

A. S. (No. 13) and others

v.

EPO

129th Session

Judgment No. 4255

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. A. S. (his thirteenth), Mr L. P. (his twenty-third) and Mr A. R. P. R. (his ninth) against the European Patent Organisation (EPO) on 6 January 2016, the EPO's single reply of 19 September, the complainants' rejoinder of 20 December 2016, the EPO's surrejoinder of 10 April 2017, the complainants' further submissions of 4 May and the EPO's final comments thereon of 4 August 2017;

Considering the complaints filed by Mr F. B. and Mr L. P. (his nineteenth) against the EPO on 21 January 2015, the EPO's single reply of 1 June, the complainants' rejoinder of 4 September, corrected on 9 September, the EPO's surrejoinder of 18 December 2015, the complainants' further submissions of 24 March 2016, the EPO's comments thereon of 30 June, the complainants' further submissions of 15 August and the EPO's final comments of 4 October 2016;

Considering the complaints filed by Mr D. d. I. T. (his fourth) and Mr W. M. (his fifth) against the EPO on 14 September 2012, the EPO's single reply of 8 March 2013, the complainants' rejoinder of 12 April and the EPO's surrejoinder of 22 July 2013;

Considering the complaints filed by Mr D. d. I. T. (his sixth) and Mr W. M. (his eighth) against the EPO on 12 June 2013, corrected on 19 August 2013, the EPO's single reply of 10 April 2014, confined to the issue of receivability, the complainants' rejoinder of 14 May and the EPO's surrejoinder of 21 August 2014;

Considering the complaints filed by Mr D. d. I. T. (his eighth) and Mr W. M. (his eleventh) against the EPO on 28 February 2014, corrected on 11 April 2014, the EPO's single reply of 11 September 2015, confined to the issue of receivability, the complainants' rejoinder of 9 December 2015 and the EPO's surrejoinder of 16 March 2016;

Considering the complaints filed by Mr D. d. I. T. (his ninth) and Mr W. M. (his twelfth) against the EPO on 11 March 2014, corrected on 11 April 2014, the EPO's single reply of 31 August 2015, confined to the issue of receivability, the complainants' rejoinder of 9 December 2015 and the EPO's surrejoinder of 21 March 2016;

Considering the complaint filed by Mr A. J. d. M. against the EPO on 1 February 2016, corrected on 21 July, the EPO's reply of 31 October, the complainant's rejoinder of 9 December 2016 and the EPO's surrejoinder of 20 March 2017;

Considering the complaints filed by Ms J. D., Ms L. D. (her second), Mr R. A. E. and Ms S. H. against the EPO on 17 June 2013, the EPO's single reply of 8 October, the complainants' rejoinder of 11 November 2013 and the EPO's surrejoinder of 13 February 2014;

Considering the second complaint filed by Ms G. D.-H. against the EPO on 15 September 2015, corrected on 7 April 2016, the EPO's reply of 18 September 2016, the complainant's rejoinder of 9 January 2017, corrected on 30 January, and the EPO's surrejoinder of 9 May 2017;

Considering the third complaint filed by Mr A. D. against the EPO on 29 January 2016, the EPO's reply of 19 September, the complainant's rejoinder of 29 October 2016 and the EPO's surrejoinder of 2 February 2017;

Considering the complaint filed by Mr P. E. against the EPO on 15 September 2015, corrected on 7 April 2016, the EPO's reply of

19 September 2016, the complainant's rejoinder of 9 January 2017, corrected on 31 January, and the EPO's surrejoinder of 10 May 2017;

Considering the tenth complaint filed by Mr R. W. G. against the EPO on 22 January 2015, corrected on 26 February, the EPO's reply of 22 June and the email of 25 September 2015 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering the eleventh complaint filed by Mr R. W. G. against the EPO on 16 December 2015, corrected on 9 July 2016, the EPO's reply of 28 October 2016, the complainant's rejoinder of 5 January 2017 and the EPO's surrejoinder of 12 April 2017;

Considering the twenty-second complaint filed by Ms E. H. against the EPO on 15 January 2015, the EPO's reply of 2 June, the complainant's rejoinder of 23 June, corrected on 3 August, and the EPO's surrejoinder of 16 November 2015;

Considering the eighth complaint filed by Ms A. D. E. H. against the EPO on 19 December 2015, corrected on 11 July 2016, the EPO's reply of 26 October 2016, the complainant's rejoinder of 5 January 2017 and the EPO's surrejoinder of 12 April 2017;

Considering the complaints filed by Mr W. H. H. (his twelfth), Mr D. d. I. T. (his eleventh) and Mr L. R. (his fourteenth) against the EPO on 13 January 2015, the EPO's single reply of 4 May, the complainants' rejoinder of 16 July and the EPO's surrejoinder of 29 October 2015;

Considering the thirteenth complaint filed by Mr W. H. H. against the EPO on 22 January 2015, corrected on 3 March, the EPO's reply of 22 June, the complainant's rejoinder of 18 September 2015, corrected on 12 February 2016, and the EPO's surrejoinder of 27 June 2016;

Considering the eighteenth complaint filed by Mr W. H. H. against the EPO on 21 December 2015, corrected on 11 July 2016, the EPO's reply of 27 October 2016, the complainant's rejoinder of 5 January 2017 and the EPO's surrejoinder of 12 April 2017;

Considering the sixteenth complaint filed by Mr A. C. K. against the EPO on 24 September 2015, corrected on 20 January 2016, the

EPO's reply of 12 August, the complainant's rejoinder of 11 October 2016 and the EPO's surrejoinder of 11 January 2017;

Considering the sixth complaint filed by Mr M. K. against the EPO on 22 January 2015, the EPO's reply of 2 June, the complainant's rejoinder of 21 September and the EPO's surrejoinder of 18 December 2015;

Considering the second complaint filed by Mr M. L. against the EPO on 13 September 2014, the EPO's reply of 28 September 2015, the complainant's rejoinder of 3 November 2015 and the EPO's surrejoinder of 1 February 2016;

Considering the complaint filed by Mr S. A. M. against the EPO on 27 January 2016, corrected on 16 July, and the EPO's reply of 2 November 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the complaint filed by Mr J. N. M. M. against the EPO on 21 September 2015, corrected on 7 April 2016, and the EPO's reply of 20 September 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the complaints filed by Mr W. M. (his seventh), Mr J. J. M., Ms S. R. (her fourth) and Mr J. S. against the EPO on 25 April 2013, corrected on 29 May 2013, the EPO's single reply of 27 August 2015, the complainants' rejoinder of 30 November 2015 and the EPO's surrejoinder of 4 March 2016;

Considering the second complaint filed by Mr M. M. against the EPO on 22 January 2016, corrected on 5 July, the EPO's reply of 2 November 2016, the complainant's rejoinder of 13 January 2017 and the EPO's surrejoinder of 19 April 2017;

Considering the complaint filed by Ms R. M. against the EPO on 23 January 2016, corrected on 23 July, the EPO's reply of 2 November 2016, the complainant's rejoinder of 14 January 2017 and the EPO's surrejoinder of 19 April 2017;

Considering the complaint filed by Mr G. R. A. P. against the EPO on 27 August 2015, corrected on 1 July 2016, and the EPO's reply of

20 October 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the third complaint filed by Mr G. P. against the EPO on 30 July 2015, corrected on 20 April 2016, and the EPO's reply of 20 September 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the complaint filed by Ms S. M. P. against the EPO on 10 September 2015, corrected on 7 April 2016, and the EPO's reply of 20 September 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the thirteenth complaint filed by Mr L. P. against the EPO on 12 June 2013, corrected on 10 July 2013, the EPO's reply of 7 March 2014, confined to the issue of receivability, the complainant's rejoinder of 23 May, the EPO's surrejoinder of 9 September, the complainant's further submissions of 18 October 2014 and the EPO's final comments thereon of 16 February 2015;

Considering the seventh complaint filed by Mr A. R. P. R. against the EPO on 31 March 2015, the EPO's reply of 23 July, the complainant's rejoinder of 28 October 2015 and the EPO's surrejoinder of 15 February 2016;

Considering the complaint filed by Mr M. S. against the EPO on 19 January 2016, corrected on 2 July, the EPO's reply of 2 November 2016, the complainant's rejoinder of 14 January 2017 and the EPO's surrejoinder of 13 April 2017;

Considering the twelfth complaint filed by Mr H. S. against the EPO on 16 September 2015, corrected on 7 April 2016, the EPO's reply of 19 September, the complainant's rejoinder of 23 December 2016, corrected on 11 January 2017, and the EPO's surrejoinder of 20 April 2017;

Considering the complaint filed by Mr A. S. against the EPO on 21 August 2015, corrected on 14 December 2015, and the EPO's reply of 11 July 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the second complaint filed by Mr A. S. against the EPO on 21 August 2015, corrected on 14 December 2015, and the EPO's reply of 11 July 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the third complaint filed by Mr A. S. against the EPO on 21 August 2015, corrected on 14 December 2015, and the EPO's reply of 12 August 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the fourth complaint by Mr A. S. against the EPO on 18 May 2016 and the EPO's reply of 21 December 2016, the complainant having failed to file a rejoinder within the allocated time;

Considering the complaints filed by Mr I. H. T. (his twentieth), Mr T. H. (his fourth), Mr A. C. K. (his seventh), Ms S. R., Mr P. O. A. T. (his eighth) and Ms M. W. (her sixth) against the EPO on 12 May 2012, corrected on 6 June, the EPO's single reply of 14 December 2012, confined to the issue of receivability, the complainants' rejoinder of 18 January 2013, supplemented on 5 February, and the EPO's surrejoinder of 21 May 2013;

Considering the complaints filed by Mr I. H. T. (his twenty-first), Ms S. R. (her second), Mr P. O. A. T. (his ninth) and Ms M. W. (her seventh) against the EPO on 21 September 2012, corrected on 10 November 2012, the EPO's single reply of 8 March 2013, the complainants' rejoinder of 12 April and the EPO's surrejoinder of 22 July 2013;

Considering the complaints filed by Mr I. H. T. (his twenty-second), Mr P. B., Mr K. C. B. (his twelfth), Mr I. B. (his second), Mr D. d. l. T. (his fifth), Mr S. É., Mr T. H. (his fifth), Mr M. S. (his second), Mr P. O. A. T. (his eleventh), Ms A. M. W. (her third) and Ms M. W. (her eighth) against the EPO on 22 February 2013, corrected on 27 February, the EPO's single reply of 14 June, the complainants' rejoinder dated 12 September and the EPO's surrejoinder of 17 December 2013;

Considering the twenty-seventh complaint filed by Mr I. H. T. against the EPO on 22 November 2013, the EPO's reply of

14 September 2015, confined to the issue of receivability, the complainant's rejoinder of 22 December 2015 and the EPO's surrejoinder of 29 March 2016;

Considering the thirty-first complaint filed by Mr I. H. T. against the EPO on 6 August 2015, corrected on 24 August 2015, the EPO's reply of 19 January 2016, confined to the issue of receivability, the complainant's rejoinder of 2 March and the EPO's surrejoinder of 9 June 2016;

Considering the thirty-second complaint filed by Mr I. H. T. against the EPO on 13 August 2015, corrected on 24 August 2015, the EPO's reply of 9 March 2016, the complainant's rejoinder of 14 June, corrected on 21 June, and the EPO's surrejoinder of 5 October 2016;

Considering the thirty-third complaint filed by Mr I. H. T. against the EPO on 18 August 2015, corrected on 24 August 2015, the EPO's reply of 9 March 2016, the complainant's rejoinder of 17 June and the EPO's surrejoinder of 26 September 2016;

Considering the eighteenth complaint filed by Mr P. O. A. T. on 21 September 2015, corrected on 31 March 2016, the EPO's reply of 19 September, the complainant's rejoinder of 2 November 2016 and the EPO's surrejoinder of 7 February 2017;

Considering the eighteenth complaint filed by Mr J. M. W. against the EPO on 10 February 2014, the EPO's reply of 10 July, the complainant's rejoinder of 9 August and the EPO's surrejoinder of 12 November 2014;

Considering the complaint filed by Mr P. Z. against the EPO on 29 January 2016, corrected on 15 July, the EPO's reply of 2 November 2016, the complainant's rejoinder of 13 January 2017 and the EPO's surrejoinder of 13 April 2017;

Considering the 509 complaints filed against the EPO by the complainants whose names are listed in the annex to this judgment between September 2015 and October 2015, the three replies of the EPO filed in March 2017, the complainants' rejoinders filed between September 2017 and August 2018, the three surrejoinders of the EPO

filed between November 2018 and January 2019, and the applications to intervene filed by 30 officials whose names are listed in the annex;

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

Having examined the written submissions;

CONSIDERATIONS

1. The 556 complainants referred to above challenged internally various decisions adopted by the Administrative Council of the EPO, namely, decisions CA/D 30/07, CA/D 8/12, CA/D 9/12, CA/D 12/12, CA/D 15/12, CA/D 4/13, CA/D 5/13, CA/D 46/13, CA/D 2/14, CA/D 3/14, CA/D 10/14, CA/D 11/14 and CA/D 2/15. While the subject matter of those decisions differs, the complaints before the Tribunal are similar in that the impugned decision in each case is a decision of the Administrative Council dismissing a request for review filed with the Chairman of that body and subsequently withdrawn by the Council. Accordingly, the complaints will be joined by the Tribunal to form the subject of a single judgment.

2. After the filing of these complaints, the Tribunal adopted two judgments in which it addressed an issue that concerns all of them, namely the competence of the Administrative Council to entertain requests for review filed by EPO staff members. In Judgment 3700, the complainant had challenged the decision of the President of the Office to re-direct his request for review of decision CA/D 9/12 to the Administrative Council. The Tribunal found that the Administrative Council was not the “competent authority”, within the meaning of Title VIII of the Service Regulations concerning settlement of disputes, to examine the complainant’s request for review, as he had not been appointed by that body. In Judgment 3700 the Tribunal decided that

“the meaning of the expressions ‘competent appointing authority’ (Articles 107(2) and 109(4) of the Service Regulations) and ‘appointing authority which took the decision challenged’ (Articles 109(2) and 110(1) of the Service Regulations), while not clear, should, having regard to the language and logic of Title VIII of the Service Regulations, be interpreted

as meaning: (a) for employees appointed by the President, all requests for review must be lodged with the President and must be decided by the President; (b) for employees appointed by the Administrative Council, requests for review of individual decisions concerning them that were taken by the Administrative Council [decisions relating to appointments and disciplinary matters] must be lodged with the Council and must be decided by the Council, whereas requests for review of individual decisions concerning them that were taken by the President must be lodged with the President and must be decided by the President. In the present case, as the complainant was appointed by the President, his request for review had to be lodged with the President.”

3. This analysis was later confirmed in Judgment 3796, dealing with a challenge to decision CA/D 10/14 by a staff member who had likewise been appointed by the President. The Tribunal, having determined that “[t]he Administrative Council should have recognised that it was not the competent authority at all and should have referred the request to the President”, decided to set aside the impugned decision and remit the matter to the EPO in order for the President, as the competent authority, to take a decision on the complainant’s request for review.

4. The main outcome of Judgment 3796 was that the impugned decision taken by the Administrative Council as the “competent authority” was set aside and that the internal procedure was to follow a different course.

5. Following the public delivery of those judgments, the Chairman of the Administrative Council notified the complainants of the Council’s decision to withdraw all its previous decisions on requests for review falling within the competence of the President of the Office according to the criteria set out in the above-mentioned judgments of the Tribunal, and to refer the underlying requests for review to the President for a new decision. The Chairman considered that the complaints pending before the Tribunal were rendered moot by the new decision of the Administrative Council, and he invited the complainants to withdraw them. The EPO informed the Tribunal of this development in writing, providing a list of the complaints concerned.

6. The Tribunal considers that the withdrawal of the final decisions was a reasonable and legally correct action taken by the Administrative Council. Otherwise, the EPO could have been exposed to repetitious judgments setting aside such decisions. This step, taken in light of Judgments 3700 and 3796, is unexceptionable.

7. The present complainants refused to withdraw their complaints, despite the fact that the impugned decisions had been withdrawn.

8. In various exchanges with the Tribunal, the complainants argued that there was no reason to withdraw their complaints, since the decisions challenged had direct adverse effects on them and did not require any implementing measures. However, this argument is irrelevant, as the final decision on the internal appeals against those decisions still has to be taken by the competent authority, namely the President of the Office. Once the internal means of redress are exhausted and a final decision is taken, it can be impugned before the Tribunal and the nature of the decision and the existence of the cause of action will be examined. Therefore, the withdrawal of the present complaints would not have prejudiced a subsequent examination of this issue by the Tribunal.

9. Another argument raised by some complainants was that they were retired staff members and the President therefore could not be considered as their appointing authority. However, the status of the President as a staff member's appointing authority for the purposes of the Service Regulations is a matter of fact which is obviously not altered by the staff member's retirement.

10. As a result of the withdrawal of the impugned decisions, the Tribunal can only conclude that the complaints are now without object. The legal foundation for the complainants' claims no longer exists, and their complaints must therefore be dismissed in their entirety. It follows that the applications to intervene are to be dismissed as well.

11. It is however noted that the complainants may have incurred costs in filing complaints against a decision which was presented to them as a final decision that could be impugned before the Tribunal. As the withdrawal of the impugned decisions was not caused by the complainants but by the way in which the EPO interpreted its rules, the complainants may be entitled to costs (see Judgment 2853, considerations 6 to 8). Such costs should be considered in the resumed internal appeal proceedings.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 5 November 2019, 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 in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ

Annex

Five hundred and nine complainants (in alphabetical order):

(Names removed)

Thirty interveners (in alphabetical order):

(Names removed)