Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

C. (No. 8) and d. l. T. (No. 25)

v.

EPO

137th Session **Judgment No. 4797**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr T. C. (his eighth) and Mr D. d. l. T. (his twenty-fifth) against the European Patent Organisation (EPO) on 13 July 2019 and corrected on 27 November, the EPO's single reply of 16 March 2020, the complainants' rejoinder of 19 August 2020 and the EPO's surrejoinder of 7 December 2020;

Considering the letter of 12 January 2023 by which the EPO informed the Registry of the Tribunal that it had paid 100 euros in moral damages to the complainants for the irregular composition of the Appeals Committee, as was done in Judgment 4550;

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

Having examined the written submissions and disallowed the applications for hearings;

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

The complainants challenge the modifications made to the procedure for examining patent applications and contest the validity of the internal appeal proceedings.

The complainants were examiners at the European Patent Office, the secretariat of the EPO, when the EPO issued the Practice and Procedure Notice (PPN) 03/11 ("the Notice") on 15 March 2011. The Notice modified the procedure for examining patent applications. The

complainants contested the Notice on the ground that the General Advisory Committee (GAC) was not consulted in breach of Article 38(3) of the Service Regulations for permanent employees of the European Patent Office. They initiated the internal appeal procedure together: Mr C. in his capacity as a member of the Staff Committee, and Mr d. l. T. in his capacity as a GAC member and an alternate Staff Committee member.

Pursuant to Judgments 3694 and 3785 concerning the composition of the Appeals Committee, the President of the Office withdrew the decision of 16 June 2016 by which the complainants' appeal was rejected as manifestly irreceivable. The complainants were informed in March 2017 that the matter was remitted to the Appeals Committee for a new examination. On 26 September 2018, they were notified that the President of the Office had informed the Appeals Committee that the appeal was referred back for a new examination by the new Appeals Committee in accordance with Articles 106 to 113 of the Service Regulations and the corresponding Implementing Rules as amended by decision CA/D 7/17. They were also informed that the "presiding member" of the panel, who was examining their appeal, had proposed to the Appeals Committee to apply the summary procedure. In October 2018, the complainants objected to the referral of their appeal to the Appeals Committee and raised objections concerning the independence and impartiality of all members. They argued in particular that the said members had accepted instructions from the President, in violation of Article 112(1) of the Service Regulations, regarding the reopening of the appeal procedure.

The Appeals Committee deliberated in January 2019 and issued its reasoned opinion on 25 February 2019. It unanimously recommended dismissing the appeal as manifestly irreceivable pursuant to the summary procedure, and awarding each complainant 500 euros for the length of the procedure. It found that Mr C. lacked a cause of action as he was not a member of the GAC. He was irreceivable to claim a breach of his rights based on the failure to consult the GAC. It found that Mr d. l. T. had no legitimate interest in pursuing his appeal given that the Tribunal had delivered Judgment 3053 on a complaint of his, the

rationale of which was applicable to the present appeal. In that judgment, the Tribunal found that proposals or decisions relating to the law or procedures applicable to patent applications did not directly affect the relationship of staff members with the Organisation and thus Article 38(3) of the Service Regulations on consultation was not engaged. The Appeals Committee also concluded that neither of them had a cause of action as they could not validly claim to have been individually and adversely affected by the Notice as it merely set out working instructions in the framework of patent examinations and did not affect the employees' relationship with the Office. The Appeals Committee further held that the requests to submit the Notice to the GAC for consultation before its entry into force or to suspend its effect at least until such consultation took place were moot as well as the claim to annul the Notice 03/11 since the Notice was no longer valid. It added that, pursuant to the delivery of Judgment 3053 on his first complaint, Mr d. l. T. no longer had a legitimate interest to pursue the proceedings.

By a letter of 15 April 2019, the Vice-President of Directorate-General 4, acting on delegation of authority from the President, informed each complainant that their appeal was summarily dismissed for the reasons it stated. Regarding the recommendation to award them moral damages for the length of the internal appeal procedure, she noted that, according to the Tribunal's case law, staff representatives acting in that capacity were not entitled to moral damages. Hence, the moral damages awarded would be credited to the budgetary line of the staff committees related to training and duty travel. That is the decision they each impugn before the Tribunal.

The complainants ask the Tribunal to declare decision CA/D 7/17 and the "whole appeals procedure" null and void, to grant them moral damages for burdening them unnecessarily with an invalid appeal procedure, which negatively affected their dignity, and placed them in a "helpless situation". They also seek moral damages for undue delay asking the Tribunal to order that the 500 euros already paid by the EPO in moral damages for the length of the internal procedure to the staff representation be transferred to the complainants' bank account, or to order that the EPO allows the staff representation to create a budget

solely under its control, or to order the transfer of the payment to the bank account of the central bureau of the EPO Staff Union. In addition, they seek an award of interest at the rate of 2 per cent per month of delay on any payment granted. Lastly, they claim costs.

On an auxiliary basis, the complainants ask the Tribunal to send the case back to the EPO so that the Appeals Committee examine their appeal, in a balanced composition in accordance with Judgments 3694, consideration 6, and 3785, consideration 6. They also ask the Tribunal to order that the appeal be examined *ab initio* and that the panel does not include persons who took part in the procedure so far as member of the Appeals Committee. On a further auxiliary basis, they ask the Tribunal to annul *ab initio* the Notice, and the related instructions in the Internal Guidelines for Examination and Patent Cooperation Treaty.

The EPO asks the Tribunal to dismiss the complaints as irreceivable *ratione materiae* because the Tribunal is not competent to examine patent law. Subsidiarily, it asks the Tribunal to find that the complaints are unfounded. The claims made in relation to the moral damages that have already been awarded amount to an injunction and should be rejected as irreceivable. The EPO further asks the Tribunal to reject the claim for costs stressing that the complainants provide no evidence of the costs incurred. It makes a counterclaim for costs considering that the complaints are vexatious.

CONSIDERATIONS

1. The two complainants, Mr C. and Mr d. l. T., were members of staff of the EPO at relevant times. On 13 July 2019, each filed a complaint with the Tribunal, each impugning a decision of the Vice-President of Directorate-General 4 (exercising powers delegated by the President of the Office) of 15 April 2019 dismissing an internal appeal they had lodged. It is unnecessary to refer to all the details of the course of events preceding the consideration of each appeal by the Appeals Committee (which reported on 25 February 2019) which founded the two decisions of the Vice-President on 15 April 2019. Suffice it to note that the genesis of each of their grievances was the issuing of

the Practice and Procedure Notice 03/11 (PPN 03/11) ("the Notice") on 15 March 2011. Each complaint raises fundamentally the same questions of law and arises from the same facts. Accordingly, the complaints should be joined so one judgment can be rendered.

2. The complainants' grievance was initially that before the adoption of the Notice, it ought to have been, but was not, submitted for consideration by the then General Advisory Committee (GAC) (it was subsequently superseded by the General Consultative Committee). This arose out of correspondence in early 2011. The Notice was issued on 15 March 2011. By letter dated 31 March 2011, the complainants jointly wrote to the President of the Office. They did so in their capacity as staff committee member or alternate member though additionally, for the second complainant, as a member of the GAC. The letter commenced:

> "We became aware of the [Notice]. This notice is supposed to be applied by all Search Divisions from its publication date, but to our surprise, its content has never [been] submitted to the GAC for opinion."

The letter later continued:

> "For the same reasons explained in this former case [a reference to another earlier case], and because the introduction of the [Notice] affects the work of the members of Search Divisions, this notice should have been submitted to the GAC, so that at least the legal consultation requirements enshrined from the Service Regulations were fulfilled.
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> For all of the above, we are impelled to respectfully request the submission to the GAC of the [Notice] before its entry into force as well as the provisional suspension of the [Notice] and its effects at least until such a consultation [has taken] place. In addition, we further request the complete annulment of the [Notice].
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> Finally, we expect that our claims can be given a positive consideration, and we kindly request to keep us promptly informed of the attention given to them. Only in the case that our claims were not to be granted, that this letter is to be considered as introducing an internal appeal according to the Articles 106 to 108 of the Service Regulations."

3. The President's response was contained in a letter of 26 May 2011 written on his behalf. The second and following paragraphs of the letter said:

> "After an initial examination of the case the President considers that your request cannot be met. Article 38(3) [of the Service Regulations for permanent employees of the Office] provides for the consultation of the General Advisory Committee for any proposal to amend the Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules, and any proposal which concern the whole or part of the staff to whom the Service Regulations apply.
>
> Practice and Procedures Notices (PPN) are working instruments for examiners which do not introduce any change in the conditions of employment. In particular, [the Notice] is an extension of the practice enshrined in the current Internal Instructions for Search [...] PPNs do not fall under any of the topics provided for in Article 38(3) [of the Service Regulations].
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> [...]
>
> In view of the above [...] your letter has been registered as an internal appeal [...] and forwarded to the Appeals Committee [...]"

4. It has been desirable to set out the subject matter of the grievance as it was initially formulated for submission to the Appeals Committee. It was a very narrowly framed legal issue susceptible of a ready answer with no factual issues of substance in dispute. However, as it has transpired, in the Tribunal the complainants seek to raise a myriad of detailed legal arguments concerning the consideration of their grievance and, in particular, the way it was dealt with by the Appeals Committee including the composition of the Committee. Indeed, in the Tribunal, the complainants seek to challenge the lawfulness of changes made to the system of appeals within the EPO in the period following the submission of their grievance to the appeal process in May 2011.

5. The Appeals Committee decided that the appeals of each of the complainants were irreceivable. That was because, in relation to Mr C., he was not a member of the GAC and Mr d. l. T., though a member of the GAC, had no legitimate interest in pursuing his appeal, effectively because the matter about which the GAC was not consulted was not comprehended by Article 38(3) of the Service Regulations. The conclusion about Mr C. is correct but not in relation to Mr d. l. T.. As the Tribunal observed in Judgment 3291, consideration 7:

> "Bypassing the GAC constituted an error of law regarding Article 38(3) of the Service Regulations; that error of law being enough to vitiate the decision. The complainant was considered to have a cause of action because he was a member of the GAC, representing the GAC's interests."

Mr d. l. T. had and has an interest in establishing, as it transpires he does, that the body on which he was a member was not, but should have been, consulted. But for convenience the Tribunal will continue to refer, but only in a descriptive sense, to both complainants notwithstanding Mr C.'s lack of standing.

6. Thus, a convenient starting point, in this case, is to focus on the question of whether the original grievance, that the Notice should have been submitted for consideration by the GAC, is founded. Article 38(3) of the Service Regulations relevantly specified, at the time in question, the matters in respect of which a reasoned opinion of the GAC should be called for and given. It provided inter alia:

> "any proposal to amend [the] Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom [the] Service Regulations apply or the recipients of pensions".

7. The scope of this provision was considered by the Tribunal in a broadly analogous factual situation. In Judgment 3053, delivered in public on 8 February 2012, the Tribunal considered the status, for the purposes of Article 38(3) of the Service Regulations, of amendments to the Implementing Regulations to the European Patent Convention which, the complainant contended, altered the responsibilities of the search and examining divisions within the EPO. The Tribunal reviewed several earlier judgments addressing similar issues, namely Judgments 1488, 2196, 2874 and 2875. The Tribunal concluded that the subject matter of the grievance was not comprehended by Article 38(3). In consideration 10, it said:

> "What the expression ['concerns [...] staff to whom [the] Service Regulations apply'] directs is that the proposal or decision in question should in some way affect the relationship of staff members with the Organisation, whether in terms of the work to be performed, the way in which it is to be performed, the method by which it is to be evaluated or the like. Proposals and/or

> decisions relating to the law and/or procedures applicable to patent applications do not directly affect that relationship although, as recognised in Judgment 2874, decisions or proposals as to the implementation of changes to the law and/or procedures may well do so."

8. In the present case the Notice, as described by the Appeals Committee:

> "established the 'coding of the future Examining Division at search and/or PCT Chapter II stages'. It merely set working instructions in the framework of the patent examination and did not affect the employees' relationship with the Office."

9. While it is true the Notice concerns the procedures applicable to patent applications, it nonetheless directed, as the Tribunal apprehends it, that the primary examiner identifies and, it appears, records "the three names of the members of the future Examining Division" and "consult [with] the other future members, in order to ensure that the others share his preliminary opinion". At least in this respect, the Notice concerned the work to be performed and the way it was performed as comprehended by the observations of the Tribunal in Judgment 3053 quoted above. Accordingly, the GAC should, on a possible very wide reading of Article 38(3) of the Service Regulations, have been consulted. While the complainants, in their brief, seek to demonstrate that this simple and straightforward instruction had profound consequences and violated fundamental norms, the Tribunal is not at all persuaded that this is so.

10. Cases arise in the Tribunal where the defendant organisation has failed to consult a person or a body, which should have been consulted under the relevant rules, and the Tribunal may make orders which require that consultation take place and the Tribunal may also set aside the decision made without consultation (see, for example, Judgment 4230). But setting aside the decision is not an inevitable outcome following a conclusion that consultation should have, but did not, take place. As explained by the Tribunal in Judgment 3883, considerations 22 and 23:

> "22. However, more important, is the question of what flows from this unlawful conduct [a failure to consult]. In Judgment 3736, just cited, which concerned deductions from pension payments to individual former staff members based on a general decision made without appropriate consultation, the Tribunal concluded that the individual decisions to deduct the payments should be set aside and the organisation ordered to reimburse the complainants the amounts deducted.
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> 23. However ultimately what relief can be granted by the Tribunal is governed by Article VIII of the Tribunal's Statute that confers and defines its jurisdiction. That provision clearly contemplates that if a complainant establishes that a decision was unlawfully made, the decision can be rescinded. Equally, however, it contemplates that if the rescission of a decision is not 'advisable', then the Tribunal 'shall award the complainant compensation for the injury caused to her or him'. Plainly enough following this latter course depends on the opinion and assessment of the Tribunal in the exercise of what, in substance, is a discretionary power (see Judgment 1419, consideration 24)."

11. In the present case, the failure to consult the GAC occurred over a decade ago. Indeed, as noted earlier, the GAC was abolished in 2014, almost a decade ago. It cannot now be consulted. There is a suggestion in the pleas of both the complainants and the EPO that the Notice is no longer in force. If so, this would be relevant and militate strongly against granting relief based on the failure to consult. But even if it is in force, it is not apparent to the Tribunal that the Notice's continued implementation would cause any real prejudice or injury to the complainants or the staff of the Office more generally. In these circumstances, it is clearly not advisable to rescind the decision adopting and promulgating the Notice notwithstanding the failure to consult the GAC. However, while Article VIII of the Tribunal's Statute contemplates the awarding of compensation there should be none in the present case. That is because a staff representative, bringing proceedings in that capacity, is not entitled to an award of moral damages (see Judgment 4575, consideration 9).

12. The complainants have succeeded in establishing the legal point they have agitated for over a decade, but as no relief should be granted, the complaints should be dismissed. No costs order should be made in favour of Mr d. l. T. as his pleas in the proceedings before the

Tribunal paid scant regard to the central issue concerning the obligation to consult the GAC. The EPO's counterclaim for costs should be rejected.

13. It is unnecessary to address the myriad of detailed legal arguments concerning the earlier consideration of their grievance and, in particular, the way it was dealt with by the Appeals Committee, including the composition of the Committee, and to address their challenge to the lawfulness of changes made to the system of appeals within the EPO in the period following the submission of their grievance to the appeal process in May 2011. Indeed, mostly the issues concerning the changes to the system and the transitional measures adopted have already been addressed in judgments of this Tribunal.

14. The complaints are either irreceivable or unfounded and should be dismissed.

DECISION

For the above reasons,

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

In witness of this judgment, adopted on 26 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER