

L.
v.
EPO

120th Session

Judgment No. 3523

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms I. L. against the European Patent Organisation (EPO) on 8 July 2011, the EPO's reply of 14 October and the complainant's letter of 19 December 2011 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

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:

In her complaint, the complainant challenges the decision to discontinue the payment of the education allowance for her son.

The complainant, who holds both German and Romanian nationality, joined the European Patent Office, the EPO's secretariat, in Munich in 2003.

She received the education allowance for her son as from September 2006. By a letter of 30 July 2008, the Personnel Department informed her that, following a review of her application for the payment of the

education allowance for the 2008/2009 academic year, it had been established that she had been awarded the education allowance by mistake, as she had German citizenship. As a German national she was not entitled to the allowance according to the terms of Article 71(1) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter “the Service Regulations”), and the conditions of Article 71(2) of the Service Regulations, which would allow her to receive the allowance as a German national by way of exception, were not met in her case. The payment of the allowance would therefore be discontinued effective 1 August 2008. However, the EPO would not seek to recover the amounts already paid to her.

By a letter of 15 September 2008, the complainant requested the continued payment of the allowance, emphasising that it would be very difficult for her son to change schools, which would be necessary if the allowance was discontinued, and that she would face considerable financial difficulties in that case.

On 1 December 2008 the complainant filed a request for review of the decision to discontinue the payment of the education allowance. She argued that for reasons of legal certainty and legitimate expectations, the allowance should continue to be paid as long as the underlying facts remained the same. She stated that the initial grant of the education allowance could not have been the result of an error, as the EPO was aware of her dual nationality at the time of her recruitment.

By a letter of 9 December 2008, the Head of the Remuneration and Leave Department referred the complainant to a case which was then pending before the Tribunal and which concerned the payment of the education allowance to nationals of the country in which they are serving. He stated that it was not necessary for her to lodge an individual appeal, since the EPO would apply the Tribunal’s judgment to all appellants who were in the same position. She was therefore asked to inform the EPO whether or not she wished to pursue her appeal. She was also informed that the President had decided to reject her request for review as unfounded, for the reasons put forward by the EPO in other appeals on the same issue and in the Internal Appeals Committee’s (IAC) opinion on those appeals, which was attached

to the letter. In response to the letter, the complainant explained that, in her view, her case differed from the case which was then pending before the Tribunal and she requested, therefore, that the internal appeal proceedings continue.

In its opinion of 15 February 2011 the IAC found that the complainant had a legitimate expectation that the education allowance would continue to be paid until her son finished primary school. While recognizing that the EPO was entitled to rectify the administrative error committed, the IAC unanimously recommended that the appeal be allowed in part and that the education allowance, plus interest, be paid to the complainant for a period of around four years, covering her child's primary school education, but that any entitlement to its payment beyond that point be denied.

The complainant was informed by a letter of 11 April 2011 that the President had decided to follow the IAC's unanimous recommendations and to allow the appeal in part: the EPO would pay the arrears of education allowance due for the period from 1 August 2008 until the end of her son's primary school attendance, with interest at the rate of 8 per cent per annum. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to pay the education allowance retroactively from the date it was stopped until her son "has finished his studies". She claims moral damages, as well as costs.

The EPO rejects the complainant's claims as unfounded.

CONSIDERATIONS

1. The issue to be determined in this case is whether, having paid the education allowance for the education of the complainant's son from September 2006, the EPO should maintain the payment of that allowance until he has completed his studies. The complainant, who commenced work with the EPO in September 2003, has Romanian and German dual nationality. The allowance was purportedly paid

under Article 71 of the EPO's Service Regulations, and Articles 71(1) and (2) are specifically mentioned by the EPO.

2. The decision to discontinue the payment of the allowance was made upon the complainant's application for payment for the 2008/2009 academic year. In its communication dated 30 July 2008, the EPO stated that, having noticed the complainant's German citizenship, it had realised that she was not entitled to the allowance under Article 71(1) or Article 71(2) of the Service Regulations. As the allowance had been paid to her in error, it would be discontinued with effect from 1 August 2008. However, on the recommendation of the IAC, the President, by letter of 11 April 2011, decided that the allowance should be paid until the complainant's son had completed his primary education, but no further.

3. The complainant submits that the education allowance was not paid in error, as the EPO contends. She insists that she thought that the allowance was justified because of her Romanian citizenship. It is noteworthy, however, that she also states that upon review of the documents pertaining to her employment she noticed that she was hired by the EPO as a German citizen.

4. Article 71(1) of the Service Regulations states as follows:

“(1) Permanent employees – with the exception of those who are nationals of the country in which they are serving – may request payment of the education allowance, under the terms set out below, in respect of each dependent child, within the meaning of Article 69, regularly attending an educational establishment on a full-time basis.”

5. In Judgment 3358, under 5, the Tribunal reiterated its consistent finding that the wording of Article 71(1) is unambiguous and excludes from entitlement to the education allowance permanent employees ‘who are nationals of the country in which they are serving’. In other words, only employees who are not nationals of the country where they serve are entitled to the allowance. The complainant is not entitled to the education allowance under Article 71(1) of the

Service Regulations, particularly given, as she noted, that she was hired by the EPO as a German citizen.

6. Article 71(2) of the Service Regulations states as follows:

- “(2) By way of exception, permanent employees who are nationals of the country in which they are serving may request payment of the education allowance provided that the following two conditions are met:
- (a) the permanent employee’s place of employment is not less than 80 km distant from any school or university corresponding to the child’s educational stage;
 - (b) the permanent employee’s place of employment is not less than 80 km distant from the place of domicile at the time of recruitment.”

7. These are compendious provisions, both of which must be satisfied for entitlement to the education allowance under this Article. In Judgment 2564, under 3, the Tribunal stated that the purpose of Article 71(2)(b) is to provide allowances to help children to study in their country of origin if their parents are stationed elsewhere. The complainant does not qualify for the allowance under Article 71(2)(b), since she was recruited and was stationed in Munich at the material time and her son attended school there. As she has not met the condition of Article 71(2)(b), she does not qualify for the allowance under the compendium of Article 71(2).

8. The complainant contends that the EPO paid her the allowance after it applied a favourable interpretation of Article 71 of the Service Regulations, thereupon exercising a favourable practice for two years in her case and for a longer period of time in the case of some 10 other staff members who, like the complainant, hold dual nationality including that of the country in which they are serving. She contends that the EPO then reversed its own practice under the pretext that it was made in error. She submits that, having signalled by its practice over the several years that she was within Article 71, the EPO should be estopped from suddenly discontinuing the payment of the allowance, or should be made to continue the payment in accordance with her legitimate expectation.

9. As it has been found that the complainant had no legal entitlement to the allowance under Article 71(1) and (2) of the Service Regulations, the issue of whether or not an established practice existed is irrelevant. The Tribunal has stated in Judgment 3071, under 28, for example, that a practice that is inconsistent with staff regulations cannot obtain legal force. In those circumstances, the EPO was entitled to review and to modify its decision and the complainant's plea that the decision to discontinue the payment of the allowance was a change of practice is unfounded. By extension, the complainant's further plea that the decision to discontinue the payment of the allowance was a change of practice, which was introduced without consulting the staff representation, pursuant to Articles 33 to 38 of the Service Regulations, is also unfounded.

10. In light of the above considerations, the decision to discontinue the payment of the allowance did not breach an acquired right that the complainant asserts she had, as no acquired right inhered in the mistaken payment of the allowance in circumstances in which there was no entitlement under the Service Regulations.

11. Finally, the complainant further contends that the decision to discontinue the payment of the allowance violates the principle of legal certainty, which requires that once the decision to pay her the allowance was made she should have been in a position to trust that it would have remained in force as long as the underlying facts did not change. She also adds that neither the facts nor the provisions of the relevant Service Regulations changed after she obtained the allowance in 2006. The Tribunal, however, holds that legal certainty for the payment of the education allowance is founded upon the correct interpretation and consistent application of the relevant Service Regulations. Accordingly, the EPO was entitled to discontinue the payment of the allowance without violating the principle of legal certainty and there is no evidence that the EPO acted in bad faith either by granting or by reviewing the allowance for the complainant's son.

12. In the foregoing premises, the complainant's pleas on all grounds are unfounded and the complaint must accordingly be dismissed.

DECISION

For the above reasons,
The complaint is 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