

C. (Nos. 7 and 8)

v.

EPO

135th Session

Judgment No. 4632

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr P. C. against the European Patent Organisation (EPO) on 5 May 2017, the EPO's reply of 11 September 2017, the complainant's rejoinder of 23 October 2017 and the EPO's surrejoinder of 14 February 2018;

Considering the eighth complaint filed by Mr P. C. against the EPO on 19 May 2017, the EPO's reply of 11 September 2017, the complainant's rejoinder of 23 October 2017 and the EPO's surrejoinder of 14 February 2018;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant challenges the implied rejections of his requests for decision on the disciplinary proceedings initiated against him.

Facts relevant to this case may be found in Judgment 3958 on the complainant's third complaint and in Judgment 3960 on his fifth complaint – both delivered in public on 6 December 2017 –, as well as in Judgment 3961, on his sixth complaint, delivered in public on 24 January 2018. Suffice it to recall that the complainant, a member of an EPO Board of Appeal, was suspended from service in December 2014 pending an investigation into allegations of serious misconduct on

his part. In March 2015 the Administrative Council informed him that it had decided to initiate disciplinary proceedings against him and to continue his suspension on full remuneration until the end of the proceedings.

Between 25 June 2015 and 11 January 2016, the Administrative Council made three requests to the Enlarged Board of Appeal (EBA), under Article 23 of the European Patent Convention (EPC), to have the complainant removed as a member of the Board of Appeal. The requests were either withdrawn or rejected. On 14 June 2016 the EBA rejected the last request, which was referred to as case No. Art. 23 1/16, and so informed the parties on 23 June 2016. Two days earlier, on 21 June 2016, the complainant had submitted request for decision asking the Administrative Council to terminate the disciplinary proceedings initiated against him and to lift the suspension decision. The disciplinary proceedings against the complainant were listed as an item for information on the agenda for the Administrative Council's meeting of 29 and 30 June 2016, which was issued on 10 June 2016. Having received no response to his 21 June 2016 request for decision, on 24 November 2016 the complainant filed a request for review against its implied rejection. The Administrative Council held a meeting on 14 and 15 December 2016, but the complainant did not receive a substantive response from the Administrative Council concerning his request for review and the Communiqué issued by the Administrative Council subsequent to the meeting was silent concerning the disciplinary proceedings. On 5 May 2017 he filed his seventh complaint with the Tribunal, impugning the Administrative Council's implied rejection of his 24 November 2016 request for review. On the complaint form, he indicates 14 December 2016 as the date on which he notified the EPO of the claim for which he has received no express decision.

In the meantime, on 2 February 2017, the Administrative Council's secretariat had informed the complainant that several of his messages, including that of 24 November 2016, had been received. The Administrative Council was bound by deadlines set in the relevant provisions, such as Article 109(6) of the Service Regulations for permanent employees of the European Patent Office and Article 9 of

the Rules of Procedure, and was expected to duly respond within the applicable deadlines.

On 21 February 2017 the complainant requested a review of the implied rejection of his 21 June 2016 request for decision on disciplinary proceedings D1/15 asking in particular that the issue be placed on the agenda of the Administrative Council for a decision at its 151st meeting of 15 and 16 March 2017. The meeting took place but the complainant's request remained unanswered. Consequently, he filed his eighth complaint with the Tribunal on 19 May 2017 challenging the implied rejection of his request. On the complaint form, the complainant indicates 15 March 2017 as the date on which he notified the EPO of his unanswered claim.

On 13 December 2017 the Administrative Council took a decision on the disciplinary proceedings. It found that the complainant had engaged in misconduct and demoted him to the lowest grade and step in his job group. It noted that his suspension became ineffective following Judgments 3958 and 3960 and therefore withdrew the suspension decision. It rejected his request for payment of costs. It added that the complainant was under the authority of the President of the Boards of Appeal, who should take appropriate steps towards his reinstatement until the end of his mandate on 31 December 2017.

In his seventh complaint, the complainant asks the Tribunal to quash the implied rejection of his 24 November 2016 request for review, and in his eighth complaint the implied rejection of his 21 February 2017 request for review. In both complaints he asks the Tribunal to quash the originally contested decision of the Administrative Council, that is to say the implied rejection of his request for decision of 21 June 2016. He also asks the Tribunal to order the Administrative Council "to take appropriate corrective action in the matter", in particular to take a final decision in the disciplinary proceedings being conducted against him under case no. D1/15 such that: (i) the disciplinary proceedings "[are] to be terminated without prejudice" to him, (ii) the suspension imposed initially by decision CA/D 12/14, maintained on half salary by decision CA/D 14/15 and subsequently extended *sine die* by decision CA/D 18/15 in breach of the fundamental principle of non-retroactivity is to be lifted and the house ban imposed by the President of the Office on

3 December 2014 is to be rescinded, (iii) all withheld components of remuneration are to be paid with 5 per cent interest, (iv) he is reinstated with immediate effect and without restriction as a “technically qualified Member of the Boards of Appeal”, (v) a legally binding order is made to the effect that the investigation, the disciplinary proceedings and the procedures before the EBA with reference No. Art. 23 1/15, 23 2/15 and 23 1/16 constitute no obstacle for reappointment following the current appointment period which expires on 31 December 2017, and (vi) all documentation associated with the aforementioned proceedings and procedures are removed from his personal file. The complainant seeks an award of “moral/exemplary damages” in an amount of at least two years’ gross salary for the injury for failure to respect the duty of care and to adhere to the rule of law, in particular the failure of the Administrative Council to deal with the matter in an appropriate manner and within a reasonable time frame. He claims costs with respect to pursuing his appeal and the “preceding requests to the Administrative Council” as well as interest on all amounts granted pursuant hereto at the rate of 5 per cent per annum, from the date of his illegal suspension through the date all amounts awarded are fully paid. Lastly, he claims such other relief as the Tribunal determines to be just, necessary, appropriate and equitable.

The EPO asks the Tribunal to dismiss the seventh and eighth complaints as irreceivable for lack of a cause of action with respect to the challenge of the disciplinary proceedings and the suspension decision. Regarding the seventh complaint, it adds that the complainant has failed to exhaust internal means of redress. It submits that the complaints are otherwise unfounded. In its surrejoinders, the EPO argues that the complaints are now moot regarding the primary request. It asks the Tribunal to order the complainant to pay a portion of the defendant’s legal costs.

CONSIDERATIONS

1. The events leading to these proceedings are sufficiently described in the preceding summary of the facts. The complainant seeks the joinder of these two complaints filed on 5 May 2017 and on 19 May 2017 respectively and this is not opposed by the EPO. Accordingly, the two complaints are joined so that one judgment can be rendered.

The complainant seeks an oral hearing but the Tribunal is satisfied it can reasonably and fairly determine the issues by reference to the written submissions of the parties. Accordingly, the request for an oral hearing is rejected.

2. In its replies, the EPO raises a number of threshold issues concerning the receivability of the two complaints and whether the complainant has a cause of action. In a common rejoinder filed in both proceedings on 23 October 2017, the complainant sought to identify with precision what was the foundational administrative decision he was challenging in both proceedings, apparently in order to answer the EPO's submissions on these threshold issues. It was initially put in these terms in paragraph 106 of the rejoinder:

“Thus the Complainant is not challenging the disciplinary procedure *per se* or his suspension but rather the failure of the Administrative Council to issue a properly reasoned substantive decision on his wholly legitimate and well-founded Requests for the closure of the disciplinary procedure.”

This characterization of the decision is repeated in paragraphs 125 and 148 of the rejoinder.

3. The relevant request is described in paragraph 147 of the rejoinder as that made on 21 June 2016. It is a written request of 18 pages and the first section is headed “Request to terminate the disciplinary proceedings”. Under that heading are listed certain specific requests, the first of which was that the “disciplinary procedure D1/15 is to be terminated without prejudice to the [complainant]”. The request document then proceeded to discuss various matters of detail under a succession of headings, including “Current procedural situation placed in context”, under which, after recounting some of the history, the complainant said:

“it is respectfully suggested that the Administrative Council should now as a matter of urgency take careful stock of the factual and legal situation arising from these developments before deciding on any further action in the matter”. A later heading was: “The likely consequences of any further attempt to pursue proceedings under Article 23 (1) EPC”. Under that heading the complainant said: “[i]n view of the foregoing, it is respectfully submitted that due and proper account should be taken of the potential reputational risks to the Organisation should any attempts be made on the part of the Office Administration to persuade the Council to make any further attempt to pursue proceedings against me under Article 23 (1) EPC.” It is clear the complainant was seeking to persuade the EPO to abandon the disciplinary proceedings against him.

4. One of the threshold issues raised by the EPO is to the following effect. The complainant cannot challenge the disciplinary procedure or his suspension until there is actually an express final decision (or even an implicit final decision) by a competent authority. It observes that any of the complainant’s claims or requests made in respect of the lawfulness of the disciplinary proceedings or the suspension decision are irreceivable as the complainant would otherwise be allowed to contest the disciplinary procedure irrespective of whether it had reached its end. The EPO cites Judgments 1363, consideration 22, and 3198, consideration 13. This legal proposition is correct, and its rationale was explained in Judgment 3961, consideration 4 (another case concerning the complainant):

“[...] once the ongoing disciplinary proceedings against the complainant have concluded and a final decision within the meaning of Article VII of the Statute of the Tribunal has been delivered, the complainant may then challenge that decision and any part of the proceedings. In the meantime, in the absence of a final challengeable decision, this complaint is premature. Consistent case law holds that procedures may include many steps which lead to a final, impugnable decision, but those steps cannot be challenged separately. To allow otherwise would open procedures to a senseless and paralysing number of individual appeals that would serve no useful purpose (see Judgments 3876, under 5, 3700, under 14, 3433, under 9, and 3512, under 3).”

5. The complainant's request did not proceed on the premise that there had been a final decision on the disciplinary case brought against him. Rather it was to terminate prematurely (the complainant would say appropriately) the disciplinary proceedings. This was only a step in the process and the complainant has no cause of action to challenge its rejection even if only implicitly. Accordingly, his two complaints are irreceivable and should be dismissed.

6. The EPO seeks to recover some of its legal costs from the complainant. Judgment 3961, cited earlier in these reasons, is relevant in two respects. Firstly, there is a discussion on when costs may be awarded against a complainant, which includes circumstances where the complaint is vexatious (see considerations 6 and 7). Secondly, the Tribunal's reasoning should have made it clear that these complaints had no real prospects of succeeding. Judgment 3961 was delivered in public on 24 January 2018. These complaints were filed in May 2017. Had these complaints been filed after Judgment 3961 had been delivered, there would be a comparatively compelling case for requiring the complainant to pay some or all of the EPO's legal costs of these proceedings. But they were not. Accordingly, the EPO's counterclaim for costs is rejected.

DECISION

For the above reasons,

The complaints are dismissed, as is the EPO's counterclaim for costs.

In witness of this judgment, adopted on 20 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ