K. (No. 4)

v.

EPO

130th Session **Judgment No. 4319**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 1 May 2014 and corrected on 4 August, the EPO's reply of 19 December 2014 and the complainant's rejoinder of 17 April 2015, the EPO having chosen not to file a surrejoinder;

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 challenges the designation of his reporting and countersigning officers for a staff report.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat. At the material time, he was working as an administrative officer at grade B5. On 23 January 2014 he was notified that his reporting and countersigning officers for the reporting period 1 January 2012 to 31 December 2013 would be Mr W. and Mr G., respectively. By a letter of 30 January 2014 addressed to the President of the Office, the complainant submitted a request for review of the communication of 23 January concerning his reporting and countersigning officers. He contended that the "decision" it contained was unlawful because there was nothing in his personal file to show

that he had been officially transferred to a position under the authority of either Mr W. or Mr G. He requested that the decision be set aside, as well as the staff report in question, if prepared by those officials, and he sought clarification as to the appropriate reporting and countersigning officers and documentary evidence of the basis on which the Office had decided that Messrs W. and G. should prepare his staff report.

By an email of 20 February 2014 the Conflict Resolution Unit (CRU) informed the complainant that his request for review could not be registered, as the assignment of his reporting and countersigning officers was merely a preparatory step in the reporting exercise and, as such, did not constitute a challengeable decision within the meaning of Article 108 of the Service Regulations for permanent employees of the European Patent Office. It could, however, be challenged in due course as part of an appeal against his staff report, once finalised. In this regard, the complainant was reminded that, according to Article 109(3)(b) of the Service Regulations, staff reports could not form the subject of a request for review. The author of the email added that the complainant's letter would nevertheless be forwarded to the Administration so that they would be informed of the concerns he had raised.

On 1 May 2014 the complainant filed the present complaint, indicating on the complaint form that the EPO had failed to take a decision within the 60-day period provided for in Article VII, paragraph 3, of the Statute of the Tribunal on the claim he had notified to the Organisation on 30 January 2014. He asks the Tribunal to order the EPO to examine his request for review in accordance with the applicable law. He claims moral damages in the amount of 20,000 euros "for foreseeable, needless litigation, wilful hindrance of [his] right of defence and unwarranted strain and stress", and punitive damages in the amount of 10,000 euros on the basis that the EPO was well aware, following an earlier appeal, that the situation with respect to his reporting and countersigning officers needed to be clarified. He also seeks an award of costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable for several reasons and, in any event, unfounded on the merits.

CONSIDERATIONS

1. In submitting that the complaint is irreceivable, the EPO refers to the provisions of Article VII of the Tribunal's Statute. It contends that the complaint is irreceivable, among other things, because it is not filed against a final decision as the complainant did not exhaust the internal means of redress that were available to him.

2. The EPO's arguments to support its submission that the complaint is irreceivable may be summarized as follows: the CRU's communication of 20 February 2014 was not a final decision but a procedural step which informed the complainant of the correct avenues of the internal procedures which he should have pursued. Even if that communication were to be considered an implied rejection of the request for review (which the EPO denies), the complainant still did not exhaust the internal means of redress which were open to him, as required by Article VII, paragraph 1, of the Tribunal's Statute, and which the Tribunal has stated, in Judgment 2381, consideration 6, for example, is a necessary condition for the receivability of a complaint. The complainant should have lodged an internal appeal rather than the present complaint which he filed on 1 May 2014. He actually lodged an internal appeal addressing the same subject matter, subsequently, on 17 May 2014.

3. The CRU's communication of 20 February 2014 to the complainant relevantly stated as follows:

> "We would like to inform you that the assignment of your reporting officers is merely a preparatory step in the reporting exercise; it does not constitute a challengeable decision within the meaning of Article 108 [of the Service Regulations]. In the circumstances, your request of 30.1.2014 cannot be registered. The nomination of your reporting officers may be challenged in due course as part of any internal appeal filed against your staff report, once finalised. In this respect, please note that staff reports form an exception under Article 109(3)(b) [of the Service Regulations] and so cannot form the subject of a request for review. [...]"

4. The complainant acknowledges that he did not exhaust the other internal means of redress that were open to him under the EPO's Service Regulations. His case is that he did not do so because it would have proved "a hollow and meaningless formality considering that the [EPO] did not apply correctly the required dispute settlement procedure

in place". He insists that "[d]irect recourse [to the Tribunal] is therefore warranted [...] as the defendant's letter of [20 February 2014] contains an implicit 'waiver' of the requirement to exhaust first the internal means of redress" resulting "*de facto* in a denial [of his] right of defence and violation of the statutory rights". This, according to him, was because the Administration did not provide a decision as required by the applicable law; did not take the required procedural steps; failed to respond to his request for review with a formal final decision within the meaning of Article 109 of the Service Regulations, "but rather responded merely with an informal reply by a non-competent authority and body [...]", the CRU. The complainant relies on Article VII, paragraph 3, of the Tribunal's Statute.

5. Paragraph 1 of Article VII of the Statute of the Tribunal states as follows:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations."

The complainant notes the Tribunal's statement in consideration 13 of Judgment 3287, for example, that one of the purposes which this provision serves is to ensure that grievances are considered in internal appeals before they are considered by the Tribunal.

Paragraph 3 of Article VII of the Tribunal's Statute relevantly states as follows:

> "Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and her or his complaint shall be receivable in the same manner as a complaint against a final decision. [...]"

6. The complainant's reliance on Article VII, paragraph 3, is misplaced because his "claim" of 30 January 2014 did not, in fact, remain unanswered during the 60-day period provided for in that provision. It was rejected on 20 February 2014. It is clear from the case law (see Judgment 3714, considerations 6 and 7, for example) that Article VII, paragraph 3, is applicable where the Administration does not respond to an initial claim within that period. It does not apply to situations where the Administration does respond to the claim within 60 days.

The complainant's 30 January 2014 claim was rejected on 20 February 2014. Accordingly, Article VII, paragraph 3, was no longer applicable. He should have challenged that 20 February decision by an internal appeal, in which he could have contested the EPO's contention that the original communication of 23 January 2014 was not a challengeable decision, instead of trying to do so directly before the Tribunal as he has done in his complaint. As the Tribunal recalled in Judgment 4056, consideration 5, a staff member of an international organisation cannot of her or his own initiative evade the requirement that internal remedies must be exhausted prior to filing a complaint with the Tribunal. The complaint is therefore irreceivable pursuant to Article VII, paragraph 1, of the Tribunal's Statute for failure to exhaust the internal means of redress that were available to the complainant.

7. More fundamentally, however, the "decision" of 23 January 2014 which the complainant seeks to challenge was not a challengeable decision. It was a mere step towards what eventually may have become a challengeable decision. The CRU was therefore right to reject it on this ground.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, 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

HUGH A. RAWLINS

DRAŽEN PETROVIĆ