

M. (No. 2)

v.

EPO

133rd Session

Judgment No. 4492

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms H. M. against the European Patent Organisation (EPO) on 11 December 2012 and corrected on 15 March 2013, the EPO's reply of 22 July, the complainant's rejoinder of 22 October 2013 and the EPO's surrejoinder of 31 January 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant seeks compensation for the alleged financial consequences of the decision taken in March 2003 to grant her an invalidity pension with retroactive effect from 1 July 2000.

Facts relevant to this case are to be found in Judgment 2386 on the complainant's first complaint, which was delivered in public on 2 February 2005. Suffice it to recall that in August 1998 an Invalidity Committee was convened to examine the complainant's case because, following a prolonged period of illness, she had reached the end of the maximum period of entitlement to sick leave. Two of the three members of the Committee considered that the complainant had a severe illness, that she was suffering from total invalidity and that her illness was an occupational disease. However the third member (the medical practitioner appointed by the European Patent Office, the EPO's secretariat) disagreed

with the findings of the other two members, which he considered to be insufficiently substantiated, particularly with regard to their conclusion that the complainant was suffering from an occupational disease. The Administration considered that in the absence of a valid opinion from the Invalidity Committee, the invalidity proceedings had not been completed and that the complainant's request for early retirement could not be granted. The complainant lodged an internal appeal contesting this decision. As the President of the Office decided on 17 March 2003 to follow the recommendation of the Appeals Committee, the complainant received an invalidity pension as from 1 July 2000 and a lump-sum payment for serious illness calculated on the basis of the salary she received in June 2000.

By a letter of 20 August 2003 the complainant was informed that the invalidity pension was subject to national taxation and that she was therefore entitled to the payment of a tax adjustment. The details of the sums due pursuant to the 17 March 2003 decision were sent to her in a letter dated 21 August 2003 which she impugned in her first complaint. The Tribunal dismissed this complaint as irreceivable in Judgment 2386.

On 28 January 2009 the complainant asked to be reimbursed for the "late payment interest" she had to pay to the German tax authorities for the years 2000-2004 and the legal consultation fees she had disbursed to obtain advice on tax issues relating to the confusing calculations allegedly made by the EPO following the retroactive award of the invalidity pension. By a letter of 24 March 2009 she was informed that the President considered that the EPO was not responsible for the fact that she had to pay interest on the tax arrears due for the years 2000-2004 and that he had referred the matter to the Internal Appeals Committee (IAC). The complainant expanded upon her requests on 6 December 2010 and 13 February 2012. After hearing the parties, the IAC unanimously recommended, on 13 July 2012, that the appeal be dismissed as partly irreceivable and entirely unfounded. By a letter of 3 September 2012 the complainant was informed that her internal appeal was dismissed as recommended by the IAC. That is the impugned decision.

The complainant asks the Tribunal to award her 30,562.64 euros compensation in addition to "interest on late payments" regarding several sums she details. She also seeks the reimbursement of the legal and tax advice costs she incurred since 17 October 2012 and will incur until she reaches the normal retirement age, and costs for the proceedings.

Relying on Judgment 2386, the EPO submits that some of the complainant's claims are irreceivable. It also submits that the complainant has extended the subject matter of the internal appeal in an inadmissible manner. Subsidiarily, it asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. In the decision which the complainant impugns, the Director ad interim of Directorate 431, by delegation of power from the President of the Office, accepted the unanimous recommendation of the IAC to reject the complainant's internal appeal as partly irreceivable and unfounded.

2. The background to this case is rooted in a dispute over the Office's refusal to grant the complainant early retirement after the majority of the Invalidity Committee recommended that she be retired on grounds of invalidity and be paid an invalidity pension under Article 54(2) of the Service Regulations for permanent employees of the Office. The Invalidity Committee's opinion was communicated to the complainant in July 2000. However, it was by letter of 17 March 2003 that the President, endorsing the recommendation of the Appeals Committee to whom the complainant had appealed, decided to grant the complainant early retirement. The President informed her that she would receive, among other payments, the invalidity pension, a lump-sum payment under the Collective Insurance Contract due to serious illness, pursuant to Article 62(7) of the Service Regulations, and the reimbursement of legal costs related to her appeals to the Appeals Committee upon receipt of the relevant bills. The complainant's invalidity pension was calculated retroactively as from July 2000. Particulars of the payments to which she was entitled were detailed in a letter dated 21 August 2003.

3. In her letter of appeal dated 28 January 2009, the complainant requested reimbursement of the interest she had paid on tax arrears in the amount of 4,467 euros alleging that the EPO had breached its duty of care. She also requested 3,339.04 euros for the difference between the income tax which had actually become due between 2000 and 2007 and the tax adjustments paid to her by the Office during that period.

She additionally requested a payment in the amount of 5,000 euros for legal consultation to resolve issues that arose from the re-categorisation of her invalidity status. In a letter dated 6 December 2010, the complainant increased the amount claimed for legal consultation to 17,447.44 euros and asked for an order that the Office be obliged to meet any future legal costs incurred in the meantime, including those resulting from the conversion of the invalidity pension into an invalidity allowance with effect from 1 January 2008. By letter dated 13 February 2012, the complainant requested further reimbursement of fees for legal consultation incurred between 14 December 2010 and 8 February 2012. She also requested costs in the proceedings.

4. The IAC concluded that the request for the lump-sum for tax adjustment was irreceivable being *res judicata* as the pleas for that request were identical to those which the Tribunal found to be irreceivable in Judgment 2386. It also concluded that the complainant's request that the Office be obliged to meet the cost for future legal and tax consultation was irreceivable as being beyond the framework of her original request. The IAC further concluded that the request for reimbursement of interest on tax arrears, and, by extension, for compensation of legal and consultancy costs was unmeritorious and that under Article 113(7) of the Service Regulations it was not appropriate to award the complainant the costs in the proceedings.

5. In the present complaint, contesting the impugned decision, the complainant makes the following requests:

- (1) That the EPO be ordered to pay her compensation in the amount of 30,562.64 euros in addition to "interest on late payments" in the amount of at least 5 percentage points above the relevant base rate of interest, comprising 13,643.56 euros from 28 January 2009 onwards, 11,609.92 euros from 6 December 2010 onwards, 4,396.42 euros from 13 February 2012 onwards and 912.74 euros from the appeal onwards;
- (2) That the Tribunal finds that the EPO must reimburse her legal and tax advice costs in the same amount that, from 17 October 2012 onwards, she had incurred or will incur in conjunction with income tax assessments based on her employment at the EPO until she reaches the normal retirement age; and

- (3) That the costs of the proceedings be ordered against the EPO, in particular her out-of-court legal fees under the German law providing for the reimbursement of lawyers.

6. Various claims are subsumed under the first request in which the complainant seeks a total of 30,562.64 euros in addition to interest. As she explains it, she claims 4,467 euros for “interest on late payments” which she paid for the income tax years 2000 to 2004; 3,339.04 euros for the difference between the tax adjustments paid by the Office for the years 2000 to 2007 and the income tax that she paid for that period; and a total of 22,756.60 euros for constant tax law advice and representation. According to the complainant, this latter sum comprises 21,843.86 euros gross (including incidental expenses and VAT at between 16 per cent and 19 per cent) incurred for tax law advice and representation during the period 21 January 2005 to 8 February 2012, the date of the last invoice before the oral proceedings before the IAC in February 2012, and an additional 912.74 euros for the period 9 March 2012 to 16 October 2012.

7. The Tribunal notes that the EPO does not contest the receivability of the complainant’s claim for compensation for “interest on late payments” and its merits will be considered later. The Tribunal, however, finds it unnecessary to consider the issue of the receivability of the other claims, which is disputed by the EPO, as the complaint is unmeritorious and accordingly unfounded.

8. In her second request the complainant asks the Tribunal to order the EPO to reimburse her for legal and tax advice costs which she has incurred from 17 October 2012 or will incur for her income tax declarations resulting from her employment with the EPO, until she reaches the normal retirement age. She claims no specified sum. In explaining the request, the complainant states that as regards tax year 2008, differences of opinion arose between the EPO and the German tax authorities over the question whether former EPO employees who were paid an invalidity allowance, rather than an invalidity pension, should be taxed in their country of residence and that since the difference of opinion has not been resolved to date and the legal situation is uncertain, it must be assumed that the EPO will be liable for legal and/or tax advice costs, including advice on the assessment of income tax related to her employment by the EPO in the future as well.

The complainant essentially asks the Tribunal to issue what amounts to a declaratory order on future uncertain contingencies. The Tribunal does not make such orders. Moreover, the claim is not based on a challengeable final decision for which the complainant has exhausted the internal means of redress, as paragraph 1 of Article VII of the Statute of the Tribunal requires. The claim is accordingly irreceivable.

9. The complainant's central claim for compensation for "interest on late payments" is premised on her contention that the EPO breached its duty of care. The Tribunal recalls that the principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform employees in advance of any action that may imperil their rights or harm their rightful interests. The case law further states that the duty of care is greater in a rather opaque or particularly complex legal situation, as is often the case when it is necessary to determine staff rights in technical fields, such as the determination of pension rights (see, for example, Judgments 3861, under 9, and 2768, under 4).

10. The complainant argues that she suffered financial disadvantage in that she incurred interest on tax arrears because the EPO delayed the payment of her invalidity pension and related benefits. Her supporting arguments may be summarised as follows: had the Office not unlawfully refused to commence the payment of her invalidity pension in 2000, when the Invalidity Committee so recommended, she would have avoided paying a higher rate of taxation incurred as a result of a single late payment of the invalidity pension, the lump-sum and related benefits in 2003. Following the retroactive award of the pension, there was great uncertainty about how the tax declarations should be filed for the years 2000-2003. The income tax notices for 2000-2004 were issued in 2007 and 2008 only and she had to pay interest on the arrears despite the fact the German tax authorities were responsible for the delay in processing the matter. Had the Office determined as early as 1 July 2000 that she was entitled to an invalidity pension, there would have been no delay in processing at the tax office and the issue of interest on arrears would not have arisen. Moreover, following the decision of March 2003, the EPO provided confusing calculations to the German tax authorities, which resulted in great confusion for the tax authorities

in dealing with her income tax assessments and consequently created considerable difficulties for her in her communications with the tax office. She was overwhelmed by the lengthy disputes over the tax issues that arose which severely impaired her already critical state of health. The ultimate result was that her submission and processing of her tax declarations for the years 2000 to 2004 were complex and protracted, causing her to incur interest on the tax arrears paid to the German Treasury for the tax years 2000 to 2004. Her legal representative waited for the EPO to provide clarification. The interest levied by the tax authorities did constitute damage and the responsibility for this damage lies with the Office. She had no reason to assume that interest would have been levied.

11. The foregoing arguments are however, premised, in effect, on erroneous assumptions. It bears recalling that at the heart of this matter is the interest which the complainant incurred as interest for the late filing of her income tax declarations. In the first place, the Tribunal is satisfied that the EPO's decision to grant the complainant early retirement and the related benefits was made in March 2003 in accordance with the applicable rules, with no discernible breach of the duty of good faith or the duty of care owed to the complainant. The complainant was duly informed of the particulars of her entitlements in August 2003 and it was in her interest as a prudent taxpayer to so order her tax affairs to avoid incurring interest on tax arrears.

Regarding the claim relating to the interest paid for the years 2000-2004, amounting to 4,467 euros, as noted above, the complainant argues that following the retroactive award of an invalidity pension there was great uncertainty about how the tax declarations should be filed for 2000-2003, that the income tax assessments for 2000-2004 were issued in 2007 and 2008 only and that she had to pay the interest despite the fact that the German tax authorities were responsible for the delay in processing the matter. By this, the complainant has herself accepted that the German tax authorities were responsible for the delay. Moreover, the Tribunal sees no basis on which to hold that the delay with the complainant's tax assessment for the years 2000-2004 was caused by the EPO rather than by her failure to file her tax returns on time.

12. For the same reasons, the EPO cannot be held liable for the alleged loss suffered by the complainant corresponding to the difference between the tax adjustments paid by the EPO for the years 2000-2007 and the income tax she had to pay (3,339.04 euros), which, she states, resulted from the German progressive tax system that caused her tax liability for the year 2003 to be at a sharply increased rate because of the back-payment of the invalidity pension.

Moreover, particularly against the foregoing conclusions, the EPO cannot be held responsible for the expenses incurred by the complainant for tax law advice and representation during the period 21 January 2005-8 February 2012, and for the period 9 March to 16 October 2012.

13. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ