

P. (No. 12)

v.

EPO

127th Session

Judgment No. 4120

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr L. P. against the European Patent Organisation (EPO) on 12 March 2013 and corrected on 29 April, the EPO's reply of 8 November, the complainant's rejoinder of 7 December 2013 and the EPO's surrejoinder of 14 March 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 decision not to communicate to him an investigation report concerning the payment of school fees to another employee.

The complainant was at the material time an employee of the European Patent Office, the secretariat of the EPO, and a staff representative. On 11 September 2009 he wrote to the President of the Office in relation to a possible incorrect application, in favour of another employee, of Article 120(a) of the Service Regulations for permanent employees of the Office concerning the payment of school fees. He requested to have the application of that Article investigated. The complainant was subsequently informed that the matter was being investigated by Internal Audit. Further communications ensued between

the Administration and the complainant concerning the outcome of the investigation.

On 3 November the complainant wrote to the President requesting, by 13 November, the disclosure of the findings of the investigation. He added that if the President could not give him a positive reply, his email should be considered as initiating the internal appeal process, in which case he claimed the quashing of the decision, the full disclosure of the findings of the investigation, moral damages, punitive damages for covering up misconduct, and costs. On 17 December 2009 the complainant was informed that his request was rejected. The matter was referred to the Internal Appeals Committee (IAC).

Following the EPO's objections to the receivability of his appeal, the complainant filed further submissions clarifying his claims. Hence, in his further submissions of 30 October 2011 to the IAC, he specified that he asked to be provided with the outcome of the investigation. This meant that if the EPO was satisfied that the employee concerned had been unlawfully reimbursed for the school fees, it could inform him of that conclusion without having to provide more details. Indeed, that information alone would show that no changes had been made in the way Article 120(a) of the Service Regulations was applied. Conversely, if the EPO considered that the employee concerned had been lawfully reimbursed for the school fees, he asked to be provided with an explanation as to why this was lawful. To that end, it would be useful to know the outcome of the investigation.

The IAC issued its opinion on 29 October 2012. It unanimously recommended that the outcome of the investigation on the application of Article 120(a) of the Service Regulations be disclosed to the complainant; the majority recommended that the personal details of the employee concerned not be disclosed. The IAC also unanimously recommended that the complainant be awarded moral damages together with damages for undue delay in the appeal proceedings. The majority of the IAC members further recommended that he be awarded 500 euros in costs.

By a letter of 21 December 2012, the Vice-President of Directorate-General 4, acting by delegation of authority from the President, informed the complainant of his decision to reject his appeal as irreceivable and unfounded. The Vice-President considered that the outcome of Internal Audit's investigation had no effect on his position in law and that he therefore had no cause of action. As to the merits, the Vice-President explained that, in accordance with the Internal Audit Charter, Internal Audit was accountable to the President alone. The Charter further provided that Internal Audit's report could be forwarded to the Board of Auditors, the Audit Committee, the head of any unit which had been the subject of an internal audit, and the relevant Vice-President. Hence, there was no basis to disclose the report to him. The complainant impugns that decision before the Tribunal.

The complainant asks the Tribunal to order the EPO to disclose the outcome of the investigation in the sense that he should be informed whether or not there had been an abuse of Article 120 of the Service Regulations. If the practice has changed, he asks to be informed of the new criteria established in relation to the payment of the benefits foreseen under Article 120(a) of the Service Regulations with respect to Munich duty station. He also seeks moral damages, including for delay in the internal appeal proceedings, punitive damages, costs and any other relief that the Tribunal may deem fit.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and for failure to exhaust internal means of redress. It otherwise asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. At relevant times, the complainant was a member of staff of the EPO and a staff representative. Article 120(a) of the Service Regulations creates an entitlement to the payment of school fees of a staff member's child in certain circumstances. It appears the complainant believed, in relation to another staff member, that the other staff member had benefited from the entitlement in circumstances where he should not have.

2. In September 2009 the complainant wrote to the President requesting that the matter (the payment of the school fees for the other staff member) be investigated. The matter was investigated by Internal Audit. At various points during the latter part of 2009, the complainant sought to be provided with documents or details concerning the results of the internal audit. This request was not acceded to, which ultimately led to an internal appeal heard by the IAC.

3. On 29 October 2012, the IAC issued an opinion in which it concluded inter alia, by way of recommendation, that the outcome of the investigation by Internal Audit should be disclosed to the complainant. There was a division of opinion amongst the members of the IAC whether this disclosure should include particulars concerning the identity of the staff member to whom the entitlement had been paid. By letter dated 21 December 2012, the Vice-President of Directorate-General 4 (acting on delegation from the President) dismissed the appeal for reasons which included that the appeal was irreceivable. This is the impugned decision in these proceedings. The EPO argues the complaint filed in this Tribunal is irreceivable. It is convenient to deal with this issue at the outset as it is a threshold issue.

4. The underlying rationale for the conclusion of the IAC in relation to receivability had two elements. One was that there may have been a possible infringement of the complainant's rights and an impeding of his functions under Article 34 of the Service Regulations which relates to his role as a staff representative. The second was that there may have been differing practices in the application of Article 120(a) of the Service Regulations, which may have had an adverse impact on a large number of permanent employees, and that the complainant had a legitimate role in bringing this issue forward.

5. In the pleas, both the complainant and the EPO canvassed the nature and scope of the request the complainant had made. In the Tribunal's opinion, the nature and scope of the request are best ascertained by the complainant's email dated 3 November 2009 which effectively initiated the internal appeal. In substance, that email was the

culmination and synthesis of earlier requests. It is tolerably clear from the opening paragraph of the email of 3 November 2009 that the initial issue raised by the complainant was the “possibly incorrect application of Art[icle] 120(a)” to a specified person, namely a director. The nature of the request being pursued was identified in the concluding paragraph of the email (save for a short section at the end of the email concerning it being treated as an appeal). The request is expressed to be a “disclos[ure of] the findings of the investigation”. There is little room to doubt that the complainant’s original request for investigation and disclosure of information was, from the complainant’s perspective, centrally concerned with the incorrect or even inappropriate application of Article 120(a) of the Service Regulations to the benefit of a specified individual. Equally there is little room to doubt that the complainant sought to be provided with the results of the investigation into whether, in relation to that individual, there had been an incorrect or even inappropriate application of the Article.

6. Staff representatives have a legitimate and important role in the functioning of international organisations. However there are limits to that role, at least as may involve rights enforceable in proceedings in the Tribunal. In its reasoning the IAC referred to Judgment 2919 of this Tribunal in support of a widely cast role for staff representatives. However, the effect of that judgment may have been misunderstood and, in any event, the Tribunal has recently indicated that Judgment 2919, if read too widely, went beyond the scope of the Tribunal’s established jurisprudence (see Judgment 3515, consideration 3). In the present case, whether Article 120(a) of the Service Regulations had been applied correctly or incorrectly to the individual the subject of the internal audit was not a matter in respect of which the complainant had an interest capable of being pursued in a complaint to this Tribunal. Nor did the complainant have an enforceable right to obtain the results of the internal audit. Accordingly the complainant has no cause of action and his complaint in the Tribunal is irreceivable (see Judgment 3426, consideration 16). Thus, the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2018,
Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael
F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I,
Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ