W. (No. 2)

v.

EPO

120th Session **Judgment No. 3539**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J. W. against the European Patent Organisation (EPO) on 11 July 2011 and corrected on 3 August, the EPO's reply of 24 November, the complainant's rejoinder of 19 December 2011 and the EPO's surrejoinder of 29 March 2012;

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 EPO's decision to reject his requests for childcare allowances on the ground that, at the material time, playgroup facilities such as the one attended by his daughters were not recognised childcare facilities. The complainant has worked as an examiner at the European Patent Office, the EPO's secretariat, in The Hague (Netherlands) since 1998.

On 25 February 2008 the complainant applied for a childcare allowance to cover the costs of his daughter V.'s attendance at a playgroup facility in The Hague from 1 March 2007 to 17 November 2008. His request was rejected by an e-mail of 20 March 2008, on the

ground that the facility in question was not a recognised childcare facility within the meaning of Circular No. 301 entitled "Guidelines for the implementation of the childcare allowance (Article 70a ServRegs) and for the level of parental contribution for the use of Office crèches" and Article 70a of the Service Regulations for Permanent Employees of the European Patent Office ("the Service Regulations").

By a letter of 7 May 2008 the complainant challenged the decision to reject his application for a childcare allowance. He submitted that the decision had not resulted from an individual examination of his specific case, contrary to paragraph 3 of Circular No. 301, which provides that "[a]ny other facilities [not included in the list of recognised childcare facilities] will be considered […] on a case-by-case basis". Nor did Circular No. 301 specify the criteria to be applied in an individual examination. As the examination may not be arbitrary and as it was not apparent how the facility concerned differed substantially from recognised facilities, he requested that the contested decision be annulled and that his application for a childcare allowance be granted. In the event that his request could not be met, his letter was to be considered as an internal appeal.

By a letter of 3 July 2008 the complainant was informed that the President of the Office considered that the relevant rules had been applied correctly, as the playgroup in question was also not recognised as a childcare facility under Dutch law. Consequently, his appeal had been referred to the Internal Appeals Committee (IAC) for an opinion.

On 20 October 2008 the complainant applied for another childcare allowance for his daughter J. , to cover the costs of her attendance at the same playgroup facility from 1 September 2008 onwards. His request was rejected by letter of 5 December 2008 on the ground that playgroups were not among the childcare facilities registered under Dutch law, for which allowances were payable.

On 15 December 2008 the complainant challenged the decision to reject his request for a childcare allowance on the same grounds as those cited in his first internal appeal. In addition, he alleged a breach of the principle of equal treatment, on the ground that the EPO had recognised comparable childcare facilities at other places of employment.

The complainant requested that the contested decision be annulled and that his application be granted. In the event that his request could not be met, his letter was to be considered as an internal appeal.

By a letter of 3 April 2009 the complainant was informed that, as the President considered that the rules had been applied correctly, his second internal appeal had been referred to the IAC for an opinion.

On 1 June 2009, while the complainant's internal appeals were pending before the IAC, the Principal Director of Human Resources issued a notice on recognised childcare facilities in The Hague in which playgroups were expressly recognised for the first time, with retroactive effect from 1 January 2009. The allowance having been granted to the complainant from 1 January 2009, his claim with respect to his second appeal was maintained for the period 1 September to 31 December 2008.

The EPO submitted its position paper in June 2010. At the IAC's request, the Administration produced additional information in October and November.

In its opinion of 18 March 2011 a majority of the IAC recommended rejecting the complainant's appeals as unfounded, on the ground that the EPO had acted within its discretion in deciding not to recognise playgroups in The Hague as recognised childcare facilities for the purpose of granting a childcare allowance. The EPO was found to have objective reasons in support of its approach, as playgroups were treated as an informal type of childcare by the local authorities and were not registered as suitable facilities for childcare under domestic law at the material time. The majority also found that the EPO was entitled to rely on its previous decision and the corresponding practice of not recognising playgroups as a general rule and merely verifying in specific cases whether there were any special circumstances justifying different treatment. In this case the EPO had cited the lack of recognition by the local authorities, which was found by the majority to be an objective and suitable criterion. In this respect, it noted that the complainant had failed to substantiate his request in more detail to justify treating the playgroup in question as an exception. The majority concluded that the EPO was not obliged to

recognise the playgroup in question as a recognised childcare facility prior to 1 January 2009. A minority recommended allowing the complainant's internal appeals on the ground that the EPO had breached Circular No. 301, as its assessment had not involved an individual examination of the specific playgroup in question but had merely consisted in establishing whether playgroups were recognised facilities under Dutch law. In light of the EPO's recognition of playgroups as childcare facilities in June 2009, the minority found that a case-by-case examination conducted at the outset would have led to the grant of childcare allowances to the complainant.

By a letter of 18 May 2011 the complainant was informed that the President had decided to follow the recommendation of the IAC majority opinion and to dismiss both appeals as unfounded. The letter stated in particular that the EPO's general decision not to recognise playgroups in The Hague was based on objective grounds and appropriate criteria. The EPO had fulfilled its obligation under Circular No. 301 to keep the list of recognised childcare facilities under review and it had promptly added playgroups to the list once the quality control and registration mechanisms for those facilities had been improved. Contrary to the minority opinion, the EPO had in fact carried out an individual assessment of his requests for a childcare allowance. However, as affirmed by the majority, the complainant had not provided sufficient grounds to justify treating the playgroup in question as any different from all other playgroups. As a result, the EPO's decisions to reject his requests for the allowance were well-founded. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to grant the childcare allowance for the periods in question. He also seeks moral damages.

The EPO rejects the complainant's claims as irreceivable in part and entirely unfounded.

CONSIDERATIONS

1. This complaint concerns the childcare allowance in Article 70a of the EPO Service Regulations. The complainant's applications for the childcare allowance for his two daughters' attendance at a playgroup facility in The Hague were refused.

2. An overview of the relevant EPO documents will assist in clarifying the parties' positions. Article 70a of the Service Regulations provides for the payment of a childcare allowance under certain conditions. Under Article 70a(1), the allowance is payable for each dependent child "regularly making use of a childcare facility recognised by the Office". Circular No. 301 is entitled "Guidelines for the implementation of the childcare allowance (Article 70a ServRegs) and for the level of parental contribution for the use of Office crèches". At paragraph 3 the Circular states that recognised facilities are those "facilities recognised by the local authorities as being suitable for childcare" and those "facilities that are directly associated with international schools". The same paragraph also provides:

> "Any other facilities will be considered by the Office on a case-by-case basis. The list of recognised facilities will be reviewed in the light of (local) market developments or on the basis of a specific request.
>
> The list of recognised facilities will be published."

3. An additional document of October 2007, entitled "Recognised childcare facilities within the meaning of Art. 70a(1) Service Regulations", identifies in accordance with Circular No. 301 and Article 70a(1) of the Service Regulations the "childcare facilities [that] are recognised for the branch of the Office in The Hague". In line with Circular No. 301, the recognised facilities are "registered childcare facilities in terms of the Dutch law on childcare" and "day care, nursery, pre-school, or after-school care facilities directly related to an international school, and/or sanctioned, supported, or recommended by said school". The explanatory note in relation to the childcare facilities under Dutch law states that they are "those facilities registered

by the local municipalities" followed by a descriptive list of the included types of facilities.

4. The same document of October 2007 also states:

> "A list of facilities which are recognised will be progressively established as they are identified. In general they will be those which offer regular care throughout the year and, for school age children, cover also holiday periods."

Lastly, the document contains the same statement concerning the case-by-case assessment of any other facilities found in Circular No. 301 at paragraph 3 and referred to in consideration 2, above.

5. In summary, the complainant's main plea on which his other pleas largely rest is that the EPO erred in failing to consider the playgroup facility his daughters attended on a "case-by-case" basis. He contends that his requests came squarely within the statement in Circular No. 301 that "other facilities will be considered by the Office on a case-by-case basis" on the "basis of a specific request". He argues that the EPO was required to examine his specific case and could not refuse his requests solely on the ground that the playgroup facility his daughters attended was not recognised under Dutch law. That is, there was no examination of his specific case. The complainant, in effect, argues that the statement found in the Circular, reproduced in consideration 2 of this Judgment, contemplates the recognition of a facility that is not one of those types of facilities listed in Circular No. 301 and described with greater particularity in the October 2007 document.

6. The EPO submits that the complainant misinterprets the meaning of on a "case-by-case" basis in Circular No. 301. It argues that the Circular provides for an assessment on a case-by-case basis solely for the purpose of reviewing the list of recognised facilities in the Circular and that a review may be triggered by a specific request. The EPO states that it is in this context that some facilities are automatically recognised while other facilities require a case-by-case assessment to be recognised. However, the Circular does not contemplate the assessment of a specific facility that is not one of the listed types

of facilities. The EPO also submits that, in any event, it in fact conducted an individual assessment to determine whether the playgroup in question met the criteria of Circular No. 301 and the guidelines applicable to its branch in The Hague.

7. At this point, it is recalled that in the impugned decision the President concluded that the refusals of the requests for the childcare allowances were well-founded, in part, on the fact that the EPO had carried out an individual assessment of the requests, but that the complainant had not provided sufficient grounds to justify treating the facility his daughters attended any different from all other playgroups.

8. The main dispute between the parties concerns the interpretation of the text in Circular No. 301 referred to in consideration 2 above. It is observed that the text at issue is capable of more than one interpretation. As Article 70a confers a benefit on staff members it should, and in turn Circular No. 301, be given a liberal interpretation. Where, as in this case, a provision is capable of more than one interpretation, the interpretation favouring a broader application for the benefit of staff members should be adopted rather than the interpretation of narrower application which could deprive staff members of the benefit.

9. In that context, the provision that is reproduced at the end of consideration 2 of this Judgment, pursuant to which the complainant applied for the childcare allowance, contemplates that, outside of the "facilities recognised by the local authorities as being suitable for childcare" and "facilities that are directly associated with international schools", the EPO would consider applications for the childcare allowance for other facilities on a case-by-case basis.

10. Although the EPO submits that it conducted an "individual assessment", it is clear from the record that the EPO's assessment of the facility in question consisted of a review of the legal status of the facility in the Netherlands, but no assessment of, amongst other things, the nature of the services provided by the facility was undertaken,

apparently because the complainant had not provided any evidence about the facility. However, in these circumstances the EPO cannot rely on the complainant's failure to submit any evidence in support of the request to reject the claim.

11. If, as the EPO contends, in a "case-by-case" consideration of a facility it is the claimant's responsibility to demonstrate that the facility in question ought to be recognised, then it was incumbent on the EPO to at least inform the complainant of those criteria or the framework against which his daughters' playgroup facility would be considered. Having this information is necessary for a claimant to decide whether a special request should be submitted and, if so, the information that should be provided in support of the request. In the present case, despite repeated requests for this information, none was provided.

12. It is not for the Tribunal to decide whether a particular facility should be recognised for the purpose of the childcare allowance in the Regulation. Accordingly, the matter will be remitted to the EPO for a reconsideration of the complainant's claims for the childcare allowance. Before taking a decision on the complainant's requests, the criteria or framework against which his requests will be considered shall be communicated to the complainant and the complainant shall be given a reasonable opportunity to submit evidence in support of his requests.

In the circumstances the complainant will be awarded moral damages in the amount of 500 euros.

DECISION

For the above reasons,

1. The President's 18 May 2011 decision is set aside as are the President's earlier decisions of 3 July 2008 and 3 April 2009.

2. The complainant's requests for the childcare allowance are remitted to the EPO for reconsideration in accordance with consideration 12.

3. The EPO shall pay the complainant moral damages in the amount of 500 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2015, Ms Dolores M. Hansen, Judge presiding the meeting, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ