

H.
v.
EPO

131st Session

Judgment No. 4393

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. M. H. against the European Patent Organisation (EPO) on 30 January 2014, the EPO's reply of 20 May, the complainant's rejoinder of 28 July and the EPO's surrejoinder of 3 October 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 challenges the reduction in his total net remuneration following his promotion to a higher grade arguing that it constitutes a breach of Article 49(13) of the Service Regulations for permanent employees of the European Patent Office.

The complainant is a German national who joined the European Patent Office, the EPO's secretariat, at its branch in The Hague in 1998. Effective 1 June 2010, he was appointed as a Technically qualified member of the Boards of Appeal at grade A5 and was transferred to Munich. While serving in The Hague prior to his transfer, he was paid the expatriation allowance pursuant to Article 72(1) of the Service Regulations, which provides for the payment of such allowance to a permanent employee who holds the nationality of a country other than the country of his duty station. Payment of said allowance was discontinued as from the effective date of his appointment to grade A5

on the grounds that he would henceforth serve in the country of his nationality and he did not meet the requirements of Article 72(2) of the Service Regulations, which provides that, in some limited circumstances, an employee who holds the nationality of the country in which she or he is serving may nevertheless be entitled to receive an expatriation allowance.

On 10 May 2010, the complainant was provided with the calculation of his incremental step on promotion/appointment which informed him that, effective 1 June 2010, he would be promoted from grade A4, incremental step 7, to grade A5, incremental step 3. By a letter of 28 June 2010 to the President of the Office, the complainant contested by means of an internal appeal his payslip for June 2010, received by him earlier that day, on the ground that it did not include the expatriation allowance previously paid to him and that, as a result, his monthly net remuneration following his appointment to his new post at grade A5 had decreased by 1,968.16 euros. The complainant argued that this was in breach of Article 49(13) of the Service Regulations which directed that “[i]n no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration”. He asked that he be either assigned to incremental step 11 of grade A5 or granted the expatriation allowance. On 25 August 2010 he was informed that the matter had been referred to the Internal Appeals Committee (IAC) for an opinion.

Having held two hearings, the IAC submitted its opinion on 18 September 2013, concluding unanimously that the complainant’s entitlement to the expatriation allowance had ceased following his transfer to Munich, as he no longer fulfilled the conditions of Article 72 of the Service Regulations. However, no unanimous conclusion was reached on the complainant’s request to be assigned to incremental step 11 of grade A5. A majority of the IAC’s members considered that the safeguard provided in Article 49(13) was not absolute, that it was applicable only when a reduction in a permanent employee’s total net remuneration was a direct consequence of her or his appointment or promotion and that, in any event, the term “total net remuneration” in Article 49(13) did not include the expatriation allowance. It therefore recommended rejecting the appeal. A minority of the IAC’s members, on the other hand, considered that the safeguard envisaged in Article 49(13) was applicable to the complainant, as his change of duty station and consequent loss of the expatriation allowance were inextricably linked

to his appointment to his new post at grade A5. It thus recommended allowing the complainant's appeal. By a letter of 28 November 2013, the complainant was informed of the decision to reject his appeal as unfounded. That is the impugned decision.

The complainant requests that he be assigned to grade A5, incremental step 11, with effect from 1 June 2010 or that he be awarded the expatriation allowance as from the same date.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The determinative issue in the present complaint centres on the interpretation of Article 49(13) of the Service Regulations. The complaint stems from the complainant's appointment to the position of a Technically qualified member of the Boards of Appeal at grade A5, step 3, in Munich, effective 1 June 2010. Prior to this appointment, the complainant, a German national, held a post in The Hague as an examiner at grade A4, step 7. As part of his monthly remuneration, the complainant received a household allowance, a dependants' allowance and an expatriation allowance. On receipt of his first monthly payslip in his new position in Munich, the complainant observed that the remuneration did not include an expatriation allowance. On 28 June 2010, the complainant lodged an internal appeal against the June 2010 payslip on the ground that the total net remuneration in the payslip was 1,968.16 euros less than his total net remuneration immediately prior to his promotion, in violation of Article 49(13) of the Service Regulations. For ease of reference, Article 49(13) states:

“In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration.”

On 25 August 2010, the Director of the Employment Law Directorate informed the complainant that the President could not grant his appeal and had referred it to the IAC for an opinion.

2. Subsequently, in his 28 November 2013 final decision, the Vice-President, Directorate-General 4 (DG4), by delegation of power from the President, dismissed the appeal. In his decision, the Vice-President DG4 endorsed the IAC's unanimous opinion that the complainant was not entitled to an expatriation allowance after his transfer to Munich, as

neither the conditions in Article 72(1) nor those in Article 72(2) of the Service Regulations were met. The Vice-President DG4 observed that the aim of Article 49(13) is to safeguard against a reduction in salary caused solely by a change in grade, and found that the complainant's reduction in salary was caused by the change in duty station and not by the appointment to grade A5. The Vice-President DG4 concluded that, in these circumstances, the salary guarantee in Article 49(13) was properly applied. This is the impugned decision.

3. The complainant contends that the determination he was not entitled to an expatriation allowance after his transfer to Munich violated Article 49(13). In particular, he disputes the finding that the guarantee in Article 49(13) did not apply as neither of the conditions in Article 72(1) were met. The complainant takes the position that Article 49(13) provides that the obtaining of a higher grade by a permanent employee may "in no case" result in a reduction in his total net remuneration. He takes issue with the EPO's narrow interpretation of Article 49(13) in relation to the cause of a reduction in an employee's total net remuneration. He contends that, as Article 49(13) does not specify any "cause" in relation to the reduction of the total net remuneration, it must be broadly interpreted. The complainant points out that as a German national he received the expatriation allowance in accordance with Article 72(1) for the entire period of his service in The Hague from September 1998 until May 2010. He argues that to fulfill its purpose of preserving mutual trust, the safeguard in Article 49(13) had to be applied to the expatriation allowance which he was paid for a long period of time. In support of his argument, the complainant observes that in Judgment 460, consideration 9, the Tribunal held that the safeguard provided in Article 49(13) is applicable to allowances that are permanent or payable over a certain period of time.

The complainant also asserts that, in these circumstances, the safeguard in Article 49(13) must be applied independently of the provisions in Article 72 governing the award of an expatriation allowance; and the application of the safeguard cannot depend on whether the conditions in Article 72 are met after obtaining the higher grade. In support of this assertion, the complainant notes that in Judgments 737 and 897 the Tribunal applied Article 49(13) to the language allowance in situations where the conditions for obtaining the language allowance no longer applied after the obtaining of the higher grade.

However, the determination of this complaint will rest on the interpretation of Article 49(13) in the particular circumstances of this case.

4. The principles of statutory interpretation are well settled in the case law. The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 4178, consideration 10, 3310, consideration 7, and 2276, consideration 4). Additionally, as the Tribunal stated in Judgment 3734, consideration 4, “[i]t is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation”.

5. As a starting point in his submissions, the complainant takes the position that Article 49(13) stipulates that the obtaining of a higher grade by a permanent employee may in no case result in a reduction in his total net remuneration. It is on the basis of this interpretation that the complainant grounds his contention that, as Article 49(13) does not specify any “cause” in relation to the reduction of the total net remuneration, it must be broadly interpreted.

6. The EPO argues that the complainant could not benefit from the safeguard provided for in Article 49(13) because his total net remuneration did not decrease as a direct result of his appointment to a higher grade but, rather, as a result of his “concomitant transfer” to Munich further to his appointment as a member of the Boards of Appeal. This argument is rejected. In the circumstances of this case, the complainant’s appointment to a higher grade was inextricably linked to his transfer to Munich. Accordingly, Article 49(13) applies in this case.

7. As noted above, Article 49(13) provides that “[i]n no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration”. This provision is clear and unambiguous. It means that when a permanent employee obtains a higher grade, her or his total net remuneration at the higher grade must not in any case be less than that which she or he received in the lower grade which she or he is leaving.

It is not disputed that the complainant obtained a higher grade. Accordingly, the question is not whether the complainant was entitled to the expatriation allowance but, rather, what was his total net remuneration immediately prior to obtaining the higher grade in Munich. In accordance with Article 64 of the Service Regulations, the expatriation allowance

was included in his total net remuneration. It is undisputed that this remuneration prior to obtaining a higher grade was 11,429.04 euros. Thus, the complainant's total net remuneration upon appointment to grade A5 could not be, under Article 49(13) of the Service Regulations, less than that amount.

8. In the foregoing premises, the impugned decision will be set aside, as will the complainant's June 2010 payslip and all subsequent payslips. It is not within the Tribunal's competence to assign an official to a particular step, as the complainant requests. However, the case will be remitted to the EPO for it to take appropriate steps to ensure that the complainant's total net remuneration on appointment to grade A5 is not lower than that which he received in his previous grade, taking into account the expatriation allowance to which he was previously entitled, with all the legal consequences that this entails. The EPO must also issue new payslips for the complainant as from June 2010.

9. The complainant asks, as an alternative to his claim to be placed at step 11 of grade A5, to be granted the expatriation allowance with effect from 1 June 2010 because he resided outside Germany for almost 21 years before taking up his new duties in Munich. This claim is rejected. As the IAC correctly found, the complainant did not meet the conditions for entitlement to the expatriation allowance under Article 72 of the Service Regulations at the material time. Additionally, it is observed that the granting of an expatriation allowance to the complainant in circumstances where he is not entitled to it under the relevant provisions of the Service Regulations would constitute unlawful discrimination in his favour.

DECISION

For the above reasons,

1. The impugned decision is set aside, as are the complainant's June 2010 payslip and all subsequent payslips.
2. The case is remitted to the EPO for it to take the steps prescribed in consideration 8, above.
3. All other claims are dismissed.

In witness of this judgment, adopted on 29 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ