority opinion. The letters stated that, as the complainants’ main claims were rejected on the merits, all other secondary claims for damages were also rejected as unfounded. Those are the impugned decisions.

In his eighth complaint Mr P. asks the Tribunal to set aside the impugned decision. He claims moral damages of at least 5,500 euros for the length of the internal appeal proceedings, costs, and further relief

as the Tribunal deems appropriate. In his thirteenth complaint Mr B. claims the same relief.

The EPO rejects the complainants' claims as entirely unfounded on the merits and, subsidiarily, it submits that the amounts requested for the length of the internal appeal proceedings are excessive. The delays are due, at least in part, to the wide misuse of the EPO internal appeal system by a small number of individuals to oppose general rules adopted by the governing bodies. The EPO has taken all necessary measures to address the backlog of internal appeals and the complainants have not suffered any damages due to the delay in the proceedings. It asks the Tribunal to join the complaints, since they rely on the same facts and were already dealt with together by the IAC, and to order that the complainants bear their costs.

#### CONSIDERATIONS

1. In his eighth complaint, Mr P. impugns the decision of 8 January 2013 taken by the Vice-President in charge of Administration, by delegation of power from the President, insofar as it did not follow the IAC's recommendation to award him moral damages for the delay in the internal appeal proceedings either in the amount of 1,000 euros in accordance with the majority opinion, or in the amount of 2,500 euros in accordance with the minority opinion. The complaint is exclusively based on the fact that over five years elapsed between the date when he filed his internal appeal on 10 September 2007 and the date when the final decision was communicated to him in the letter of 8 January 2013, which constitutes an egregious delay warranting an award of damages.

2. In his thirteenth complaint, Mr B. impugns the decision of 8 January 2013 taken by the Vice-President in charge of Administration, by delegation of power from the President, insofar as it did not follow the IAC's recommendation to award him moral damages for the delay in the internal appeal proceedings either in the amount of 1,000 euros in accordance with the majority opinion, or in the amount of 2,500 euros in accordance with the minority opinion. The

complaint is exclusively based on the fact that over five years elapsed between the date when he filed his internal appeal on 14 September 2007 (which was joined with Mr P.'s appeal and registered as case No. RI/144/07) and the date when the final decision was communicated to him in the letter of 8 January 2013, which constitutes an egregious delay warranting an award of damages.

3. It is useful to note that while the IAC was unanimous in recommending an award of damages for the delay in the internal appeal proceedings, the IAC majority also recommended that Mr P.'s appeal be dismissed as partly irreceivable, since the complainant was not directly and individually adversely affected by the decision he challenged, and as unfounded on the merits, and that Mr B.'s appeal be dismissed as unfounded on the merits.

4. The Tribunal, noting that the complaints contain similar claims, that the complaint briefs are nearly identical, that they rely on the same facts and largely rest on the same argument, considers that they should be joined in order that they may form the subject of a single judgment (see, for example, Judgments 2944, under 19, and 1451, under 13).

5. The Tribunal has consistently held that international organisations have a duty to ensure that internal appeals are conducted with due diligence and with due regard to the duty of care owed to staff members (see, in particular, Judgment 2522). While the time an appeal might reasonably take will usually depend on the specific circumstances of a given case, in this case the internal appeals were both clearly irreceivable and/or unfounded. As such, they could not be considered to be particularly complicated and certainly not enough to warrant internal appeal proceedings lasting more than five years. Such a delay is indeed egregious and the complainants are each entitled to an award of moral damages. "The amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as lengthy delay may have a greater effect. That latter consideration, the effect of

the delay, will usually depend on, amongst other things, the subject matter of the appeal. Delay in an internal appeal concerning a matter of limited seriousness in its impact on the appellant would be likely to be less injurious to the appellant than delay in an appeal concerning an issue of fundamental importance and seriousness in its impact on the appellant. For example, an extensive delay in relation to an appeal concerning the dismissal of a staff member could have a profound impact on his or her circumstances. On the other hand, a delay of precisely the same period in relation to an appeal concerning a comparatively trifling issue may have limited or possibly even no impact on the circumstances of the staff member.” (See Judgment 3160, under 17.)

6. The Tribunal considers that the appeals were clearly unfounded: Appeal RI/144/07 was considered irreceivable in part concerning Mr P., since he was not due to participate in oral proceedings on the day of the strike and, therefore, he had no cause of action. The appeal was wholly unfounded on the merits with respect to both Mr P. and Mr B. Thus, the Tribunal is of the opinion that the complainants could have withdrawn their appeals when it became apparent that they would fail. The complainants have both noted that they were aware of the heavy backlog facing the IAC and the consequent delays in the internal appeal proceedings. Under the circumstances, not withdrawing the appeals could perhaps give the impression that the appeals were maintained only because of the likelihood that the IAC would recommend the payment of damages for the delay. Whether the delay was due to the EPO’s tardiness or to the malfunctioning of the IAC is simply irrelevant in light of its duty to provide to the members of its staff an efficient internal means of redress (see Judgments 2392, under 6, 2196, under 9, and the case law cited therein). The Tribunal notes that the EPO has in the meantime taken measures to address the backlog of internal appeals.

7. In light of the above, the Tribunal finds that the EPO violated its duty of care by failing to ensure efficient internal appeal proceedings within a reasonable time. Thus, considering the excessive length of

the proceedings and the lack of negative impact on the complainants, the Tribunal sets the amount of moral damages at 250 euros per complainant. As they succeed in part, the complainants are entitled to an award of costs which the Tribunal sets at 200 euros for each of them.

### DECISION

For the above reasons,

1. The EPO shall pay each of the complainants moral damages in the amount of 250 euros.
2. It shall pay each of them costs in the amount of 200 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

CLAUDE ROUILLER

DOLORES M. HANSEN

DRAŽEN PETROVIĆ