C.

v.

EPO

140th Session **Judgment No. 5065**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs P. C. against the European Patent Organisation (EPO) on 6 June 2020, the EPO's reply of 27 October 2020, the complainant's rejoinder of 4 December 2020 and the EPO's surrejoinder of 9 March 2021;

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

Having examined the written submissions;

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

The complainant challenges the decision to reject her request for an expatriation allowance.

Under Article 72(1)(a) and (b) of the Service Regulations for permanent employees of the European Patent Office, the secretariat of the EPO, an expatriation allowance is granted to non-nationals of the country where they are serving, provided they were not "permanently resident" in that country for at least three years prior to taking up their duties, no account being taken of previous service with international organisations.

The complainant, a French national residing in Germany since 1984, with some interruptions, is a staff member in active service at the EPO in Germany since 1 October 2005.

On 4 October 2005, she filed a request for an expatriation allowance. In the applicable form, entitled "Declaration concerning expatriation allowance", she indicated that she was "continuously resident in the country in which [she was] serving" and was not "serving [during the three years prior to her appointment] in the administration of the country of which [she was] a national or with another international organisation".

On 12 October 2005, the EPO rejected this request.

On 9 September 2016, the complainant filed a new "Declaration concerning expatriation allowance" where she indicated, again, that she was "continuously resident in the country in which [she was] serving", but that she had been "serving [during the three years prior to her appointment] in the administration of the country of which [she was] a national or with another international organisation", namely the European School of Munich (ESM).

By letter dated 12 December 2016, the EPO confirmed its previous rejection noting that the complainant was locally hired by the ESM and resident in Germany for more than three years prior to her date of appointment and, therefore, did not meet the criteria set out in Article 72(1) of the Service Regulations. The EPO also emphasised that the said letter was "a mere informative confirmation" of the 2005 decision, and not a decision under Article 106 or 109 of the Service Regulations.

On 10 March 2017, the complainant filed a request for review. She argued that Article 72(1) of the Service Regulations did not make any reference to the form of employment within an international organisation.

On 9 May 2017, the EPO rejected the request for review on the grounds that it was time-barred under Article 109 of the Service Regulations, that her employment with the ESM could not be considered as previous service with an international organisation pursuant to Article 72(1)(b) without leading to "an unreasonable result", and that the complainant had resided in Germany for more than three years prior to joining the ESM therefore excluding her from the application of the latter article.

On 20 July 2017, the complainant filed an appeal requesting either that the review decision be set aside and the EPO grant her an expatriation allowance with retroactive effect from 1 October 2005, or, alternatively, from 9 September 2016, or that the Appeals Committee remit the matter to the EPO for a reassessment of her entitlement to the expatriation allowance.

On 15 January 2020, the Appeals Committee unanimously recommended rejecting the appeal as irreceivable in its entirety. Regarding receivability, the Appeals Committee noted that the complainant had already requested the expatriation allowance upon entering service in 2005, and failed to challenge the original decision within the statutory time limits. This previous situation rendered the rejection of her expatriation allowance final, and the complainant could not reopen the case. Regarding the merits, the Appeals Committee noted that the complainant settled in Germany prior to joining the ESM, therefore excluding her in any case from the application of Article 72(1)(b) of the Service Regulations. Lastly, even though the complainant did not request moral damages, the Committee recommended that she be awarded 150 euros on that count for the legal uncertainty created by the unreasonable length of the appeal procedure.

On 9 March 2020, the complainant was informed that her appeal had been rejected as irreceivable in its entirety, but she was granted 150 euros for the length of the procedure. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. She asks the Tribunal to grant her the expatriation allowance as from 1 October 2005, or, on a subsidiary basis, to either remit the matter to the Organisation, or to grant her the expatriation allowance as from 1 March 2016. She also claims costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary basis, unfounded, to reject all ancillary claims, and order the complainant to bear her costs.

CONSIDERATIONS

1. The complainant requests oral proceedings. Pursuant to Article V of the Statute of the Tribunal, "[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party". In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision, and, therefore, rejects the request to hold oral proceedings.

2. The complainant impugns the 9 March 2020 decision taken by the Chief Corporate Policies Officer (CCPO), acting by delegation of power from the President of the Office. The CCPO, endorsing the 15 January 2020 recommendations of the Appeals Committee, rejected her claim to be granted the expatriation allowance as from 1 October 2005, or at least as from 1 March 2016, as manifestly irreceivable. The CCPO, however, awarded the complainant 150 euros as moral damages for the length of the procedure.

3. There is evidence in the record that the complainant first requested the expatriation allowance on 4 October 2005, upon joining the EPO, as from 1 October 2005. Her request was rejected on 12 October 2005, and this decision was not appealed internally. On 9 September 2016, that is eleven years later, the complainant reiterated her request, which the EPO, by a letter dated 12 December 2016, entertained as a request for reassessment. Further to that, the EPO rejected her request for review lodged on 10 March 2017, as time-barred. The 9 March 2020 decision, endorsing the opinion of the Appeals Committee, held that her second request was time-barred, as she had not appealed the 12 October 2005 decision within the statutory time limit of three months provided for by Article 109 of the Service Regulations.

The complainant alleges that the 12 October 2005 decision was null and void because it did not provide reasons for rejecting her request and it did not indicate the means of redress. She contends that she was allowed to reiterate her request later, and her new request was not time-barred. In her rejoinder, she adds that she did not know before 2016 that

the ESM was an international organisation, and the EPO could have informed her.

4. Firstly, the Tribunal notes that when she filed her first request for the expatriation allowance on 4 October 2005, the complainant indicated that she was "continuously resident in the country in which [she was] serving" and was not "serving [during the three years prior to her appointment] in the administration of the country of which [she was] a national or with another international organisation". In doing so, she disqualified herself from the granting of the expatriation allowance, as she did not meet the requirements for the said allowance, on the basis of her own declaration. Therefore, the 12 October 2005 decision, being based on the complainant's declaration, did not need further detailed reasons. In any event, the Tribunal holds that a decision that does not give adequate reasons is an unlawful decision, which nonetheless has effect until and unless it is impugned and annulled. Thus, the staff concerned are not exempted from challenging such a decision within the established time limit. In the present case, even if it were to be accepted (and it is not) that the 12 October 2005 decision was not properly motivated, it was legally effective, and the complainant should have challenged it at the relevant time.

5. Secondly, the failure of the 12 October 2005 decision to mention the means of redress and the relevant time limits is, in the present case, immaterial. Indeed, in the absence of any statutory provision requiring such a reference, this omission does not constitute a flaw warranting the restoration of the time limit for lodging the internal appeal. Moreover, in ordinary circumstances, a staff member is expected to know the Staff Rules and Regulations and, in particular, the rules concerning the means of redress against an unfavourable decision, whether or not they are written in the said decision. Indeed, consistent case law has it that staff members have a duty to inform themselves, that is, they are expected to know their rights and responsibilities or to ask for clarifications when there is any doubt (see Judgments 4196, consideration 4, 4032, consideration 6, and 3878, consideration 12). The Tribunal is aware that, in a specific case, it held that an

organization's duty of care required it to indicate the means of redress and time limits clearly in its decision, and, as a result, accorded the complainant a new time limit to lodge the internal appeal. However, the Tribunal so adjudicated having regard to the very specific circumstances of that case, given the complexity of the applicable rules of procedure, the duration of the procedure, and the complainant's serious disability (see Judgment 3012, consideration 6). None of these specific circumstances occur in the present case. Thus, it was correct for the Appeals Committee to find that the internal appeal was time-barred because it was filed after the expiry of the set time limit.

6. Thirdly, as to the complainant's argument that she discovered only in 2016 that the ESM was an international organisation, the Tribunal recalls that the fact that a complainant may have discovered a new fact showing that the impugned decision is unlawful only after the expiry of the time limit for submitting an appeal is not in principle a reason to deem her or his complaint receivable (see Judgments 3002, considerations 13 and 14, and 2821, consideration 8). It is true that, notwithstanding these rules, the Tribunal's case law allows an employee concerned by an administrative decision that has become final to ask the Administration for review either when some new and unforeseeable fact of decisive importance has occurred since the decision was taken, or else when the employee is relying on facts or evidence of decisive importance of which she/he was not and could not have been aware before the decision was taken (see Judgments 3002, considerations 13 and 14, 2722, consideration 4, and 2203, consideration 7).

However, in the present case, the circumstance that the complainant discovered only in 2016 that the ESM was an international organisation cannot be regarded as a new fact of decisive importance of which she was not and could not have been aware at the relevant time. The complainant had a duty to inform herself of all relevant questions, including the issue concerning the nature of the ESM, at the time she received the negative decision, even more considering that the ESM had been her employer for more than three years before she joined the EPO. According to the above-mentioned Tribunal's case law, officials are

expected to know their rights and the rules and regulations to which they are subject, including in this case the provisions regarding the expatriation allowance, and ignorance or misunderstanding of the law is no excuse (see Judgments 4741, consideration 13, 4673, consideration 16, 4573, consideration 4, 4166, consideration 4, and the case law quoted therein). Accordingly, the complainant was in a position to argue since 2005 that the ESM was an international organisation, if she had wished, and the fact that she was not aware of the nature of the ESM is attributable to her own negligence and not to a lack of care by the EPO, and, as such, cannot excuse non-compliance with the time limit for challenging the 12 October 2005 decision.

7. It is trite case law that a complainant must comply with the time limits and the procedures, as set out in the organisation's internal rules and regulations and that, where a complainant does not comply with prescribed time limits for lodging a request for review, a grievance and/or an appeal, the complaint may be irreceivable for the complainant's failure to exhaust all internal means of redress in accordance with Article VII, paragraph 1, of the Tribunal's Statute (see, for example, Judgments 4426, consideration 9, 4221, consideration 8, 4103, consideration 1, 3947, consideration 4, and the case law cited therein).

In the present case, considering that the complainant did not challenge the 12 October 2005 decision within the statutory time limit, and that there are no grounds to excuse her missing the mandatory deadline, her request for review submitted in 2017, and her internal appeal filed in 2017 were time-barred and, thus, irreceivable, as correctly stated by the impugned decision.

Accordingly, the present complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.