

115th Session

Judgment No. 3205

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. K. against the European Patent Organisation (EPO) on 2 November 2009 and corrected on 8 January 2010, the EPO's reply of 21 April, the complainant's rejoinder of 30 July, the Organisation's surrejoinder dated 11 November 2010, the complainant's additional submissions of 21 February 2011 and the EPO's final comments of 1 June 2011;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a German national born in 1964. He joined the European Patent Office – the EPO's secretariat – in 2001.

The European Patent Office has various childcare arrangements for its employees. The expression "Office crèches" refers not only to internal, on-site crèches financed by the Office, but also to a number of external crèches in which the Office has reserved places and which are subsidised by the Office. Staff members using an Office crèche

pay a “parental contribution” for this service. In October 2007 the Office introduced a “childcare allowance” for parents whose children are looked after in crèches other than Office crèches. The childcare allowance for children up to age four covers between 45 and 60 per cent of the childcare costs, depending on the grade of the employee. It covers 30 per cent of the childcare costs for children from age four to 12, regardless of the employee’s grade. It was payable from 1 January 2007 for children aged up to four and from 1 January 2008 for children aged four to 12.

In Circular No. 301 entitled “Guidelines for the implementation of the childcare allowance (Article 70a [Service Regulations]) and for the level of parental contribution for the use of Office crèches”, provision is made for adjusting the level of the parental contribution so that the childcare costs borne by staff using an Office crèche remain at the same level as those incurred by staff who use other crèches and who receive the childcare allowance. Paragraph 2 of Circular No. 301 provides: “Out of fairness to all, staff making use of facilities financed or subsidised by the Office are expected to contribute to the cost of childcare at the same level as a staff member using a comparable alternative facility”. Paragraph 2 further provides that: “The level of parental contribution charged for the use of Office crèches is adjusted to correspond to the financial burden incurred by a staff member making use of similar, comparable facilities at their place of employment and in receipt of the childcare allowance”.

A first adjustment was announced in a letter of 29 November 2007: the parental contribution was to be raised from 409 to 459 euros per month with effect from 1 January 2008. This measure concerned the complainant, whose daughter had a place in an Office crèche. He filed an internal appeal against it by a letter of 27 February 2008, arguing that the childcare costs borne by staff receiving the childcare allowance in fact amounted to only 232 euros per month and, therefore, that the parental contribution should be reduced accordingly with retroactive effect from 1 January 2007. He also requested an explanation as to how the increase had been calculated.

By a letter of 18 April 2008 the complainant was informed that the President of the Office had decided to dismiss his requests on the grounds that the increase was justified by the quality of the services offered by the internal crèches and that “the new system rectifie[d] the deficiencies of the former system”. Consequently, his internal appeal was referred to the Internal Appeals Committee (IAC), which acknowledged receipt of it on 21 April. As from 1 September 2008 the Office was granted a public subsidy and the monthly parental contribution was reduced to 421 euros.

In April 2009 the complainant enquired as to when the IAC would be in a position to arrange a hearing or deliver its opinion. The Committee replied in a letter of 30 April 2009 that, due to the current workload in the Legal Services Department, the Office’s position would not be submitted during that year, and in the meantime it was unable to proceed with his appeal. By an e-mail of 30 October the Committee informed the complainant that it had received the Office’s position paper and would forward it in a week or two. However, on 2 November 2009, as he considered that the internal appeal proceedings were unlikely to end within a reasonable time, the complainant filed his complaint with the Tribunal, challenging the implied decision to reject his appeal.

The IAC issued its opinion on 11 August 2010. It unanimously found that the parental contribution rates applicable from 1 January 2008 and from 1 September 2008, respectively, were unlawful because they were based solely on the direct operating costs of the Office crèches, whereas Circular No. 301 required that they be based on a comparison with the childcare costs borne by parents using other crèches. For the purposes of that comparison, the IAC considered that the Office should determine the average cost incurred by these parents after deduction of their childcare allowance, without taking into account “luxury crèches [...] and crèches with particularly low fees”. It recommended a recalculation of the parental contribution on that basis and an award of 500 euros in moral damages owing to the undue length of the internal appeal proceedings.

By a letter of 12 October 2010 the Director of Regulations and Change Management informed the complainant that, exercising the power delegated to him by the President of the Office, he had decided to accept the unanimous opinion of the IAC. The recalculated parental contribution was set at 281 euros for 2008 and 308 euros for 2009, and the difference between these rates and the amounts paid by the complainant was refunded with interest. However, as indicated below, this decision did not put an end to the dispute, because the complainant disagrees with the Office's new calculation.

B. The complainant initially argued that the Office's decision to increase the parental contribution breached applicable rules, because it was based on the direct running costs of the Office crèches instead of the financial burden of a staff member using a comparable alternative facility, as required by Circular No. 301. In addition, he argued that the Office's persistent refusal to supply any data showing how the new parental contribution rate had been determined was evidence of its bad faith. He asked the Tribunal to order that Circular No. 301 be correctly applied retroactively from 1 January 2007, to determine the correct parental contribution rate and to reimburse overpaid fees with interest. He also claimed moral damages in the amount of 9,000 euros, as well as costs in the amount of 4,000 euros.

C. In its reply the EPO contended that the complaint was only receivable to the extent that it challenged the contribution rate applied from 1 January 2008. On the merits, it submitted that the childcare facilities to which the Office crèches are to be compared to determine the parental contribution only include private external facilities with comparable funding and services, and not municipal facilities found in the entire Munich area, as suggested by the complainant. It argued that the advantages provided by the Office crèches are not equivalent to those provided by municipal facilities, whose fees are therefore irrelevant to determine the parental contribution rate.

D. In his rejoinder the complainant reiterates his pleas. He disputes the EPO's interpretation of Circular No. 301, pointing out that, as the

parental contribution applies to both internal crèches financed and located on EPO premises as well as external crèches subsidised by the Office and in which the Office has reserved places, internal and external places can be found in the very same crèche. This leads to the arbitrary situation where one employee with a subsidised “internal” place allocated in an external crèche will have to pay the increased parental contribution rate, whereas an employee with an external place in the same crèche will be reimbursed 45 per cent of the external fee reimbursed under the childcare allowance, in accordance with Article 70a of the Service Regulations for Permanent Employees of the European Patent Office.

The complainant also contends that, according to the transitional provisions of Circular No. 301, the first adjustment had to be made no earlier than one month after the childcare allowance enters into force. Thus, as the entry into force of the childcare allowance for children up to age four is 1 January 2007, the relevant date for retroactively adjusting the parental contribution was 1 January 2007. He amends his claim for moral damages, requesting an additional award of 5,000 euros for the bad faith displayed by the Administration.

E. In its surrejoinder, which was filed after the decision of 12 October 2010 accepting the unanimous opinion of the IAC, the EPO submits that, as the complainant has been reimbursed the total amount corresponding to the overpaid fees for both his children with interest, he no longer has a cause of action in that respect. It points out that the IAC considered that the relevant date for the adjustment of the childcare allowance was 25 October 2007 and not, as the complainant requests, January 2007. Consequently, the amount reimbursed covers the period from October 2007. The Organisation argues that the complainant’s claims for moral and punitive damages are unfounded, given that there was no misconduct or bad faith on the part of the Administration, and that he has been paid 500 euros in moral damages for the delay in the internal appeal proceedings.

F. In his additional submissions the complainant contends that the Office’s new calculation is still incorrect and that it displays bad faith

and a lack of transparency on the part of the Office. In his view, the EPO has inflated the average cost borne by employees receiving the childcare allowance by arbitrarily excluding many relevant crèches on the basis that they have “particularly low fees”. In particular, the elimination of three categories of crèches, including “catholic and protestant crèches”, without providing the details of the respective fees in order to determine whether they should be considered as “particularly low”, is arbitrary and constitutes a violation of the IAC’s recommendation.

Moreover, the complainant objects to the time frame defined by the IAC and the EPO for reimbursement of the overpaid parental contribution. He maintains that the recalculated parental contribution should take effect on 1 January 2007. In view of the Office’s bad faith in implementing the IAC’s recommendations, he now claims punitive damages in the amount of 234,000 euros.

G. In its final comments the EPO maintains its position in full and considers that its new method of calculation is fully in line with the IAC’s recommendation and with Circular No. 301. It points out that there is no entitlement to a contribution reduction from 1 January 2007 and that the complainant’s claim in this regard is based on an erroneous interpretation of the law. The EPO argues that it is within its discretion to identify which crèches have particularly low fees and that, following a detailed examination of the costs incurred by the parents concerned in 2008 and 2009, it correctly decided to exclude three categories with particularly low fees from the calculation. These crèches were excluded according to the objective criterion that they charge particularly low fees and not based on arbitrary reasons. It disputes the complainant’s assertion that Catholic and Protestant crèches charge a fee similar to municipal crèches and asserts that they were excluded precisely because they charge lower fees. Lastly, it considers that the complainant has not provided any evidence to substantiate his allegations of bad faith, and argues that his claims for moral damages and for additional punitive damages are entirely unfounded.

CONSIDERATIONS

1. On 29 November 2007, following the introduction of the childcare allowance, the complainant was informed that his parental contribution for his daughter's place in the Office crèche would increase effective 1 January 2008. The complainant protested the increase in a letter of 27 February 2008 to the President of the Office and requested:

- “1. The publication and substantiation of the calculation and the corresponding realignment of the financial burden to be incurred by a staff member according to Circular 301, 2nd paragraph, making use of comparable facilities in Munich and in receipt of the childcare allowance.
2. A corresponding adjustment or rather direct decrease of my parental contributions to this level according to Circular 301, paragraph 6.1 i) and paragraph 6.1 last sentence, retroactively to the date of entry into force of the provisions for the childcare allowance according to Art. 70a [Service Regulations], i.e. 1 January 2007 (cf. CA/D 22/07).”

2. The President denied the request and referred the matter to the Internal Appeals Committee (IAC) on 18 April 2008. Having been informed in April 2009 that it was unlikely the Office would be filing its position within the current year, the complainant filed this complaint in November 2009. On 11 August 2010, after the reply and the rejoinder were filed in the present proceedings, the IAC submitted its opinion to the new President of the Office and a copy of the opinion was given to the complainant.

3. The IAC found that the EPO's calculation of the complainant's parental contribution was unlawful as it was not done in accordance with Circular No. 301; the EPO was obliged to recalculate the contribution based on the recalculation scheme described in its report; in the event the recalculation led to a reduction in the amount of the contribution, the complainant should be reimbursed retroactively to October 2007 with reasonable interest. The majority opinion recommended an award of moral damages of 500 euros;

however, the minority opinion recommended moral damages of 1,000 euros.

4. On 12 October 2010 the Director of the Department of Regulations and Change Management informed the complainant of the President's decision to follow the unanimous opinion of the IAC as to the merits and, as recommended in the majority opinion, award 500 euros in moral damages for the excessive duration of the appeal proceedings. The Director noted that the recalculation would take some time, but that any amount due would be paid retroactively with interest at 8 per cent.

5. On 19 October 2010 the complainant was informed by e-mail that he would be reimbursed 2,676.30 euros being the overpaid fees for the period October 2007 to August 2008. The e-mail also contained information concerning the method of calculation. The complainant was subsequently informed that he would be reimbursed for his youngest daughter for the period November 2009 to June 2010. By e-mail of 21 October to the Director of Regulations and Change Management, the complainant contested the method of calculation of the reimbursement and requested detailed information about the basis upon which the average values were determined and applied. The EPO provided a detailed explanation and calculation for each child. On 28 October 2010 the complainant was given by e-mail an explanation concerning the determination of the average values and a detailed calculation of the amounts being reimbursed for each daughter. Shortly after this last e-mail, the complainant received the reimbursement.

6. In his complaint to the Tribunal, the complainant requested the following relief:

- i. recognize the Internal Appeal Procedure to be exhausted as the internal appeal proceedings are unlikely to end within a reasonable time.
- ii. order that Circular 301 is correctly applied retroactively from the 1st of January 2007, determining the correct reference value defined

therein, and consequently, reducing the fees levied for users of the internal crèches and reimbursing overpaid fees with interest.

- III. order payment of moral damages in the order of 9000 EUR.
- IV. order payment of costs in the order of 4000 EUR.”

7. The complainant now disputes the basis upon which the EPO recalculated the parental contribution and submits that the reimbursement should have been retroactive to 1 January 2007. He also claims an entitlement to additional moral damages on the grounds that the recalculation constitutes a second breach of the law and punitive damages for the EPO’s bad faith conduct.

8. The decision that was the subject matter of the internal appeal and subsequently, this complaint, has now been overtaken by the President’s decision, communicated by letter of 12 October 2010. It follows that the cause of action in this complaint is spent. It also follows that the issues the complainant now raises are challenges to the October decision for which the internal means of redress have not been exhausted. Accordingly, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet