R. (No. 2) and R. (J.)

v.

EPO

120th Session **Judgment No. 3533**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mrs Å. R. (her second) and Mr J. R. against the European Patent Organisation (EPO) on 6 July 2011, the EPO's single reply of 14 October, the complainants' rejoinder of 13 December 2011 and the EPO's surrejoinder of 10 April 2012;

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

Having examined the written submissions and decided not to order oral proceedings, for which none of the parties has applied;

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

The complainants are both permanent employees of the EPO. They are married and have three children, all of whom are minors. Both complainants are entitled to the expatriation allowance pursuant to Article 72 of the Service Regulations for Permanent Employees of the European Patent Office. Since the birth of their first child in October 2000, depending on whose basic salary was the higher in view of the circumstances at the time, either Mrs or Mr R. also received the supplement to this allowance as set out in Article 72(5) of the Service Regulations. Article 72(5) provides that permanent employees who are paid the expatriation allowance and who are not in receipt of an

education allowance for a dependent child shall receive, for that child, a supplement to their expatriation allowance as set out in Annex III of the Service Regulations.

By a letter of 8 January 2008 the complainants informed the Administration that, having examined their pay slips, they had discovered that only one of them at a time (the one with the highest salary) had been receiving the supplement to the expatriation allowance. However, in their view, they were both entitled to the supplement in respect of their dependent children. They requested the Administration to accordingly correct (as necessary) the payment of the supplement to them with retroactive effect from October 2000 and to pay it to both of them in the future.

After several queries as to the status of their request, by an e-mail of 7 April 2008 the complainants were informed that the supplement for each dependent child under Article 72(5) of the Service Regulations was payable in lieu of the education allowance. That allowance was considered to be a family allowance in accordance with Article 67(1)(a) of the Service Regulations and in line with Article 67(3), was payable to the spouse with the higher basic salary. Thus, the supplement could only be paid once in respect of each child and, consequently, the remuneration which had been paid to each of them (in respect of the supplement) was correct and their request could not be granted.

In a letter to the President of the Office of 4 June 2008 the complainants jointly challenged the decision of 7 April. They reiterated the requests they had made in their letter of 8 January and sought payment of interest on amounts owed to them. In the event the President did not grant their requests they claimed an additional 1,000 euros as compensation for the costs they would incur defending their case. By separate letters of 1 August 2008 the complainants were each informed that the President had referred the matter to the Internal Appeals Committee (IAC) for an opinion. The IAC considered their appeals jointly.

In the internal appeal proceedings the complainants reiterated their earlier claims for relief and they sought 1,000 euros in moral damages

for delay in the internal appeal proceedings. They further reserved the right to claim additional future costs.

The IAC issued its opinion on 28 February 2011. It unanimously found the appeal receivable in part. The appeal was receivable *ratione materiae*. However, it was irreceivable *ratione temporis* in part; the complainants' claim for payment of the supplement prior to October 2007 was time-barred. Furthermore, the appeal was receivable *ratione personae* only in respect of one spouse at a given time, i.e. the spouse who was not in receipt of the supplement for a given month. A majority of the IAC members recommended that the appeal be rejected as unfounded but that both of the complainants be awarded 200 euros as compensation for the delay in the internal appeal proceedings. A minority of the IAC members found in favour of the complainants and recommended that they be awarded the relief they sought.

By separate letters of 28 April 2011 the Director of Regulations and Change Management informed the complainants that, in accordance with the majority opinion of the IAC, the Vice-President of Directorate-General 4 (DG4) had decided to reject their appeal as unfounded and also to reject the recommendation that they each be awarded 200 euros in damages. As indicated in the majority opinion, the grant of the supplement to the expatriate allowance supposed that an employee had a dependent child as envisaged by the education allowance. Article 71(1) of the Service Regulations stated that the education allowance was granted in respect of dependent children within the meaning of Article 69. Article 72(5) therefore referred to the general concept of a dependent child, as understood by reference to Article 69 in its entirety. As Article 69(2) provided that not more than one dependants' allowance could be paid in respect of any child, the legal framework thus established that only a single payment should be made. This principle applied to the expatriation allowance supplement, which could only be paid to an employee in receipt of the dependants' allowance. Furthermore, contrary to the opinion of a minority of the IAC members, the meaning of "dependent child" could not be restricted to the definition set out in Article 69(3). To do so would lead to a double payment being made in respect of the same child, and this would be a

breach of the principle of equal treatment and contrary to the context, purport and purpose of Article 72(5). Those are the impugned decisions.

The complainants ask the Tribunal to quash the impugned decisions. They request payment of the expatriation supplement for dependent children pursuant to Article 72(5) of the Service Regulations (i.e. payment of the supplement to both of them at the same time). They seek a corresponding adjustment to the payment of the supplement to them with retroactive effect from October 2007, together with compound interest at the rate of 8 per cent per annum. They each seek exemplary or, in the alternative, moral damages for the "gravity of the offence" of bias in the IAC proceedings, moral damages for delay in the internal appeal proceedings in an amount no less than 1,000 euros or, in any event, no less than the amount recommended by the IAC. They both claim costs in an amount no less than 1,000 euros, and any further relief as appropriate.

The EPO asks the Tribunal to dismiss the complaints in their entirety and to order that the complainants bear their costs.

CONSIDERATIONS

1. The complainants filed separate complaints and a single complaint brief. As the complaints rest on the same material facts and raise the same issues of fact and law, they may be dealt with in one judgment, and are joined.

2. Article 72 of the European Patent Office's Service Regulations provides for the payment of an expatriation allowance to permanent employees. Under Article 72(5), a supplement to the expatriation allowance may be payable to a permanent employee. It reads:

> "Permanent employees who are paid the expatriation allowance and who are not in receipt of an education allowance for a dependent child shall receive, for that child, a supplement to their expatriation allowance as set out in Annex III of these Regulations."

3. Article 69 of the Service Regulations provides for the payment of a dependants' allowance for children under the conditions set out in the Article. Relevantly, Article 69(2) and (3) read:

> "(2) Not more than one dependants' allowance shall be paid in respect of any dependent child within the meaning of this Article.
>
> […]
>
> (3) For the purposes of these Regulations a dependent child shall be:
>
> (a) the legitimate, natural or adopted child of a permanent employee, or of his spouse, who is mainly and continuously supported by the permanent employee or his spouse;
>
> […]"

4. The complainants argue that they are both entitled to receive the supplement to the expatriation allowance. The complainants submit that there is no ambiguity in Article 72(5). They point out that they are both in receipt of the expatriation allowance, neither of them is in receipt of an education allowance for their children and the children are dependent on both of them in the sense of Article 69(3)(a) of the Service Regulations. Thus, they maintain that they both satisfy the requirements of Article 72(5).

5. In effect, the complainants are arguing that since the children are factually dependent on both of them, they are each entitled to receive the supplement to the expatriation allowance. This is essentially the same argument raised by Mrs R., the complainant in Judgment 3532. At consideration 6 of that decision, the Tribunal stated:

> "Under the conditions laid down in Section 3 of the Service Regulations, a permanent employee is entitled to family allowances including the dependants' allowance (Article 67). The dependants' allowance is payable to a permanent employee who has one or more dependent children (Article 69(1)(I)) and a dependent child must be a child who is mainly supported by the permanent employee or his or her spouse (Article 69(3)(a)). Additionally, not more than one dependants' allowance is payable for any dependent child within the meaning of the Article (Article 69(2)). In cases where the husband and wife are both employees of the Office and are both entitled to the dependants' allowance, it is payable only to the permanent employee whose basic salary is higher (Article 67(3)). Thus, it can be seen that a dependent child for the

purposes of the Service Regulations is defined by reference to the permanent employee in receipt of the dependants' allowance."

6. At considerations 7 and 8, the Tribunal made the following observations that are equally applicable to the present case:

"7. The Tribunal considered an argument analogous to that of the complainant in Judgment 2532, involving two permanent employees of the EPO, who had a natural child together but were not spouses. The mother had sole custody and received the dependants' allowance and the household allowance, while the father paid a monthly contribution for the child's maintenance. The father applied to receive the household allowance on the basis that the child was a dependant under Article 69 and there was no prohibition on the household allowance being paid twice in respect of the same child to unmarried parents. At consideration 5, the Tribunal rejected this argument. It reads:

'In [the Tribunal's] view the relevant provisions must be applied in the light of the special circumstances of the case. Even though in other circumstances it might have been possible to recognise that the complainant supported his daughter mainly and continuously, according to the applicable provisions, by virtue of providing sufficient financial support for her maintenance, this is not so in the present case. Since the mother, who is an employee of the EPO, is already considered by the Organisation to be her daughter's main provider, so that the latter is deemed to be dependent upon her in the meaning of Article 69(3)(a), the complainant could not also be considered as that child's main support.

This leads to the conclusion that since his daughter, as shown above, could not be considered by the Organisation to be dependent on him, as she had already been recognised as being dependent on her mother in the meaning of Article 69 of the Service Regulations, the complainant did not satisfy the conditions for entitlement to the household allowance.'

8. The complainant argues that this reasoning does not apply to her because she and her husband, who received the dependants' allowance at the relevant time, are married. Therefore, in her view she comes within Article 69(3) because her spouse is considered by the EPO to 'mainly and continuously' support the children. However, this text simply recognises family situations in which the spouse of the permanent employee of the EPO has natural, legitimate or adopted children who are mainly and continuously supported by either the permanent employee or the spouse."

7. Under Article 72(5), the supplement to the expatriation allowance is payable to a permanent employee for a dependent child for whom that permanent employee is not in receipt of an education allowance. Since, for the purposes of the Service Regulations, a child by definition cannot simultaneously be the dependent child of two permanent employees, the claim for payment of the supplement under Article 72(5) to both complainants concurrently will be dismissed.

8. The complainants advance three additional arguments. First, the IAC majority demonstrated wilful bias in the adjudication of their claims. Leaving aside the question of receivability raised by the EPO with respect to the complainants' claim for exemplary or moral damages related to bias, this allegation is without foundation. The analysis of the majority does not reflect the claimed absence of neutrality or that the members failed to adjudicate the claim in a fair and impartial manner.

9. Second, the complainants submit that the impugned decision was taken without proper authority. They claim that as it was signed by the Director of Regulations and Change Management and not by the Vice-President of DG4 (Administration), who has authority to take a decision when the opinion of the IAC is not unanimous. They insist that as there is no evidence of sub-delegation of authority, it follows that the decision was taken by the Director without authority and should be set aside. This argument is rejected. In Judgment 3352, under 7, the Tribunal held that it was sufficient if the letter notifying the staff member of the decision clearly stated that the decision was taken by the person having the requisite authority and that the writer of the letter was merely informing the staff member of the decision.

10. Third, the complainants assert that the EPO exceeded its authority by not following the IAC's recommendation that it award moral damages for delay. As well, the request for moral damages for delay is justified. The IAC noted that it took two years for the EPO to produce a position paper, which warranted an award of damages. Whether the complainants' requests for the grant of the supplement to their expatriation allowances were founded or not (the latter being

the Vice-President's reason for rejecting this recommendation) has no bearing on the complainants' right to have their appeal treated diligently and resolved within a reasonable period of time.

11. While the Vice-President of DG4 was entitled to decline to follow the unanimous recommendation of the IAC, in the circumstances, it was not enough to state that the recommendation was not followed because the appeal was considered unfounded. Both the IAC majority and minority, in making their respective recommendations, relied on Tribunal decisions where complainants were awarded damages for excessive delay even though the main claims were determined to be unfounded (see in particular Judgments 2744, under 8 and 9, 2957, under 6 and 7, and 2851, under 9 and 10). The Vice-President of DG4 failed to identify those facts that distinguished the complainants' case from the cited case law.

12. As to the delay itself, the case law is clear that a total delay of well over two years to reach a final decision is excessive and warrants an award of moral damages, on the basis of an organisation's breach of its positive obligation to ensure that internal appeal procedures move forward with reasonable speed (see, for example, Judgment 2197, under 33). The EPO notes that once it submitted its position paper, the internal appeal proceedings were conducted diligently. This may be so, but the submission of the parties' positions is an integral part of the internal appeal proceedings and the failure to submit a position in a timely manner contributes to the overall delay in the proceeding. Moreover, the EPO offered no explanation for the two-year delay in making its submission to the IAC.

13. Accordingly, the complainants are each entitled to an award of moral damages for excessive delay in the internal appeal proceedings in the amount of 500 euros. As the complainants have succeeded only on this claim, the Tribunal awards them costs in the total amount of 200 euros.

DECISION

For the above reasons,

1. The EPO shall pay each complainant moral damages in the amount of 500 euros.
2. It shall pay the complainants costs in the total amount of 200 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ