R.-S. (No. 2)

v.

EPO

131st Session **Judgment No. 4398**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs A. E. C. L. R.-S. against the European Patent Organisation (EPO) on 22 July 2019 and corrected on 9 September 2019, the EPO's reply of 2 January 2020, the complainant's rejoinder of 9 April, corrected on 12 May, and the EPO's surrejoinder of 23 September 2020;

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 rejection of her claim for a second payment of the lump sum paid in the event of death or permanent invalidity under Article 84(1)b) of the Service Regulations for permanent employees of the European Patent Office (hereinafter "the Service Regulations").

The complainant is the widow of a former employee of the European Patent Office, the EPO's secretariat. In 1998 her husband was placed on permanent invalidity status and received the lump sum payment pursuant to Article 84(1)b) of the Service Regulations which provides that, in the event of death or permanent invalidity, a permanent employee shall receive a lump sum payment equal to 2.75 times his annual basic salary. He also received thereafter an invalidity pension.

In 2006 the complainant's husband requested to reintegrate active service. Following a positive opinion from the Medical Committee he was reintegrated in active service in September 2007 and his invalidity pension was terminated.

The rules on invalidity, including Article 84(1)b) of the Service Regulations, were amended as of 1 January 2008. As of that date, the revised version of this article contained a new sentence at the end of paragraph 1b) stating that "[t]he lump sum shall be payable only once for the same person".

The complainant's husband passed away in 2011 while still employed by the EPO. Following her husband's death, the complainant claimed payment of the lump sum pursuant to Article 84(1)b) of the Service Regulations as the surviving spouse.

On 22 December 2011 the complainant was informed that, as her husband had already been granted the said lump sum in 1998 as a consequence of his invalidity, no second payment could be made to her as a result of his death, because the lump sum under Article 84(1)b) could only be paid once in case of invalidity or death. The complainant filed a request for review of that decision on 7 March 2012, which was rejected on 4 May 2012. The matter was referred to the Appeals Committee for an opinion.

In its opinion of 25 August 2016, the Appeals Committee decided to treat the complainant's appeal in a summary procedure pursuant to Article 9 of the Implementing Rules for Articles 106 to 113 of the Service Regulations. It unanimously recommended to reject the appeal as manifestly irreceivable on the ground that it lacked substantiation since it had been filed in clear contradiction to the unambiguous wording of Article 84(1)b) of the Service Regulations (version as of 1 January 2008).

By a decision of 26 October 2016, the complainant was informed of the decision to follow that unanimous recommendation. The complainant filed her first complaint before the Tribunal against that decision on 20 January 2017.

Meanwhile, in Judgments 3694 and 3785, delivered in public on 6 July and 30 November 2016, respectively, concerning complaints filed by other EPO employees, the Tribunal found that the Appeals Committee was not composed in accordance with the applicable rules. Following these judgments, the President of the Office withdrew the decision

impugned by the complainant in her first complaint, as it was tainted with the same procedural flaw, and the case was remitted to the Appeals Committee for new consideration. The complainant was so informed by a letter of 26 May 2017 and was invited to withdraw her complaint. However, she decided to maintain her first complaint.

In its unanimous opinion of 28 March 2019, the Appeals Committee found the appeal manifestly unfounded and therefore treated it in a summary procedure according to Article 9(1) of the Implementing Rules. It recommended to reject the appeal, but to award the complainant 600 euros for the undue delay in the procedure.

On 28 May 2019 the complainant was informed that her appeal had been dismissed as manifestly unfounded following the unanimous recommendation of the Appeals Committee, but that she would be paid 600 euros in moral damages for the length of the procedure. That is the impugned decision.

In Judgment 4256, delivered in public on 10 February 2020, the Tribunal dismissed the complainant's first complaint on the ground that it was now without object as a result of the withdrawal of the impugned decision.

In her second complaint filed on 22 July 2019 the complainant asks that her two complaints be joined. She requests the Tribunal to quash the decisions impugned in her first and second complaints and to order that she be paid the lump sum provided for under Article 84(1)b) of the Service Regulations. She claims 20,000 euros in moral damages for the harm suffered as a result of the unlawful decisions and 6,500 euros for the excessive length of the internal appeal procedures, with interest on all amounts awarded. She also seeks costs.

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

CONSIDERATIONS

1. The request which the complainant makes for the joinder of this complaint and her first complaint is moot as the Tribunal considered and dismissed her first complaint in Judgment 4256, delivered in public on 10 February 2020.

2. The decision dated 28 May 2019, which the complainant impugns in her second complaint, informed her that the unanimous recommendation of the Appeals Committee to reject her internal appeal was accepted, but that she would be paid 600 euros in moral damages for the length of the procedure. The Appeals Committee considered that appeal to be manifestly unfounded having treated it in a summary procedure pursuant to Article 9(1) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, which at the material time stated as follows:

> "If the Appeals Committee considers an appeal to be manifestly irreceivable or manifestly unfounded, it may decide to apply a summary procedure without any hearing. Such decision shall be adopted by a majority."

3. The complainant contests the lawfulness of Article 9(1) of the Implementing Rules on the basis that it allows the Appeals Committee to summarily dismiss an appeal due to alleged unfoundedness without guaranteeing the principles of an adversarial procedure and the impartiality of the procedure. She argues that the Appeals Committee failed to investigate her appeal fairly, in breach of impartiality and objectiveness, and that by treating her appeal as manifestly unfounded and applying the summary procedure without giving her a prior hearing or giving her "the possibility to react", the Appeals Committee breached her right to an effective internal appeal amounting to a breach of due process and "fair trial requirements". She further submits that no legal requirements are formulated for the summary procedure in the case of manifest unfoundedness.

4. The foregoing contention is unfounded. It is noteworthy that in Judgment 2893, consideration 5, in reply to a complainant's submissions that the internal appeal body did not afford him due process as he was not given an opportunity to put his case himself, or to present oral submissions through counsel, thereby denying him the opportunity to exercise his right to be heard, the Tribunal stated that neither the legal provisions governing that internal appeal body nor the general principles applicable to it require that a complainant be given an opportunity to present oral submissions in person or through a representative. The Tribunal also noted that, as the internal appeal body considered that it had gleaned sufficient information about the case from the parties' written submissions and documentary evidence, the internal appeal

body was under no obligation to invite the complainant to put his case orally, or indeed to accede to any request to that effect. Additionally, the Tribunal notes that in the present case the Appeals Committee invited the complainant to present written submissions and she did. The complainant presents no ground that puts into question the impartiality of the members of the Appeals Committee or the lawfulness of the summary procedure.

5. In her internal appeal the complainant had challenged the decision not to pay her the lump sum payment pursuant to Article 84(1) of the Service Regulations. The version of this Article which was in force from 1 January 2008 and at the material time (in 2011 when the complainant's spouse passed) stated as follows:

"**Death or permanent invalidity**

(1) The benefits payable shall be as follows:

a) a fixed amount for funeral expenses incurred for the permanent employee himself, his spouse and, where appropriate, his dependants under Articles 69 and 70;

b) in the event of death of the permanent employee or permanent invalidity totally preventing him from performing duties corresponding to his level of employment in the Office: a lump sum equal to 2.75 times his annual basic salary calculated in accordance with the scale given in Annex III.

The lump sum shall be payable only once for the same person."

6. The purport of the clear and unambiguous words of the last sentence, which was added to the version of Article 84(1) which was in force until 31 December 2007, is that, the complainant's husband having received the lump sum when he was put on permanent invalidity status on 1 September 1998, another lump sum payment could not be made again to his surviving spouse or his dependents. The complainant's argument that the fact the lump sum would not be paid to the same person permitted her, as the surviving spouse, to receive the lump sum benefit under Article 84(1)b) misconceives the statement therein that it shall be payable only once "for the same person".

7. However, the complainant submits that she was entitled to a second lump sum as the surviving spouse under the said Article as by not paying her the EPO breached the principle of non-retroactivity and/or the principle of acquired right. The Tribunal's case law states

that an administrative authority, when dealing with a claim, must generally base itself on the provisions in force at the time it takes its decision. Derogation from this general principle is however permitted where, among other things, the application of those provisions would result in a breach of the requirements of good faith, the non-retroactivity of administrative decisions and the protection of acquired rights (see, for example, Judgment 3214, consideration 14).

8. In consideration 14 of Judgment 2986, the Tribunal stated that a provision is retroactive only if it effects some change in existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely alters the effects of this status or of these rights, liabilities and interests in the future. Accordingly, the principle of non-retroactive application of the 2008 amended Article 84(1)b) of the Service Regulations does not arise, as it was not retroactively applied to the subject case. It was the provision which was actually in force at the material time in 2011.

9. Nevertheless, the complainant contends that the principle is applicable on arguments that may be summarized as follows: the application of the amendment to Article 84(1)b) is excluded and breaches the principle of non-retroactivity because her husband was retired for the purpose of invalidity and was afterwards hired again. This, she insists, justified a second lump sum payment to her as the surviving spouse because he had thereby entered into two separate employment relationships with the EPO and the Appeals Committee misinterpreted the law when it concluded otherwise. She argues, further, that when her husband was declared totally invalid in 1998, all legal relations with the EPO ceased. He was again recruited in 2007 and the provisions of the Service Regulations became applicable to him without exception.

10. The foregoing arguments are untenable on their foundational premise because the complainant's husband did not enter into a new work relationship with the EPO when he returned to work at his request in September 2007. He had been placed on invalidity in 1998 under Chapter III of the Pension Scheme Regulations of the European Patent Office. His employment relationship with the EPO did not thereby end. After it was determined that his invalidity was not permanent he resumed work under the same relationship that subsisted before he was placed

on invalidity as contemplated by Implementing Rule 16/3 to the Pension Scheme Regulations, which at the material time relevantly stated as follows:

> "Where the Medical Committee [...] declares that an employee who is still under the age limit laid down in the Service Regulations has ceased to satisfy the conditions of entitlement to an invalidity pension, the payment of that pension shall be terminated; if the employee concerned does not resume work in the Organisation, he shall receive either a severance grant [...] or a deferred or early retirement pension." (Emphasis added.)

Moreover, as the EPO argues, his time at the EPO cannot be viewed as two separate and independent working relationships as evidenced by the letter granting his request to reintegrate him into active service, as well as by the fact that, unlike new employees, he did not have to serve a second probationary period, required under Article 13 of the Service Regulations, neither was he subjected to the competitive recruitment procedure for a new employee, required under Article 7 of the Service Regulations and Annex II thereto.

11. The Tribunal also finds that the 2008 amendment to Article 84(1)b) did not breach the principle of acquired rights as the complainant contends. The Tribunal's case law states that the amendment of a rule to an official's detriment and without her or his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment (see, for example, Judgment 4195, consideration 7, and the case law cited therein). The Tribunal has established that the consideration whether an altered term of appointment is fundamental depends upon: (1) the nature of the term that is altered; (2) the reason for the change; and (3) the consequences of allowing or disallowing an acquired right (see, for example, Judgment 3375, consideration 12). These are compendious requirements which must all be met for the plea of breach of acquired rights to succeed.

12. In the first place, in the context of the present case, even under Article 84(1)b) in force prior to the 2008 amendment, an employee's entitlement to a lump sum payment in the event of invalidity and her or his surviving spouse's entitlement to another lump sum payment upon the employee's death were mutually exclusive. In the second place, the 2008 amendment to Article 84(1)b) of the Service Regulations did not

alter a fundamental term of the complainant's husband's contract of employment with the EPO as it was not a factor in his acceptance of employment with the EPO. The complainant's argument that a decisive factor in her husband's decision to return to work, thereby starting a second employment relationship with the EPO, was the possibility that his surviving spouse would have received the lump sum payment in the event of his death, fails. Earlier in this judgment it was found that his reintegration into active service did not amount to a new employment relationship with the EPO. Additionally, the complainant provides no evidence to support her statement that this was a decisive factor in his return to work. By extension, her argument that the deduction of an insurance fee from her husband's salary in the event of death opened up his right to receive the second lump sum also fails. There is nothing in the Declaration which the complainant provides concerning EPO death insurance, completed by the complainant's husband in 2007, that supports her allegation that it created a legitimate expectation that she would receive the lump sum in case of his death. In any event, a legitimate expectation for such a payment could not have arisen in the face of the applicable provision: Article 84(1)b) as amended in 2008. Moreover, the payment of a lump sum to a surviving spouse is by nature a remote and contingent right which arises only on the rare occurrence of the death of an official while still employed by the EPO.

13. In the foregoing premises, the complaint is unfounded and will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 26 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