Registry's translation, the French text alone being authoritative.

SIXTIETH ORDINARY SESSION

In re WEIHS

Judgment No. 786

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Joachim Alfred Weihs against the European Patent Organisation (EPO) on 9 December 1985, the EPO's reply of 4 March 1986, the complainant's rejoinder of 4 April and the EPO's surrejoinder of 2 July 1986;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and Articles 72, 106(2), 108(1) and 109 of the service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Article 72 of the EPO Service Regulations reads: "An expatriation allowance shall be payable to permanent employees in Categories A, L and B ... (3) ... who, although nationals of the country in which they are serving, have been continuously resident for at least ten years in another State at the time of their appointment, no account being taken of previous service in their home country's administration or with other international organisations". The complainant, a citizen of the Federal Republic of Germany, joined the International Patent Institute at The Hague in 1971. On 1 January 1978 he became an official of the EPO, still at The Hague. On 1 July 1985 he was transferred to the EPO in Berlin. On receiving his first pay slip thereafter, on 26 July, he realised that the expatriation allowance he had hitherto been paid had been stopped. He filed a claim under Article 108(1) of the Service Regulations on 30 July. He received no answer within the period of two months prescribed in Article 109(2).

B. The complainant states that he is impugning the implied decision to reject his internal appeal of 30 July 1985.

He contends that he satisfies the requirements of Article 72(3). The "time of appointment" in his case is 1 July 1985, the date of his transfer to Berlin. Before that date he had been continuously resident for more than ten years in Canada, the Netherlands and the United States.

He claims payment of the expatriation allowance as from 1 July 1985.

C. The EPO submits that the complaint is clearly irreceivable under Article VII(1) of the Statute of the Tribunal because the complainant has failed to exhaust the means of redress provided under Articles 108 and 109 of the Service Regulations. On 8 October 1985 the Principal Director of Personnel wrote to inform him of the referral to the Appeals Committee of the appeal he had lodged on 30 July. As the Tribunal has held, Article VII(3) of its Statute refers to any decision on an internal appeal, not necessarily the final one. Article VII(3)

is inapplicable because there is no implied final decision to reject the appeal.

D. In his rejoinder the complainant maintains that his complaint is receivable because he may challenge an implied decision to reject his internal appeal. The President did not answer his appeal within 60 days of the date of its notification, i.e. by the end of September 1985. By 8 October, when the President let him know of the referral to the Appeals Committee, there was already an implied final decision of rejection in accordance with Article 109(2) of the Service Regulations and Article VII(3) of the Statute of the Tribunal.

E. In its surrejoinder the EPO observes that by the complainant's argument the presumption of rejection that arises under Article VII(3) is irrebuttable. That is plainly a misreading of VII(3) since the President would be debarred from taking any effective action on the claim after the 60 days. No such inference may be drawn from a procedural rule. The presumption holds good only until an express decision is taken because such a decision precludes an

implied one and the application of VII(3).

The EPO adds that the Appeals Committee reported to the President on 30 May 1986 but at the date of the filing of the surrejoinder the President had not taken his final decision.

CONSIDERATIONS:

The issue of receivability in general

1. Article VII(1) of the Statute of the Tribunal provides that a complaint shall not be receivable unless the decision impugned is a final one and the person concerned has exhausted such other means of resisting it as are open to him under the Staff Regulations. Article 109(3) of the EPO Service Regulations reproduces that requirement.

2. Article VII(3) of the Statute makes an exception: where the Administration fails to take a decision upon any claim within 60 days the official may have recourse to the Tribunal. The Administration's silence is thus deemed to imply a decision to reject the claim and it is treated as the final one.

The last sentence of Article 106(2) of the Service Regulations lays down a similar rule, and Article 109(2) confirms it. Insofar as those articles purport to allow appeal to the Tribunal against an implied decision they go beyond the ambit of the EPO's competence. Article VII(3) of the Statute is the only rule that matters in determining whether to entertain a complaint against an implied decision.

3. Judgments 532, 533 and 762 have already stated how the Tribunal will construe VII(3) in EPO cases.

First, a "decision" within the meaning of VII(3) need not be a final one. If there is any decision at all, even a provisional one, no decision may be implied and VII(3) does not apply.

Secondly, if a decision is taken, not within the 60 days, but at least before the complaint is filed, the complainant may not allege an implied decision: an express one exists, and no appeal lies to the Tribunal until the internal means of redress have been exhausted.

Thirdly, there is the case in which the Appeals Committee fails to report within a reasonable lapse of time: the staff member may then allege an implied decision.

And fourthly, if the President of the Office takes no final decision within 60 days of getting the Appeals Committee's report he is deemed to have rejected the claim, the decision being inferred from his failure to act.

The receivability of the complaint

4. The complainant was transferred from The Hague to Berlin on 1 July 1985. On being paid his salary at the end of the month he saw that the expatriation allowance he had been getting at The Hague had been cancelled. On 30 July he submitted a claim to the President for the allowance. On 8 October the Principal Director of Personnel told him that after preliminary study the President had decided to reject his claim and was referring it to the Appeals Committee.

The complainant filed the complaint on 9 December 1985. Having got no answer from the President within 60 days, he infers that his claim has been rejected and believes he is entitled under Article 109(3) of the Service Regulations to file a complaint. The EPO replies that according to precedent the complaint is not receivable.

In its report of 30 May 1986 the Appeals Committee recommended uniform practice in granting the allowance in the event of transfer from one duty station to another. The President received the report on 19 June 1986 and has not yet taken his final decision.

5. The complainant is mistaken in alleging that his complaint was receivable at the date of filing.

Although the President did not take a decision within 60 days on the claim of 30 July 1985, the complainant was told on 8 October, two months before the date of filing, that his claim was provisionally rejected and passed on to the Appeals Committee. That was an express decision which precluded the existence of an implied one, and Article VII(3) cannot apply.

The complainant might have been able to allege an implied decision had the Committee failed to report within a reasonable time or the President to take his decision within 60 days of getting the Committee's report. But neither condition is met. With so many appeals before it the Committee could not ordinarily be expected to report so soon after 8 October 1985, the date of referral as 9 December 1985, the date of filing. Moreover, since it had not reported by 9 December 1985, the President could not take his final decision and so was not guilty of dilatoriness.

6. For the reasons set out in 5 above VII(3) does not apply. The complainant was required by VII(1) to exhaust the internal means of redress before filing. When he filed he had not done so since the internal proceedings were still pending. The complaint is premature and therefore irreceivable.

That does not mean that he may not lodge a complaint later. He may still do so within 90 days of the date on which the President takes his decision or, should the President fail to do so within 60 days of getting the Appeals Committee's report, within 90 days thereafter.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.