L. (No. 2)

v.

EPO

132nd Session **Judgment No. 4423**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. L. against the European Patent Organisation (EPO) on 14 January 2015, the EPO's reply of 27 April 2015 and the email of 27 June 2015 by which the complainant informed the Registrar of the Tribunal that he did not wish to file a rejoinder;

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 to consider as irreceivable his request to be entitled to 12 additional days of annual leave pursuant to Article 59(1)(b) of the Service Regulations for permanent employees of the European Patent Office.

The complainant, who was born on 5 June 1952, joined the European Patent Office, the EPO's secretariat, on 1 October 1982. On 1 February 2009, he reached 35 years of accrued service and had thus reached the maximum of pension rights at age 56. According to Article 59(1)(b) of the Service Regulations, permanent employees aged 65 and over having accrued 35 years of reckonable service for pension entitlement and having thus reached the maximum rate of retirement pension can benefit from 12 days' additional annual leave per calendar year. By an email of 28 June 2010, one of the complainant's colleagues, Mr H.,

informed the Administration that he and the complainant considered it unfair that a staff member who had accumulated 35 years of reckonable service for pension entitlement but had not yet reached 65 years of age could not benefit from that measure. He added that the issue had previously been raised by the complainant and himself as well as by the staff representation with top management but no official response had been provided. He therefore requested to be provided official reasons as to why only staff members aged between 65 and 68 would be granted such privilege. By email of the same day, the complainant confirmed and supported Mr H.'s request.

Mr H. reiterated his request in August 2010 and subsequently on 11 July 2011. In the latter request he specified that should the outcome be negative or should the Office fail to provide an answer, that request should be treated as an official internal appeal. The requests in the emails of June 2010 and July 2011 remained unanswered. However, on 24 August 2010, the Administration had replied that it would get back to him in September, which it did not do.

By email of 27 July 2012, Mr H. asked that his request be considered as an internal appeal with immediate effect. On the same day, the complainant indicated that he wished to join the internal appeal. In its position paper of 28 February 2013, the Office considered the internal appeal to be receivable.

On 13 March 2014, Mr H. withdrew his internal appeal. The complainant became the sole appellant.

After the hearing held on 3 April 2014, the Internal Appeals Committee (IAC) provided a minority and a majority opinion in two separate documents respectively dated 24 July 2014 and 27 August 2014.

In their opinion of 24 July 2014, the IAC minority considered the appeal as admissible on the basis, inter alia, that the Office did not contest the receivability and that the email of 27 July 2012 ought to be considered the starting point of the internal appeal process. The minority found that the proper qualification for determining the grant of additional annual leave foreseen by the Service Regulations was solely the continued pension contributions without corresponding increase in pension entitlements. It recommended to award the complainant 12 days of annual leave per year for the period where he had reached 35 years of service or that he be paid the corresponding value in the event that he is no longer in service.

In the majority opinion of 27 August 2014, the IAC members considered the appeal irreceivable as the implied rejection of the first official request of 28 June 2010 had become final as well as the implied rejection of the internal appeal of 11 July 2011.

By a letter of 22 October 2014, the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President of the Office, endorsed the majority opinion and dismissed the complainant's internal appeal as irreceivable *ratione temporis*. This is the impugned decision.

The complainant, who retired on 1 June 2015, asks the Tribunal to set aside the impugned decision. He requests an award of the additional 12 days of annual leave per year of service (or pro rata for periods of less than one year) and alternatively the corresponding value in the event that he is no longer in service. He claims 8 per cent interest on the amounts due as well as costs in the amount of 2,000 euros.

The EPO asks the Tribunal to dismiss the complaint as irreceivable or alternatively as unfounded.

CONSIDERATIONS

1. This complaint arises from the complainant's internal appeal request to be granted the benefit of the 12 additional leave days provided in Article 59(1)(b) of the Service Regulations. Article 59(1)(b), that came into force in 2007, provides that "[p]ermanent employees aged 65 and over having accrued 35 years of reckonable service for pension entitlement and having thus reached the maximum rate of retirement pension will benefit from 12 days' additional annual leave per calendar year". At the material time, the complainant had accrued the 35 years of reckonable service for pension entitlement and in June 2012, the complainant turned 60 years of age at which time he was eligible to receive a retirement pension.

2. On 27 July 2012, having sent three emails on 28 June 2010, 24 August 2010 and 11 July 2011 to the Staff Committee, Administration Personnel and copied to the complainant to which he had not received any substantive responses, Mr H., the complainant's colleague, sent an email to Mr R., Director 4.3.2, that was also copied to the Staff Committee; Administration Personnel; and the complainant. In the email, he observed

that "[t]his is now running since years and I have got ([the complainant] as well) no sufficient answer nor any real reaction". He added that in his view, "[this] is a very bad style not to ans[w]er such [a] serious request or to just ignore it". Relevantly, Mr H. stated that "[i]n this respect you may understand that [I will] not remind you anymore but that I turn my request now into a[n] official internal appeal with immediate effect. May I therefore ask you to forward this appeal to the department in place to start the official internal appeal procedure." On the same day, the complainant sent an email to Director 4.3.2 in which he stated that "I fully support the complain[t] below of [Mr H.] and therefore I wish to join the announced Internal Appeal. Indeed, the communication with many questions and no clear answers, related to fully paid pension contributions, goes back to Sep[tember] 2008."

3. On 25 September 2012, the Administration notified both the complainant and Mr H. of the rejection of the 27 July 2012 request as unfounded and the registration of their internal appeal. The following day the IAC acknowledged receipt of the appeal.

4. On 28 August 2014, the IAC submitted the IAC majority opinion to the President of the Office. As an aside, it is noted that Mr H. withdrew his internal appeal on 13 March 2014 prior to the 3 April 2014 internal appeal hearing. In summary, the IAC majority found that the complainant had made the same request in the internal appeal as he had made on two prior occasions that were implicitly rejected. The IAC majority concluded that as the complainant had not contested the implied rejections within the statutory period, that is by 1 January 2011 in relation to the first request of 28 June 2010 and by 10 May 2012 regarding the second request of 11 July 2011, the internal appeal was barred "by implied decisions that have acquired the authority of a final decision". The IAC majority recommended the dismissal of the appeal as inadmissible. The IAC minority found that the internal appeal was receivable and founded.

5. In his 22 October 2014 decision, taken by delegation of power from the President of the Office, the Vice-President of DG4 endorsed the IAC majority opinion and rejected the complainant's internal appeal as irreceivable *ratione temporis*. The Vice-President of DG4 stated that "in accordance with the majority opinion of the [IAC], and for the sake

of legal certainty, it is considered that you failed twice to contest within the statutory deadline of Article 106(2) [of the Service Regulations] the implied rejection of your requests for additional leave. Your [...] appeal on the same matter is therefore considered as time-barred." This is the decision impugned in the present complaint.

6. Turning to the receivability of the internal appeal, the determinative issue is whether Mr H.'s 28 June 2010 email and his subsequent 11 July 2011 email were requests to grant him and the complainant the 12 days additional annual leave as granted to permanent employees aged 65 and over as provided in Article 59(1)(b) of the Service Regulations.

7. The complainant submits that Mr H.'s 28 June 2010 email to the Staff Committee and Administration Personnel and copied to him only raised questions concerning the treatment of pension rights for staff having worked more than 35 years and was not a request as contemplated in Article 106(2) of the Service Regulations. The complainant adds that in his email of the same day to the Administration Personnel, he stated that "hereby I confirm and support the described situation concerning the treatment of pension rights for staff having worked more than 35 years".

8. In its response, the EPO takes the position that the 28 June 2010 email was a request to grant Mr H. and the complainant the 12 days additional annual leave as provided in Article 59(1)(b). The EPO also disputes the complainant's contention that Mr H.'s email of 28 June was not sufficiently precise to qualify as a request for additional annual leave within the meaning of Article 59(1)(b). The EPO submits that based on the wording in the email, in particular, the use of "official request" and "official answers", it is clear that Mr H. submitted a request that he and the complainant be granted the additional 12 days of annual leave. In support of this submission, the EPO refers to Mr H.'s statement in the 28 June email that "[until] now we have not received a well reasoned and logic/legal answer on our above mentioned official request". The EPO also refers to the complainant's email of the same day in which he stated that "As [Mr H.] [...] explained, we still wait for official answers on our questions raised long time ago". In its pleadings, the EPO also notes that in his 11 July 2011 email, Mr H. complained again about not having received a reply to his request of 28 June 2010.

9. The EPO's submission that the 28 June 2010 email was a request to grant Mr H. and the complainant the same additional 12 days of annual leave as granted to permanent employees over the age of 65 as provided in Article 59(1)(b) is fundamentally flawed. First, the EPO erroneously frames the complainant's position. As noted in consideration 7 above, the complainant specifically stated that in the email of 28 June 2010 Mr H. only raised questions concerning the treatment of pension rights for staff having worked more than 35 years.

10. Second, the EPO has taken out of context Mr H.'s statement in the 28 June email that, as of that date, they had not received "a well reasoned and logic/legal answer on [their] above mentioned official request". At this point, it is useful to set out in some detail the relevant contents of the email. The subject of the email was "Additional days of leave for staff having worked more than 35 years". In the email, Mr H. noted that this subject had been raised by the complainant and himself at the Brussels leadership meeting and with the top management and that the staff representation had also raised this question with the top management without any success. Mr H. observed that it was "simply not acceptable that such [an] official measure (to grant additional 12 days of annual leave) was only implemented for staff having worked more than 35 years and [having] reached the age of 65 years or more".

11. After explaining the unfairness of the additional 12 days of leave, Mr H. relevantly stated:

> "May I therefore ask you and person[ne]l [...] officially for the reasons to give such extra days to that definitely privileged staff of age 65 - 68 only who gets already the high privilege to work up to 3 additional more active years receiving [...] tax free salaries. This seems to me and my colleague [Mr L.] very unfair and it is simply not comprehensible. [Until] now we have not received a well reasoned and logic/legal answer on our above mentioned official request."

12. At the outset, it is observed that only one request was made in the 28 June 2010 email. In this request, as stated in the preceding quote, Mr H. asked the Staff Committee and the Administration Personnel "for the reasons" to give additional days of annual leave to the staff members of ages 65 to 68 only. Thus, it is abundantly clear that when read in the broader context of the email, the phrase "our above mentioned official request" can only be Mr H.'s request for the reasons why only staff

members of ages 65 to 68 are entitled to the additional days of annual leave. As to the complainant's statement in his email of the same date that he and Mr H. were still waiting for "official answers on [their] questions", it is evident that it was only a reiteration of Mr H.'s statement that they had still not received an answer to their "official request". Based on the above analysis, the Tribunal finds that, contrary to the EPO's assertion, Mr H.'s 28 June email was not a request as contemplated in Article 106(2) of the Service Regulations. For obvious reasons, it is not necessary to comment on the EPO's observation that in Mr H.'s 11 July 2011 email he complained again about not having received a reply to his request of 28 June 2010. It is noted that on reading Mr H.'s 11 July 2011 email, it is evident that the content of the email did not include a request as provided in Article 106(2).

13. In his 22 October 2014 decision the Vice-President of DG4 endorsed the conclusion of the IAC majority opinion that was grounded, in relevant part, on its erroneous assertion that the complainant had made the same requests in the emails of 28 June 2010 and 11 July 2011 as he made in the internal appeal. As the IAC majority opinion was fundamentally flawed, the Vice-President of DG4's endorsement of that opinion tainted the impugned decision and, accordingly, it will be set aside. As in their respective pleadings in the present complaint, the complainant and the EPO addressed the merits of the internal appeal, the matter will not be remitted to the EPO.

14. Turning to the merits of the internal appeal, the complainant submits referring to Article 59(1)(b) of the Service Regulations, that he is entitled to the extra 12 days of annual leave per year. He points out that the last sentence of chapter I.II.7 in document CA/159/07 Rev. 2, "Introduction of measures relating to pensions", confirms that "[t]his accompanying measure is proposed as contributions to the pension scheme will continue to be paid." The complainant notes that he had accrued 35 years of reckonable service for pension entitlement on 31 January 2009 and in June 2012 he reached the age of 60. Thus, at that moment, in relation to pension matters, he was in a similar situation as those permanent employees who were granted 12 days of extra annual leave per year if they served on prolonged service.

The complainant takes issue with the EPO's position that the granting or denial of the additional 12 days of annual leave is contingent on whether a permanent employee has passed the age of 65, that is, whether

or not the employee has been granted a prolongation of service pursuant to Article 54(1)(b). The complainant contends that this position is not correct. He argues that the extra 12 days of annual leave serve as compensation for the continued pension contributions without a corresponding increase in pension entitlements. He submits that this is "the legitimate qualification determining difference in treatment".

15. The complainant's submission is unfounded for two reasons. First, it broadens the intended purpose of Article 59(1)(b). According to the preceding sentence in CA/159/07 at I.II.7 cited by the complainant, the purpose of the amendment to Article 59 of the Service Regulations is "to provide those employees who continue working after the age of 65, having already worked 35 years and having reached the maximum amount of pension, with an additional 12 days of annual leave per calendar year". What the amendment did was to confer a particular benefit on employees who continued working beyond the normal age of retirement.

Second, it is well established in the case law as reiterated in Judgment 4029, consideration 20, that "the principle of equality requires that persons in the same position in fact and in law must be treated equally". As the complainant is not in the same position in fact or law as the permanent employees aged 65 and over referred to in Article 59(1)(b), who have attained the normal retirement age, the decision not to grant him the benefit of the 12 days of additional annual leave does not constitute unequal treatment by the EPO.

16. In conclusion, as stated above in consideration 13, the impugned decision will be set aside. As the complainant has succeeded in part, he is entitled to an award of costs in the amount of 750 euros.

DECISION

For the above reasons,

1. The 22 October 2014 decision is set aside.
2. The EPO shall pay the complainant costs in the amount of 750 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 9 June 2021, 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 on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ