

115th Session

Judgment No. 3213

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs L. J.-S. against the European Patent Organisation (EPO) on 24 March 2010 and corrected on 12 April, the EPO's reply of 4 August, the complainant's rejoinder of 19 August and the Organisation's surrejoinder of 13 December 2010;

Considering Article II, paragraph 5, 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. At the material time, Article 18 of the Pension Scheme Regulations of the European Patent Office concerning survivors' pensions relevantly provided as follows:

“(1) A survivor's pension shall be payable to the surviving spouse

[...]

- iii) of a former employee drawing invalidity pension, if they were married to each other at the time of his recognition as permanently unfit for service, or had been married to each other for at least five years at the time of his death, or if his

death resulted from physical disability or illness contracted in the performance of his duties, or from an accident;

[...]

- (2) The conditions laid down above with regard to minimum duration of the marriage shall be waived where there are one or more children of the marriage or of a marriage of the employee contracted prior to his leaving the service inasmuch as the surviving spouse is providing for their needs; in such case the survivor's pension shall be payable under the derogation provided for in the present paragraph, for so long as the children are actually being so provided for.

When they are no longer being so provided for, the survivor's pension shall nonetheless continue to be payable for so long as the surviving spouse does not have an income of his own from the exercise of any occupation, or from any retirement pension or other survivor's pension, equal to at least the amount of the above-mentioned survivor's pension."

Article 28(1) of the Service Regulations for Permanent Employees of the European Patent Office reads:

"Assistance by the Organisation

- (1) If, by reason of his office or duties, any permanent employee, or former permanent employee, or any member of his family living in his household is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act."

In addition, Article 87 of the Service Regulations reads as follows:

"Gifts, loans and advances

Gifts, loans or advances may be made to employees, former employees or, where an employee has died, to his successors in title, where as a result inter alia of serious or protracted illness or by reason of family circumstances they are in a particularly difficult position."

The complainant, a Dutch national born in 1946, is the widow of Mr J., a former employee of the European Patent Office – the EPO's secretariat – who retired on grounds of invalidity on 1 August 2005. With effect from that date Mr J. ceased to be exempt from the Dutch social security scheme, which includes the Dutch National Survivor Benefits Act (ANW). The ANW provides inter alia for survivor benefits for individuals whose partner has passed away.

Mr J. arranged to be exempted from the duty to pay contributions to the ANW scheme as of the first day of his retirement and he received confirmation of this exemption by a letter dated 19 August 2005. The following week he was diagnosed with terminal cancer. After having cohabited for approximately 12 years, the complainant and Mr J. were married on 2 September 2005. Shortly afterwards they were informed by the Dutch authorities that, as of the date of their marriage, the complainant was no longer entitled to any national social security benefits, including sickness insurance. Having received a prognosis that he had less than one year to live, by a letter of 13 December 2005 to the President of the Office, Mr J. requested information regarding the complainant's entitlement to pension benefits in the event of his death. In his reply of 22 December the President explained that, under the version of Article 18(1)(iii) of the Pension Scheme Regulations then in force, a survivor's pension was payable to the surviving spouse of a former employee drawing an invalidity pension, if the spouse and former employee had been married to each other for at least five years at the time of the latter's death. However, based on the circumstances at that time, that precondition was not met and the complainant's cohabitation with Mr J. prior to their marriage did not entitle her to a survivor's pension. In addition, after Mr J.'s death she would have no medical insurance through the Office. Mr J. passed away on 9 October 2006.

By a letter of 17 October 2006 from the Pension Administration Department the complainant was informed *inter alia* that she was entitled to a payment of 1,687.27 euros towards funeral expenses, that an overpayment of 1,813 euros had been made to Mr J. and this amount was owed to the EPO from his estate, that pursuant to Article 18(1)(iii) of the Pension Scheme Regulations she was not entitled to a survivor's pension, and that her coverage under the Office's sickness insurance scheme would cease as from 31 October 2006.

The Chairman of the Staff Committee in The Hague wrote to the President of the Office on 8 December 2006, requesting a review of the decision of 17 October in light of the fact that the complainant, at

the age of 60, found herself without an income. He explained that her efforts to secure a survivor's pension under the ANW had been unsuccessful and that she would not be able to draw a national retirement pension until she reached the age of 65. By a letter to the President dated 10 January 2007, the complainant impugned the decision of 17 October 2006 insofar as it denied her a survivor's pension and sought reimbursement of 1,813 euros. In the event that it was necessary to proceed with an appeal, she requested that the decision regarding her non-entitlement to a survivor's pension be quashed and that the matter be reconsidered in light of Article 18(2), second paragraph, of the Pension Scheme Regulations. Subsidiarily, she claimed an appropriate financial gift in accordance with Article 87 of the Service Regulations. In the event that none of these claims was granted, pursuant to Article 28 of the Service Regulations she also claimed practical and financial assistance in order to have her social security entitlements under Dutch law reinstated. In addition, she asked the Administration to quash the decision to claim reimbursement of 1,813 euros and to forfeit that amount on compassionate grounds in accordance with Article 87 of the Service Regulations. She also claimed costs.

The Director of the Employment Law Directorate replied on 13 March 2007, informing the complainant that the President had allowed her requests in part and had granted her, under Article 87 of the Service Regulations, a gift amounting to three times the monthly survivor's pension that she would have received had she met the statutory preconditions. However, by an e-mail of 19 March 2007 the complainant indicated that, although the financial help was welcome, the amount was not sufficient for her needs and she was therefore maintaining her appeal. On 20 March the Director of the Employment Law Directorate replied that no further redress could be offered and that, consequently, the appeal had been forwarded to the Internal Appeals Committee.

In its opinion of 30 November 2009 the Committee unanimously recommended that the appeal be dismissed as unfounded. It rejected the complainant's argument that she would be entitled to a pension

if the Administration applied a teleological rather than a literal interpretation of Article 18(1)(iii) of the Pension Scheme Regulations. The Committee concluded that a restrictive application of that provision was necessary to protect the interests of the group of beneficiaries covered by the Pension Scheme Regulations, and that it was not possible to exercise discretion to widen the scope of the provision. Furthermore, the complainant's years of cohabitation with Mr J. could not be considered analogous to a marriage for the purpose of Article 18(1), nor was it possible to find her circumstances analogous to those set out in Article 18(2). In addition, the Committee rejected the complainant's claim in equity and her arguments that the EPO had breached its duty of care. The Committee also considered that a gift in the form of a pension was not appropriate, because this would effectively circumvent the requirements of Article 18(1) of the Pension Scheme Regulations, and because the gift or payment provided for under Article 87 of the Service Regulations was intended to be of a limited amount in order to assist the recipient to overcome temporary hardship. Indeed, the complainant's financial circumstances were such that she did not fall under the ambit of Article 87. Lastly, the Committee held that the complainant was not entitled to assistance pursuant to Article 28 of the Service Regulations because the Office had already investigated the matter and ascertained that her loss of entitlements under Dutch law was not open to legal challenge. Consequently, there was no need for the Office to take further action.

By a letter of 27 January 2010 the complainant was informed that, in accordance with the unanimous opinion of the Internal Appeals Committee and for the reasons put forward by the Office during the internal appeal process, the President of the Office had decided to reject her appeal as unfounded in its entirety. That is the impugned decision.

B. The complainant presses the arguments she made during her internal appeal and she challenges the findings of the Internal Appeals Committee on a number of grounds. She acknowledges that, based on a literal application of Article 18(1)(iii) of the Pension Scheme Regulations, the length of her marriage to Mr J. does not satisfy

the five-year requirement set out therein. However, in her view, the question should be whether her long-term relationship with her late husband can be deemed equivalent to a marriage for the purpose of Article 18(1). As the preconditions contained in the Article are intended to prevent abusive claims, and since neither the Committee nor the EPO raised concerns regarding the legitimacy of her relationship with Mr J., she argues that she qualifies for a pension according to the spirit and underlying purpose of that Article. She rejects the Committee's finding that Article 18(1) is drafted in such a way to protect the interests of the beneficiaries covered by the Pension Scheme Regulations, and she asserts that the EPO's social security provisions are not based on insurance schemes but on allowances drawn from the Organisation's regular budget.

With respect to her claims in equity, she explains that while her late husband may have made decisions concerning his participation in the Dutch social security scheme, she was not informed of those decisions until later and she cannot be held responsible for the situation in which she now finds herself. Furthermore, the defendant failed in its duty of care to notify her late husband – and indeed many other staff members who were in identical or similar situations – that if they were planning to marry, they should consider the consequences of opting out of the national social security scheme in favour of the EPO scheme. Referring to the Tribunal's case law, she asserts that international organisations are held to a high standard with respect to their duty to inform staff about pension issues, and that this duty must extend to related social security issues.

The complainant submits that the Internal Appeals Committee's findings regarding her financial circumstances are flawed, as her funds are not sufficient to ensure her long-term welfare. Lastly, she contends that she never requested assistance from the Organisation's legal services and has received no such assistance. She characterises the Committee's findings in this respect as "incomprehensible".

The complainant reiterates the claims she made in her internal appeal. She adds that the pension she seeks pursuant to Article 18 of the Pension Scheme Regulations should be in the amount stipulated in

Article 19(1)(iii) of those Regulations or, alternatively, in an amount sufficient to ensure a decorous standard of living. Subsidiarily, she seeks a gift pursuant to Article 87 of the Service Regulations, either in the form of recurrent payments mirroring a survivor's pension or in the form of a lump sum sufficient to acquire an annuity equivalent to a survivor's pension. In the event that the Tribunal does not order the award of a pension or an equivalent amount, she asks it to order the EPO to provide her with assistance to ensure that her entitlements to Dutch social security benefits are reinstated with retroactive effect. She also seeks costs.

C. In its reply the EPO submits that the decision to refuse to grant the complainant a survivor's pension was based on a correct application of the relevant provisions of the Pension Scheme Regulations. It contends that her lack of entitlement pursuant to Article 18(1)(iii) of those Regulations is an undisputed fact. Article 18 is intended to secure a pension for an employee's surviving spouse while at the same time preventing abuse of the Pension Scheme, and both aims are in the interest of the individuals insured by the Scheme. To that end, Article 18 sets out an exhaustive list of preconditions to entitlement. The clear language of the provision provides legal certainty and it is not open to interpretation. In addition, the fact that benefits under the Pension Scheme are "charged to the budgets of the Organisation" does not preclude that it is a genuine insurance scheme applicable to a restricted number of beneficiaries.

With respect to the relevance of the complainant's period of cohabitation with her late husband prior to their marriage, the EPO refers to the Tribunal's case law and argues that it is lawful to treat married couples or couples who have entered into a registered partnership differently from unmarried couples. Having regard to the aim of the Pension Scheme Regulations to prevent abuse, it is reasonable to make the grant of a survivor's pension conditional upon the existence of a civil marriage, which can be proved beyond doubt. The Organisation submits that the ANW makes a similar distinction and does not provide for the grant of a survivor's pension to an unmarried surviving partner.

The EPO asserts that it fulfilled the duty of care it owed the complainant and her late husband and points out that they both had the relevant statutory provisions at their disposal and could have consulted the Administration at any time with questions regarding the complainant's future entitlement to benefits. It contends that they bore the responsibility for organising their own lives, and that it is not responsible for the complainant's lack of involvement in her late husband's decisions.

The Organisation argues that the complainant's situation does not fall under the scope of Article 87 of the Service Regulations, and that the grant of a sizable gift under this provision would circumvent the legislator's intention. Indeed, such a decision would be *contra legem*. In addition, it points to e-mails between the complainant and the Administration and asserts that she received assistance from the Office as soon as it became aware of her situation. In its view, Article 28 of the Service Regulations is not applicable in this case because the complainant did not suffer injury on account of being the family member of a permanent employee of the Office.

D. In her rejoinder the complainant maintains her pleas and claims. She submits that the EPO is attempting to limit the Tribunal's exercise of statutory interpretation. In her view, the Tribunal is free to depart from a literal interpretation of a statute not only when there is ambiguity but also when a literal interpretation leads to a result that is absurd, or unlikely to have been the intention of the legislator. She argues that the question in this case is whether a marriage of one year preceded by 12 years of cohabitation fulfils the same purpose as the five years of marriage referred to in Article 18(1)(iii).

E. In its surrejoinder the EPO maintains its position in full.

CONSIDERATIONS

1. The complainant impugns the decision of 27 January 2010 whereby she was informed that the President of the Office had decided to endorse the unanimous recommendation of the Internal

Appeals Committee and to reject her appeal as unfounded in its entirety. The complainant argues that while she does not qualify for a survivor's pension according to a literal reading of Article 18(1)(iii) of the Pension Scheme Regulations – in the version then in force – her case could be decided under the same provision using a “teleological reading”, because by cohabiting with her late husband for more than 12 years prior to marrying, she qualified for a pension according to the “spirit” and “underlying purpose” of the Article. She also argues that the Organisation did not provide “sufficient guidance to discharge its duty of care”.

2. Her claims for relief are set out in B, above.

3. The complainant is not entitled to a survivor's pension under the literal wording of Article 18(1)(iii) of the Pension Scheme Regulations, quoted under A. That provision stipulates that the surviving spouse of an employee receiving an invalidity pension is entitled to a survivor's pension only if they were already married when the employee retired owing to invalidity or had been married for at least five years prior to the employee's death. In the present case, the complainant and Mr J. were married one month after his retirement on invalidity and had been married for just over a year at the time of his death. Mr J. had been informed by a letter dated 19 August 2005 that his wife would not be eligible for a survivor's pension under the Dutch social security scheme as he had previously arranged to be exempted from the duty to pay social security contributions, including those towards the national survivor's pension under the ANW. This decision was not contested within the six-week time limit from the notification of it.

4. In response to his letter of enquiry dated 13 December 2005, Mr J. had also been informed by a letter of 22 December that, given the circumstances at that time, his wife would not be entitled to a survivor's pension, nor would she be eligible for medical insurance through the Office unless the prerequisites of Article 18(1)(iii) of the Pension Scheme Regulations were met. Mr J., the complainant's

husband, passed away on 9 October 2006, and as he was not insured under the ANW at the time of his death, the complainant was not eligible for a survivor's pension through that scheme. By a letter dated 17 October 2006 from the EPO Pension Administration Department the complainant was informed that she would not receive a survivor's pension and that she would cease to be covered by the Office's sickness insurance scheme on 31 October 2006. She was also informed that she was entitled to a fixed amount of 1,687.27 euros towards funeral costs and that concerning tax adjustment an overpayment of 1,813 euros had been made which would need to be recovered from her late husband's estate.

5. In January 2007 the complainant filed an appeal requesting *inter alia* that the decision not to grant her a survivor's pension be reviewed with regard to the provisions of Article 18(2), second paragraph, of the Pension Scheme Regulations. The President of the Office decided in March 2007 to grant her request in part and award her an *ex gratia* payment, under Article 87 of the Service Regulations, amounting to three times the monthly survivor's pension (total amount equalling 9,169.10 euros), which the complainant would have received under Article 19(3) of the Pension Scheme Regulations had she met the requirements. In its opinion dated 30 November 2009 the Internal Appeals Committee concluded that the complainant's appeal was unfounded and should be dismissed. The President of the Office endorsed the opinion of the Committee and rejected the appeal.

6. The Tribunal agrees with the findings and conclusions of the Internal Appeals Committee, and with the Organisation's statement that the "wording [of Article 18 of the Pension Scheme Regulations] leaves no room for misunderstanding or unclearness which needs to be solved by way of interpretation". The primary rule of interpretation is that words are to be given their obvious and ordinary meaning (see Judgment 1222, under 4). The complainant substantially asserts that "marriage" according to Article 18 of the Pension Scheme Regulations could also include "stable cohabitation". This is incorrect. Stable cohabitation is a known and common situation. If the

Organisation had intended cohabitation to be equivalent to marriage in status, it would have explicitly stated so in its Service Regulations. Furthermore, the complainant's argument that the award of a pension could be construed as a discretionary decision is not sound. Pension entitlements are highly regulated and codified and, as such, do not fall within the realm of discretionary decisions.

7. The complainant's allegation that the Organisation did not discharge its duty of care, is unfounded. She submits that while her late husband "may have made decisions about his participation in the Dutch social security scheme", she was "neither informed nor aware thereof until later". She argues that the Organisation "should have issued information to staff members warning employees who are/were single or widowed and about to retire of the potential administrative problems flowing from the service regulations". She further submits that the Organisation should have notified its staff regarding the specific issues with regard to the Dutch system and how it could affect their pension entitlements. The Tribunal observes that the complainant's husband had full access not only to the Service Regulations of the Organisation (including the Pension Scheme Regulations), but also to a helpdesk which was set up specifically to assist staff in legal matters relating to the Dutch authorities. The fact that the complainant's husband did not properly acquaint himself with the provisions of the Service Regulations as they pertained to him and the complainant, particularly regarding his retirement on invalidity and his upcoming pension rights, and that he did not avail himself of the service put in place to assist staff with matters relating to the Dutch authorities, cannot be qualified as a failure on the EPO's part to discharge its duty of care. International organisations have a duty of care towards their employees and must provide clear rules and regulations as well as clarifications of such when requested, but they cannot be solely responsible for every situation stemming from confusion regarding said rules. Employees are also charged with the duty to inform themselves, and to request clarification when necessary so that the system can work efficiently to the best advantage of both the Organisation and the staff members either as a group or individually

(see, for example, Judgment 2997, under 6). In the present case it is unfortunate, but clear, that the complainant's husband took decisions which affected his spouse's pension entitlements, without properly informing himself of the full consequences of those decisions. The Organisation correctly applied the relevant provisions of the Service Regulations and Pension Scheme Regulations and discharged its duty of care towards the complainant.

8. The claim regarding the quashing of the decision by the EPO to claim reimbursement of the tax adjustment is likewise unfounded. The letter of 17 October 2006 states in relevant part: "The final calculation of tax adjustment for 2006 results in an overpayment of €1,813.00. This debt must be claimed from your late husband's estate." The letter did not contain a decision regarding the payment of the tax adjustment. It merely indicated that the tax adjustment must be claimed from the complainant's husband's estate. The complainant submitted in her internal appeal that her late husband's daughter was his sole heir but that the complainant had settled the claim for recovery of the overpayment. As such, the Tribunal notes that the recovery of said overpayment is a matter to be discussed between the complainant and her late husband's daughter. This claim must be dismissed.

9. The complainant asks for the award of a pension directly under Article 18 of the Pension Scheme Regulations, in the amount specified in Article 19(1)(iii) of the Pension Scheme Regulations, or at least in an amount sufficient to ensure a decorous standard of living or, in the alternative, a gift under Article 87 of the Service Regulations, either in the form of recurrent payments mirroring the aforementioned pension, or in the form of a lump sum sufficient to acquire an annuity substantially equivalent to said pension. The Tribunal points out that it does not have the power to award pensions outside of the Pension Scheme Regulations, nor is it appropriate for the Organisation to award a recurring "gift" under Article 87 of the Service Regulations, mirroring a pension. As such, this claim can only be dismissed.

10. In the event that she is not awarded a pension or gift, the complainant requests assistance to ensure that her Dutch social security entitlements be reinstated. The Tribunal notes that the Organisation has already assisted the complainant, in that the Administration thoroughly investigated her situation and decided that there was no legal basis to request the reinstatement of the Dutch social security entitlements, and therefore considered her request to be outside the provisions of Article 28 of the Service Regulations. Consequently, her request is unfounded.

11. In view of the foregoing, the complaint is unfounded in its entirety and must be dismissed. As the complaint fails, the complainant shall bear her own costs.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet