

P. (No. 6)

v.

EPO

127th Session

Judgment No. 4119

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr R. P. against the European Patent Organisation (EPO) on 18 January 2013 and corrected on 11 July, the EPO's reply of 7 November, the complainant's rejoinder of 10 December 2013 and the EPO's surrejoinder of 14 March 2014;

Considering the applications to intervene filed by Mr R. G. on 8 May 2013, and by Ms D. H. on 12 May 2013, and the EPO's letter of 7 November 2013 indicating that it had no objection to the applications;

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 contests the decision of the President of the European Patent Office, the EPO's secretariat, to amend the wording of a circular in respect of the age limit for the payment of a dependants' allowance.

The basic conditions for the granting of the dependants' allowance for dependent children are set out in Article 69(4) of the Service Regulations for permanent employees of the European Patent Office. Between 1995 and 2009, the Internal Appeals Committee was called upon to examine the wording of Article 69(4) several times and issued

diverging opinions suggesting that the text of the Article was not fully clear and could be differently construed. In order to avoid further appeals aiming at contesting the interpretation of Article 69(4) of the Service Regulations, on 10 December 2009 the Administrative Council adopted the President's proposal to amend it. The previous wording referred to "children aged between eighteen and twenty-six" whereas the amended wording refers to "children who have not reached twenty-six years of age". On 20 January 2010 the President published her decision of 23 November 2009 amending Circular No. 82, which set out guidelines for implementing Article 69, with effect from 1 March 2010. The Circular was amended in order to reflect the new wording of Article 69(4).

The complainant has two children born in December 1999 and November 2002, respectively. On 8 March 2010 he lodged an appeal with the President of the Office against the decision of 23 November 2009 amending Circular No. 82. He argued, among other things, that the amendment was a "change in substance" negatively affecting him which modified the Service Regulations by providing a more narrow interpretation of the required age limit for the payment of a dependants' allowance. He contended that the amendment "shorten[ed] the period during which a child is considered as 'mainly and continuously supported' by one year". He requested the quashing of the 23 November decision and claimed damages and costs. His appeal was forwarded to the Internal Appeals Committee.

After having heard the parties, the Internal Appeals Committee issued its report on 5 September 2012, recommending by a majority that the President dismiss the appeal as unfounded. By a letter of 5 November 2012, the complainant was informed of the President's decision to reject his appeal as irreceivable *ratione materiae* and, subsidiarily, as unfounded. That is the impugned decision.

The complainant requests the joinder of this complaint with two other pending complaints. He asks the Tribunal to quash *ab initio* the amendment to Circular No. 82 and, in so doing, to examine the decision by which Article 69 of the Service Regulations was amended. He also seeks an award of damages.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione materiae* and, subsidiarily, as unfounded. In its surrejoinder, it asks the Tribunal to award costs against the complainant in the event that he maintains his complaint notwithstanding the clear case law concerning the receivability of complaints directed against general decisions.

CONSIDERATIONS

1. The complainant was, at the material time, a member of staff of the EPO. Article 69 of the Service Regulations created, for permanent employees, an entitlement to the payment of a dependants' allowance in relation to dependent children in circumstances specified in the Article. In January 2010 an amended version of Circular No. 82 was published on the Intranet following a decision of the President of 23 November 2009. That Circular set out amended guidelines for determining whether a child was dependent within the meaning of certain provisions of Article 69 of the Service Regulations. It addressed, relevantly, the time at which, having regard to the age of the child, the allowance ceased to be payable.

2. On 8 March 2010 the complainant lodged an appeal with the President against the amendment to Circular No. 82. It was referred to the Internal Appeals Committee and registered as appeal IA/10b/10. A number of issues arose about the appropriate manner in which, relevantly for present purposes, that appeal (and broadly related appeals) should have been dealt with, but it is unnecessary to detail those issues and how they were resolved. Suffice it to note that on 5 September 2012 the Internal Appeals Committee issued a report containing a majority opinion and a minority opinion in relation to the complainant's appeal IA/10b/10. By a letter dated 5 November 2012, the Vice-President of Directorate-General 4 communicated to the complainant his decision (made on delegation from the President of the Office) in relation to, amongst other things, appeal IA/10b/10. In relation to that appeal the Vice-President of Directorate-General 4 concluded it was irreceivable and, subsidiarily, unfounded. The decision of 5 November 2012 is the decision impugned in these proceedings.

3. The EPO challenges the receivability of the complaint on several grounds. It is necessary only to deal with one of them. It is that the decision to amend Circular No. 82 was a decision of general application and could not be challenged by a member of staff, in this case the complainant, unless and until the decision of general application was applied individually to the member of staff with an adverse legal effect. The complainant had two teenage children. At the time the Circular was amended and also at the time the internal appeal was commenced, no issue had arisen about the application of the Circular, and in particular whether the complainant's entitlement to the dependants' allowance ceased to be payable because of the age of his children. The approach of the Internal Appeals Committee was that the internal appeal was "admissible" because the amendment to the Circular at least arguably adversely affected the complainant's legitimate expectations and his acquired rights.

4. The Tribunal's case law consistently holds that a member of staff cannot challenge, by way of a complaint in the Tribunal, a general decision unless and until it is applied to that staff member with adverse legal consequences (see Judgment 4016, consideration 5, and the case law cited therein). That case law is rooted in the provisions of the Tribunal's Statute. The Tribunal's jurisdiction is to deal with disputes concerning, relevantly, the alleged non-observance of the Staff Regulations or of the official's terms of appointment. In a case such as the present there would have been, at least arguably, a non-observance of the Service Regulations at the moment the complainant was not paid the allowance because of the age of his children. That might have been so because, amongst other reasons, the amendment was not lawfully made or the Service Regulations, properly construed, conferred the allowance beyond the time identified in the amended Circular. However before the payment of the allowance ceased, no issue would arise about the non-observance of the Service Regulations. In the result, this complaint is irreceivable and will be dismissed.

5. Judgment 3291 has been given in related proceedings so the request for joinder has become moot. Given that this complaint will be dismissed because it is irreceivable, the applications to intervene will also be dismissed. No order for costs will be made against the complainant.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The applications to intervene are dismissed.
3. The EPO's counterclaim for costs 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