P. (E.) (No. 9)

v.

EPO

132nd Session **Judgment No. 4426**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mrs E. P. against the European Patent Organisation (EPO) on 6 April 2020, the EPO's reply of 21 July, the complainant's rejoinder of 14 October 2020 and the EPO's surrejoinder of 14 January 2021;

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 decision not to retroactively promote her while she was on sick leave.

The complainant is a former staff member of the European Patent Office, the EPO's secretariat. On 13 April 2007 she fell sick. As of January 2008 she was on extended sick leave within the meaning of Article 62(8) of the Service Regulations. With effect from 1 July 2008, she was placed on invalidity for occupational grounds.

Following a conciliation procedure and two internal appeals lodged by her concerning her staff report for the 2006-2007 exercise, this report was finalized and she became eligible for retroactive promotion as of 1 December 2007. On 28 September 2012 the Vice-President of Directorate-General 4 (DG4) informed her spouse (in his capacity as the complainant's representative) that the Promotion Board would take the complainant's case into consideration "[at] the earliest possible session".

The complainant's spouse acknowledged that his wife's case would be considered in October 2012, being the upcoming Promotion Board's session, and requested to be informed of the outcome. On 30 January 2013 the list of the names of promoted staff members was published without mentioning the complainant's name. No internal appeal was lodged at that time.

In separate proceedings, the complainant's spouse received, on 18 November 2013, a confidential document in which it was explained that the complainant had not been promoted in October 2012 because "according to Article 62 [of the Service Regulations], a promotion [could] not take effect during a period of long term sick leave". In that document it was further stated that the practice of the Promotion Board was to wait for the person to return to work and then recommend the promotion on that date but, since the complainant never resumed work, a recommendation for promotion could not be issued. On 27 January 2014 the complainant's spouse lodged, on behalf of his wife, a request for review of the decision not to promote her. He asked the President of the Office to grant the complainant a retroactive promotion as of 1 December 2007, as well as payment of all emoluments due upon promotion, with interest. The request for review was rejected on 2 June 2014 as irreceivable *ratione personae* and *temporis*.

On 16 June 2014 the complainant, represented by a legal counsel, lodged an internal appeal before the Appeals Committee reiterating the claims her spouse made in the request for review and further requesting compensation for moral injury and costs.

The Appeals Committee recommended on 17 June 2015 to reject the appeal as manifestly irreceivable *ratione temporis*. The President's final decision taken on 24 July 2015 followed that recommendation. The complainant impugned that decision in her seventh complaint with the Tribunal.

On 30 November 2016 the Tribunal delivered in public Judgment 3785 in which it found that the Appeals Committee's composition from January 2015 to November 2016, i.e. the period in which the complainant's appeal was examined, was flawed. On 1 March 2017 the complainant was informed that, based on the Tribunal's ruling in the said judgment, the President had decided to withdraw the 24 July 2015 decision and to refer her case back for consideration by a newly composed Appeals Committee. The complainant was invited to withdraw her seventh complaint on the

basis that it had become moot. She did not and her complaint was dismissed as being without objet in Judgment 4256, delivered in public on 10 February 2020.

Meanwhile, in its new opinion of 3 December 2019, the Appeals Committee had unanimously recommended rejecting the appeal as manifestly irreceivable *ratione temporis* and awarding the complainant moral damages for the length of the internal appeal procedure.

By a letter of 22 January 2020, which constitutes the impugned decision in the present proceedings, the complainant was informed of the President's decision to follow the Appeals Committee's recommendation.

The complainant asks the Tribunal to set aside the impugned decision and to order her promotion retroactively as of 1 December 2007. She also claims material and moral damages, costs and any other relief the Tribunal deems reasonable and just.

The EPO argues that the complainant failed to lodge her request for review within with the three-month deadline set out in Article 109(2) of the Service Regulations. It requests the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. On 27 January 2014 the complainant's spouse, acting on her behalf, initiated the internal appeal procedure underlying this complaint by requesting a review, pursuant to Article 109 of the Service Regulations, of the decision not to promote her after the Promotion Board's session in October 2012. Her name was not on the list of staff members who were promoted, which was published on 30 January 2013. Her spouse lodged the request for review approximately one year after the list of promoted staff members was published. Article 109(1) and (2) of the Service Regulations applicable at the material time relevantly stated as follows:

> "(1) A request for review shall be compulsory prior to lodging an internal appeal [...]
>
> (2) It shall be submitted within a period of three months to the appointing authority which took the decision challenged. This period shall start to run on the date of publication, display or notification of the decision challenged. Where the request for review is against an implied decision of rejection within the meaning of Article 107, paragraph 3, it shall start to run on the date of expiry of the period for reply."

2. The President of the Office, who is the appointing authority, rejected the request for review on the basis, inter alia, that it was time-barred. The Appeals Committee unanimously reached the same conclusion in its opinion dated 3 December 2019. It recommended to the President to reject the complainant's internal appeal as manifestly irreceivable pursuant to its summary procedure provided in Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations, but to pay the complainant 650 euros in moral damages for undue delay in the internal appeal proceedings. In the impugned decision, dated 22 January 2020, the President accepted that recommendation. The complainant contests that aspect of the decision rejecting her appeal as manifestly irreceivable.

3. Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations applicable at the material time stated as follows:

> "(1) If the Appeals Committee considers an appeal to be manifestly irreceivable, it may decide to apply a summary procedure without any hearing.
>
> (2) An internal appeal may be considered to be manifestly irreceivable inter alia if it:
>
> (a) is not submitted by a person referred to in Article 106(1) of the Service Regulations or rightful claimant on his behalf;
>
> (b) does not challenge an act within the meaning of Article 108 of the Service Regulations;
>
> (c) is submitted outside the time limits foreseen in Article 110(1) of the Service Regulations;
>
> (d) challenges a decision having the authority of *res judicata* or a final decision within the meaning of Article 110(4) of the Service Regulations;
>
> (e) challenges a decision which should have been subject to the review procedure pursuant to Article 109(1) of the Service Regulations;
>
> (f) challenges a decision which cannot be challenged through the internal appeal procedure pursuant to Article 110(2) of the Service Regulations.
>
> (3) In such a case, the Appeals Committee may deliver an opinion limited to the receivability of the appeal."

4. In its opinion the Appeals Committee relevantly summarized the reasons for its recommendation as follows:

> "The Appeals Committee, unanimously considering the appeal to be manifestly irreceivable, decided to treat [it] in a summary procedure in accordance with Article 9(1) of [the Implementing Rules for Articles 106 to 113 of the Service Regulations].
>
> For an internal appeal to be admissible, an orderly review procedure in accordance with [Article] 109 [of the Service Regulations] has to be carried out. The [complainant], however, [lodged] her request for a management review outside the three-month time-limit.
>
> In the present case the [complainant] could not rely on new facts to re-open the time-limit for requesting a management review. [She] had been informed that her case would be submitted to the Promotion Board at its next possible session. Non-promotion is notified to the person concerned by omission of his or her name from the list of the staff members who have been promoted. No reasons are given in the promotion list to staff members who have not been promoted. In the [complainant]'s case the possibly erroneous character of the reasoning of the Promotion Board is therefore not material for her observance (or non-observance) of the time limit for submitting a request for a management review of the implicit decision of non-promotion taken in her regard. She could, for example, have requested the reasons for her non-promotion once the [...] promotion list had been published."

5. This passage shows that the Appeals Committee considered the internal appeal to be manifestly irreceivable because the request for review was lodged outside the time stipulated. Whilst Article 9(2)(c) of the Implementing Rules for Articles 106 to 113 of the Service Regulations expressly permitted the Appeals Committee to apply its summary procedure where an internal appeal was lodged out of time, it did not specifically permit it to apply that procedure where a request for review was lodged out of time. However, the bases for applying the summary procedure under Article 9(2) of the Implementing Rules are not exhaustive, as underlined by the words "inter alia". The Committee was not precluded from applying its summary procedure to the appeal as the same rationale that underlies applying the summary procedure where an internal appeal is lodged out of time (avoiding procedural futility) also underlies the rationale for applying the summary procedure where a request for review is lodged out of time.

6. In lodging the request for review, the complainant's spouse had acknowledged, on her behalf, that the request was out of time. He justified lodging it on 27 January 2014 on the basis of the 18 November

2013 accidental disclosure to him of an extract from the Promotion Board's October 2012 session's confidential report concerning its consideration of the complainant's promotion from grade B3 to B4 at the request of the Vice-President of DG4. In that request, the Vice-President asked that the matter be submitted for the Board to consider whether the complainant's promotion could have been recommended before 1 July 2008, the date on which she ceased active service due to invalidity. The report stated that, given the available record of the complainant's performance, her promotion could have been possible with effect from 1 December 2007, but on that date she was already on long term sick leave and had not returned to work and under Article 62 of the Service Regulations a promotion could not take effect during that period.

7. The EPO contends that the Appeals Committee correctly applied its summary procedure and recommended rejecting the internal appeal on arguments that may be summarized as follows: the complainant was specifically informed that the Promotion Board would have considered her promotion at its "earliest possible session", which was foreseen to have been in the autumn of 2012. Although her name did not appear in the list of promoted staff members published on 30 January 2013, by which she would have been made aware that she was not promoted in that exercise, she lodged her request to review that decision out of time on 27 January 2014, thereby failing to abide by the mandatory three-month time limit for doing so under Article 109(2) of the Service Regulations. Additionally, she demonstrated no mitigating circumstances to justify waiving her obligation to lodge her request for review within the time specified.

8. On the other hand, the complainant contends that the Appeals Committee wrongly applied the summary procedure and recommended the rejection of her internal appeal as manifestly irreceivable, on submissions which may be summarized as follows: she was not made aware that the Promotion Board would have considered her case in its October 2012 session. In his letter dated 28 September 2012, the Vice-President of DG4 informed her spouse that the matter would be submitted to the Promotion Board for consideration "[at] the earliest possible session" but did not inform him that the session would be convened in October 2012. Even if she knew that it would be convened at that time, she could not reasonably have suspected that the case would be considered in that

session. Given the date of the Vice-President's letter, it was highly improbable that the Board would have received the necessary supporting documents in time for that session. It was the accidental disclosure of an extract from the confidential report of the Promotion Board's October session revealing the unlawful reasons for denying her promotion that made her aware of a valid basis for contesting the decision not to promote her. In those circumstances, the Tribunal's case law permits the waiver of the stipulated time limits because that disclosure revealed a "new fact" of decisive importance of which she was not and could not have been prior aware, triggering her request for review. According to her, the EPO ignored the fundamental principle of equity in that, having disadvantaged her because she was sick and having concealed the evidence, it is not entitled to rely on the strict time limit for lodging her request for review.

There is no evidence that the EPO concealed the reasons for the complainant's non-promotion. The evidence is that it does not inform staff members of the reasons for their non-promotion.

9. Consistent principle has it that a complainant must comply with the time limits and the procedures, as set out in the organisation's internal rules and regulations and that, where a complainant does not comply with prescribed time limits for lodging a request for review, a grievance and/or an appeal, the complaint may be irreceivable for the complainant's failure to exhaust all internal means of redress in accordance with Article VII, paragraph 1, of the Tribunal's Statute (see, for example, Judgments 4103, consideration 1, and 4221, consideration 8).

It is noteworthy that, in Judgment 2187, the complainant contested, among other things, an individual decision not to promote her. Her name did not appear on the published list of staff members who were promoted in the subject exercise. She urged the Tribunal, on the basis of the principle of equity, to waive the stipulated time limit for lodging her internal appeal contesting her non-promotion. She also argued, in effect, that the posting of the list in which her name did not appear did not constitute a final notice that a decision had been taken and that the period within which her appeal had to be lodged could not begin to run until she was individually notified of the decision not to promote her. She argued that this approach was consistent with the Tribunal's case law and with the stipulation in the Service Regulations that an individual decision concerning a staff member "shall at once be communicated in

writing to the person concerned" and that any decision adversely affecting a person shall state the grounds on which it is based. In consideration 6, the Tribunal stated that an employee whose name does not appear on a list of promoted staff members is naturally entitled to challenge the implied decision to exclude her or him from that list. This accords with Article 109(2) of the Service Regulations. It further stated that, to grant employees the possibility of contesting such decisions without limit of time would mean, in effect, that decisions communicated to staff and published in an official document, not only with a view to informing employees of their promotion but also to enable those who consider themselves to have been wrongly excluded from the list to exercise their rights, could be challenged indefinitely. The Tribunal stated that the complainant raised arguments which may have excused her delay in appealing and which the EPO may have taken into account on the ground of equity, but that, while the Tribunal was sympathetic to her arguments, it did not consider them to provide sufficient grounds for rejecting the EPO's plea of irreceivability. There are aspects of Judgment 2187 which mirror the present case.

10. The case law recognizes that, in very limited circumstances, an exception may be made to the requirement of strict adherence to the relevant time limits. These include instances in which some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or where the staff member concerned by that decision is relying on facts or evidence of decisive importance of which she or he was not and could not have been aware before the decision was taken (see, for example, Judgments 3903, consideration 6, and 4118, consideration 4).

11. The Tribunal finds that the Vice-President's letter dated 28 September 2012, which informed the complainant's spouse that the matter concerning her promotion would be submitted to the Promotion Board for consideration "[at] the earliest possible session" and, additionally, Circular No. 246 of 11 January 2012, which informed EPO staff members that the Board was to meet during the autumn, sufficiently notified the complainant that her promotion would be considered during the October 2012 session. It is noteworthy that the complainant does not specifically assert that she was unaware of the publication of the list of staff members who were promoted on the Board's recommendations from its October 2012 session. Once the list was published, the

complainant could have contested the decision not to promote her and requested the reasons thereof. This renders untenable her plea that the time limits should be waived in the present case on the basis that the accidental disclosure of an extract from the Promotion Board's confidential report on 18 November 2013 constituted an unforeseeable "new fact" of decisive importance that justified lodging a request for review one year after the publication of the list. As in Judgment 2187, although the Tribunal is sympathetic to the complainant's arguments, it does not consider them to provide sufficient grounds for rejecting the plea of irreceivability entered by the EPO. In these premises, the complainant's claims concerning promotion must be rejected. Moreover, the Tribunal cannot order the EPO to retroactively promote the complainant with effect from 1 December 2007, as she claims (see, for example, Judgments 4377, consideration 2, and 4391, consideration 12).

12. In the foregoing premises, the complaint should be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 June 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ