K. (No. 2)

v.

EPO

127th Session **Judgment No. 4116**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. K. against the European Patent Organisation (EPO) on 23 January 2013 and corrected on 29 April, the EPO's reply of 5 August, the complainant's rejoinder of 7 November 2013 and the EPO's surrejoinder of 17 February 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the rejection of his request for payment of an education allowance for his children.

On 19 December 2008 the complainant, a German national working as a permanent employee of the European Patent Office, the EPO's secretariat, in Munich, requested the payment of an education allowance for his three daughters pursuant to Article 71 of the Service Regulations for permanent employees of the Office. Article 71(1) relevantly provides that permanent employees, except those who are nationals of the country in which they are serving, may request payment of the education allowance for each dependent child regularly attending an educational establishment on a full-time basis. By way of exception, Article 71(2) provides that permanent employees who are nationals

of the country in which they are serving may request payment of the allowance if their place of employment is not less than 80 km distant from any school or university corresponding to the child's educational stage as well as from the place of domicile at the time of recruitment.

The Administration responded to that request in a letter dated 22 December 2008, stating that, as the complainant was German, he was not eligible for an education allowance unless both conditions of Article 71(2) were met, which did not seem to be the case.

On 11 November 2009 the complainant submitted a new request for the education allowance, providing additional facts and arguments to support his request. He noted that in the letter of 22 December 2008 no deadlines were set "in respect of a reply or appeal" and stated that, should his new request be rejected, his letter was to be treated as an internal appeal within the meaning of Articles 106 to 108 of the Service Regulations. By a letter of 18 December 2009 the Administration informed the complainant that it could only "reconfirm the information" given to him previously, according to which he did not meet the requirements for the payment of an education allowance. As for the fact that the letter of 22 December 2008 did not explicitly mention the deadlines for lodging an appeal, the Administration stressed that this was of no relevance since the statutory deadline set out in Article 108 of the Service Regulations had been missed. For this reason, his appeal would be deemed irreceivable. The complainant was asked to reconsider his decision to lodge an appeal on the matter.

On 5 January 2010 the complainant provided further evidence linked with his education allowance request. However, on 11 January 2010 he was informed of the decision of the President of the Office to dismiss his request and refer the matter to the Internal Appeals Committee. After having heard the parties, the Committee issued its opinion on 30 August 2012. It unanimously considered the appeal to be receivable but recommended by a majority that it be dismissed as unfounded.

By a letter of 31 October 2012, the complainant was informed that the Vice-President of Directorate-General 4, acting by delegation of the President, had decided to reject his appeal as unfounded and irreceivable. The Vice-President considered that the letter of 22 December 2008

amounted to a clear rejection of his 19 December 2008 request and had set the deadline in which to appeal. The complainant filed his appeal in November 2009, eleven months later. His appeal was therefore time-barred. That is the impugned decision.

The complainant asks the Tribunal to order the payment of the education allowance for two of his daughters, with interest, and to award him costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. At relevant times, the complainant was a member of staff of the EPO based in Munich. By letter dated 19 December 2008, the complainant requested the payment of an education allowance in relation to his three daughters for the years 2007 and 2008. The EPO responded by letter dated 22 December 2008. In that response, the EPO noted the terms of Article 71 of the Service Regulations which included a provision that the allowance was not available, at least ordinarily, to "nationals of the country in which they [were] serving". The letter concluded:

> "As you are German, we regret to inform you that your request can't unfortunately be granted, unless both conditions of Art[icle] 71(2) [of the Service Regulations] are met, which does not seem to be the case.
>
> I remain at your kind disposal should you need further support on the matter."

The two conditions in Article 71(2), which concerns an exception applying to permanent employees who are nationals of the country in which they are serving (and, if satisfied, enables such a person to be paid the allowance), are firstly that the permanent employee's place of employment is not less than 80 km distant from the educational institution "corresponding to the child's educational stage" and, secondly, that the permanent employee's place of employment is not less than 80 km distant from the place of domicile at the time of recruitment.

2. In a letter dated 11 November 2009, the complainant repeated his request to the EPO for the payment of the education allowance for his three daughters for the years 2007 and 2008. He also asked that if

his request was refused, the letter be treated as an internal appeal. The response of the EPO in a letter dated 18 December 2009 was, in relation to the payment of the allowance, negative and the point was also made that the complainant had failed to appeal against the letter of 22 December 2008, and any appeal now was out of time and thus irreceivable.

3. The internal appeal was heard and culminated in an opinion of the Internal Appeals Committee of 30 August 2012. The members of the Committee were divided in their opinion on the merits. By a letter dated 31 October 2012, the Vice-President of Directorate-General 4, acting by delegation of the President, rejected the appeal. He repeated the EPO's position that the appeal was time-barred and "inadmissible" though he also dealt with the substance of the reasoning of the Internal Appeals Committee.

4. In these proceedings in the Tribunal, the EPO argues that the complaint is irreceivable because the complainant had not exhausted the internal means of redress. It points out that the case law of the Tribunal requires the exhaustion of the internal means of redress by means which accord with the applicable staff rules and time limits, citing Judgments 575, consideration 2, and 1888, consideration 4. In the present case, if the letter of 22 December 2008 constituted a final administrative decision in relation to the complainant's request for the payment of the education allowance, then plainly no challenge by way of an internal appeal was maintained within the specified time limit. Also, if that is the correct characterization of the letter of 22 December 2008, the "decision" of 18 December 2009 was simply confirmatory of the original final administrative decision in relation to the complainant's request and did not set off new time limits for the submission of an internal appeal (see, for example, Judgment 3870, consideration 4).

5. The Tribunal is satisfied that the letter of 22 December 2008 should have been viewed as an appealable administrative decision. While perhaps not in the most emphatic terms, the import of the letter clearly was a rejection of the complainant's request turning essentially, as it did, on the complainant's status as a German national and his non-

fulfilment of the conditions of Article 71(2) of the Service Regulations. The Tribunal can comfortably infer that it was understood this way by the complainant, who did nothing to challenge what was said in the letter on the assumption that the conclusion expressed in the letter was tentative or qualified. It is true that, almost a year later, the complainant revived his request. But had he believed the response of 22 December 2008 was tentative or qualified, one could have expected him to pursue the matter immediately. He did not do so.

6. In the result, the complainant did not exhaust the internal means of redress in relation to the decision of 22 December 2008 and his complaint to this Tribunal is irreceivable and should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 November 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ