

the legitimate expectation that formal requirements of the appeal have already been checked by the EPO.

2.3. Causal link and the requirement of proof

For applicants to be able to claim that they have relied on incorrect information in accordance with the principle of good faith, it has to be established that the erroneous information from the EPO was the direct cause of the action taken by the applicants and objectively justified their conduct (T. 460/95 of 16 July 1996; G. 2/97, OJ 1999, 123; J. 5/02; J. 5/07; J. 10/17). According to J. 27/92, it must be established that, on an objective basis, it was reasonable for the appellant to have been misled by the information. Whether or not this was the case would depend on the individual circumstances of each case.

In T. 321/95 the appellant argued that it had an oral agreement with the primary examiner. No such agreement was derivable from the file. Thus, the appellant's arguments on an alleged violation of good faith were no more than the appellant's personal opinion and a mere "miscommunication" between the primary examiner and the applicant.

In T. 343/95, the board considered the contents of a telephone conversation on which the appellant based its arguments with respect to an alleged violation of the principle of good faith. The board held that in a case like the one in hand it was sufficient if the board determined the contents of the conversation on the basis of a balance of probabilities. The conditions for the application of the principle of legitimate expectations were fulfilled (but see T. 188/97, where the board could not establish the facts surrounding a telephone conversation with sufficient certainty to invoke the principle of legitimate expectations).

3. Information provided by EPO

3.1. Clear and unambiguous communications and forms

According to the case law of the boards of appeal, the principle of the protection of legitimate expectations governing procedure between the EPO and applicants requires that communications addressed to applicants must be clear and unambiguous, i.e. drafted in such a way as to rule out misunderstandings on the part of a reasonable addressee. A communication from the EPO containing erroneous information which misleads the applicant into taking action causing the refusal of his patent application is null and void in its entirety (J. 2/87, OJ 1988, 330). An applicant must not suffer a disadvantage as a result of having relied on a misleading communication (J. 3/87, OJ 1989, 3; J. 23/14). On the contrary, if his actions were based on a misleading communication he is to be treated as if he has satisfied the legal requirements (J. 1/89, OJ 1992, 17).

In T. 2092/13 the board concluded that a communication from the examining division was ambiguous and had misled the appellant. In the circumstances of the case, the communication had created a realistic and reasonable expectation that any subsequent negative finding on the issue of novelty and/or inventive step was communicated to the appellant before any adverse decision would be taken. The appealed decision was set aside and the case remitted for further prosecution. See also T. 1423/13.