

E. (Nos. 15 and 16)

v.

EPO

(Application for review)

136th Session

Judgment No. 4730

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for review of Judgment 4417 filed by Ms M. E. on 10 February 2022, the reply of the European Patent Organisation (EPO) of 18 July 2022, the complainant's rejoinder of 4 October 2022 and the EPO's surrejoinder of 17 January 2023;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal and Articles 6, paragraph 5, and 7 of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. This is an application for the review of Judgment 4417, delivered in public on 7 July 2021, on the complainant's fifteenth and sixteenth complaints. The facts underlying those complaints are summarised in that judgment. Suffice it to recall that in that case, the complainant had contested before the Tribunal the instructions she received regarding the issuance of patent applications. In Judgment 4417, the Tribunal rejected her complaint on the ground that the EPO was correct to decide that her appeal was manifestly irreceivable. The Tribunal recalled, referring to Judgment 3053, considerations 10 and 11, that decisions with respect to the law and/or procedures applicable to patent applications do not adversely affect staff members and, thus, cannot be

the subject of an internal appeal. In short, such decisions are not appealable and do not create a cause of action. The Tribunal also recalled that proposals and/or decisions relating to the law and/or procedures applicable to patent applications do not directly affect the relationship of staff members with the Organisation, 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.

2. The complainant states that the present application is concerned with the Tribunal's reasoning and decision on her sixteenth complaint. Her director had initially instructed her to issue a communication under Article 94(3) of the European Patent Convention (EPC) inviting the patent applicant to provide further observations and to amend the said patent application. He explained how she should proceed when she asked for clarifications. The complainant subsequently requested the President of the European Patent Office, the EPO's secretariat, to stop any interference with the responsibilities vested under the EPC in the examining division related to the subject patent application, as such instructions impaired her independence as a patent examiner. Ultimately, in her sixteenth complaint, the complainant impugned the decision, dated 15 May 2019, in which the Principal Director of Human Resources, by delegation of authority from the President, accepted the Appeals Committee's unanimous recommendations to reject the complainant's internal appeals as manifestly irreceivable on the basis that they were not directed against appealable decisions under Article 108 of the Service Regulations for permanent employees of the European Patent Office as the complainant had not demonstrated that the subject working instructions adversely affected her relationship with the EPO and her terms of appointment. The Appeals Committee further unanimously concluded, relying on consideration 11 of Judgment 3053, that working instructions issued by the complainant's hierarchical superiors regarding internal working procedures concerning the subject patent applications were managerial decisions relating to administrative procedure as she had failed to show that her rights stemming from the terms of her employment or her reputation were negatively affected by the instructions. In effect, the Appeals Committee concluded that the appeals were

manifestly irreceivable pursuant to Article 9(2)(b) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, which stated that an internal appeal may be considered to be manifestly irreceivable if it does not challenge an individual decision within the meaning of Article 108 of the Service Regulations. Endorsing this reasoning, in considerations 7 and 8 of Judgment 4417, the Tribunal dismissed the complaint.

3. For a considerable time, the process of review of the Tribunal's judgments was not expressly recognised in the Tribunal's Statute, but it now is in Article VI by an amendment made by the International Labour Conference on 7 June 2016. However, the settled principles governing the process of review have been developed by the Tribunal over time and before the amendment of the Statute in 2016 and continue to apply. According to those principles, the Tribunal's judgments are final and without appeal and have *res judicata* authority. They may be reviewed only in exceptional circumstances and on strictly limited grounds. The only admissible grounds of review are failure to take account of material facts, a material error (in other words, a mistaken finding of fact involving no exercise of judgement), an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover, these pleas must be likely to have a bearing on the outcome of the case. On the other hand, pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea afford no grounds for review (see, for example, Judgment 4338, consideration 2, and the judgments referred to therein).

4. Advancing three grounds of review, the complainant contends that, in Judgment 4417, the Tribunal failed to take into account material facts and committed material errors involving no exercise of judgement which resulted in its wrongful dismissal of her sixteenth complaint, which errors had a bearing on the outcome of that complaint.

5. In one ground of review, the complainant submits that the Tribunal failed to take into account material facts and committed a material error because it did not consider that in an email of 11 September 2014 her director had, among other things, referred to possible disciplinary consequences if she failed to implement his instruction and insisted that she carried it out without delay, as well as the fact that she was subsequently reprimanded by a letter of 27 March 2015 for alleged obstructive behaviour. It is noteworthy, however, that the reprimand was withdrawn late January 2018 before the complainant filed her sixteenth complaint on 12 August 2019. Noting the withdrawal of the reprimand and the fact that it was already the subject matter of a distinct complaint underlying Judgment 4392, the EPO submits, correctly, that the Tribunal properly refrained from referring to it in Judgment 4417. In Judgment 4392, the Tribunal considered the reprimand was without object as it had been withdrawn. In any event, the reprimand and the circumstances that led to it were not material to the central issue determined on the complainant's sixteenth complaint, which was whether her director unlawfully instructed her to issue the communication to the patent applicant. It had no bearing on the assessment of her sixteenth complaint or the decision. This ground of review is therefore unfounded.

6. In a second ground of review, the complainant submits that the Tribunal committed a material error by failing to take into account a material fact because it failed to fully investigate what role and function directors have in the examination of patent applications and patent examination procedure, and, if so, what competencies it comprises. She insists that it was only after such a clarification the Tribunal could have decided if the matter merely concerned patent law and was thus inadmissible rather than dismissing her complaint for lack of jurisdiction, which would have had a bearing on the case. She states that the Tribunal is now obliged to thoroughly examine whether her director had a role in patent examination procedure, and, if he did, whether his instruction to her to issue the communication to the patent applicant "took place in the realm of patent or civil service law". She recalls that she had submitted that the EPC, especially Articles 18 and 94(3), gives

no responsibility to directors in the examination of patent applications because the competent body is the examining division and no provision in the rules provides for examiners to receive instructions from line managers in the grant or refusal of specific patent applications.

7. This second ground of review is unfounded. It cannot be maintained that the Tribunal failed to take account of the issue concerning the role of the complainant's director. It was reflected in the factual matrix and reiterated in considerations 1, 2, 3 and 4 of Judgment 4417. Having referred to it, the Tribunal concluded that the complaint was manifestly irreceivable, on the basis on which the Appeals Committee did so as stated in consideration 2 of this judgment, because working instructions issued by the complainant's hierarchical superiors regarding internal working procedures concerning the subject patent applications were managerial decisions relating to administrative procedure.

8. In a third ground of review, the complainant submits that the Tribunal committed a material error because it stated that the director's instruction to issue the communication to the patent applicant was given to her and other members of the examining division who were not even present at the EPO when the instruction was given. She states that having overlooked the fact that the instruction was given to her alone, and not to the whole examining division who had considered the patent application, the Tribunal committed a material error as it failed to discuss the consequences of that fact. This ground of review is also unfounded.

9. In considerations 3 and 4 of Judgment 4417, the Tribunal referred to a "working instruction issued to her and the other members of the examining division". The Tribunal relevantly stated as follows in these considerations:

"3. In the internal appeal underlying her sixteenth complaint, the complainant also contested her director's working instruction issued to her and the other members of the examining division after a panel of that division refused to grant a patent application in April 2014. She contested the instruction to withdraw the refusal in essentially similar terms to those

on which she contested the instructions in her internal appeal underlying her fifteenth complaint. [...]

4. In each of these complaints the complainant centrally contends that the working instructions which two of her directors separately issued to her and other members of the examining division (confirmed by the superior officials) were *ultra vires*; involved an abuse of power; compromised the independence of examiners and interfered with the responsibilities which the EPC directly vested in her as an examiner and member of the examining division. Inasmuch as these complaints raise the same central issue for determination, the Tribunal joins them to be the subject of a single judgment.”

10. In the first place, the Tribunal made the statements concerning the issue of working instructions to the complainant and other members of the examining division only in the context of determining whether to join her fifteenth and sixteenth complaints, however mentioning her central claims in those complaints that the issued instructions were unlawful. There was no other reference in the judgment to instructions having been issued to other members of the division. There was certainly no such statement in assessing her central claim and arriving at the decision that her sixteenth complaint was manifestly irreceivable. The mere reference to the instructions being issued to the complainant and other members of the examining division was not material to the Tribunal’s consideration of the central issue in the complaint: whether the subject instruction was lawful.

11. As the complainant has not established a ground for review, her application for review will be dismissed.

DECISION

For the above reasons,

The application for review is dismissed.

In witness of this judgment, adopted on 23 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

DRAŽEN PETROVIĆ