L.

v.

EPO

123rd Session **Judgment No. 3789**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs C. L. against the European Patent Organisation (EPO) on 20 January 2012 and corrected on 16 March, the EPO's reply of 21 June, the complainant's rejoinder of 9 August and the EPO's surrejoinder of 16 November 2012;

Considering Article II, paragraph 5, 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 rejection of her requests for payment of an education allowance for her children.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, which she joined in December 2001. She has dual nationality – German and Italian – and is based in Munich, Germany. The EPO recognized a town in Italy for the purpose of home leave under Article 60 of Service Regulations for permanent employees of the EPO. The complainant's two children, a son and a daughter, have the same two nationalities.

On 13 October 2008 the complainant requested the payment of an education allowance for her son pursuant to Article 71(1) of the Service Regulations, which relevantly provides that permanent employees, except those who are nationals of the country in which they are serving, may

request payment of the education allowance for each dependent child regularly attending an educational establishment on a full-time basis. The EPO rejected that request on 11 March 2009 considering that her German nationality disqualified her from entitlement to the education allowance.

On 9 April 2009 the complainant lodged an internal appeal against that decision. Her appeal was referred to the Internal Appeals Committee (IAC) for an opinion.

On 23 November 2009 the complainant requested the payment of the education allowance for her daughter. The request was rejected for the same reason, namely her German nationality. On 16 December 2009 she filed an internal appeal against that decision, which was forwarded to the IAC for an opinion in February 2010.

Following a hearing held on 10 February 2011, the IAC issued its opinion regarding both appeals on 26 August 2011. A majority of its members recommended that the appeals be rejected as unfounded, which is what the President decided, by delegation of authority, on 24 October 2011. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to order payment of the education allowance for her son as of 1 October 2008, and for her daughter as of 1 October 2009, as well as interest on the amounts in question.

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

CONSIDERATIONS

1. The complainant is an Italian national employed by the EPO. She was based in Germany. She is also a German national. This complaint raises the narrow issue of whether the complainant was entitled to a benefit under Article 71 of the Service Regulations either because the provision was directly applicable or because, as a matter of discontinued practice, its terms had been applied to a person in her position and that practice should have continued.

2. It is convenient to set out, at this point, the terms of paragraphs 1 and 2 of Article 71:

> "(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.
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> (2) By way of exception, permanent employees who are nationals of the country in which they are serving my request payment of the education allowance provided that the following two conditions are met:
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> (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;
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> (b) the permanent employee's place of employment is not less than 80 km distant the place of domicile at the time of recruitment. [...]"

3. The complainant first sought payment of the education allowance on 13 October 2008 in relation to her then 19 year old son who had just started his post-secondary education. This request was refused. A further request, which again was refused, was made for the payment of the education allowance by the complainant on 23 November 2009 in relation to her then 17 year old daughter who had started her post-secondary education in October 2009. In relation to the refusal to grant each request, the complainant lodged an internal appeal culminating in a report of the IAC dated 26 August 2011 addressing both appeals. A majority concluded the appeal was unfounded. The Director, Regulations and Change Management, by a delegation of authority of the President, informed the complainant by letter dated 24 October 2011 that her appeal had been rejected as unfounded. This is the impugned decision.

4. It is unnecessary to engage in a detailed discussion of the arguments advanced by the complainant and the EPO in their pleas nor is it necessary to analyse the majority and minority opinions of the IAC. The gravamen of the complainant's case was that she was not only a national of Germany but also a national of Italy, her country of origin, with which she had strong language, cultural and other ties as also did her children. In addition she was entitled to home leave in Italy. In the result she argues she was entitled to payment under Article 71(1) and, in

addition, the discontinuance of a practice favourable to her gave rise to a violation of acquired rights and legitimate expectations. The complaint was filed on 20 January 2012 and the EPO's reply, the complainant's rejoinder and the EPO's surrejoinder were dated 21 June 2012, 9 August 2012 and 16 November 2012 respectively. Subsequently, this Tribunal has dealt authoritatively with the issue raised in this complaint.

5. In Judgment 3358, delivered in public on 9 July 2014, and in Judgment 3523, delivered in public on 30 June 2015, the Tribunal addressed the operation of Article 71(1) in relation to dual nationals. Judgment 3358 concerned a dual national (a German and French national) employed by the EPO in Munich. Judgment 3523 concerned a dual national (a German and Romanian national) employed by the EPO in Munich. In the latter judgment, the Tribunal said:

> "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.
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> [...]
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> 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.
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> 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."

6. These conclusions provide a complete answer to the substance of the complainant's case. The complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ