R.

v.

EPO

120th Session **Judgment No. 3532**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs Å. R. against the European Patent Organisation (EPO) on 6 July 2011, the EPO's reply of 14 October, the complainant's rejoinder of 13 December 2011 and the EPO's surrejoinder of 10 April 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant joined the EPO in 1997. She is married to another EPO staff member and they have three children, all of whom are minors. At the material time, pursuant to the applicable Service Regulations for Permanent Employees of the European Patent Office, the complainant's husband was in receipt of a dependants' allowance in respect of all three children.

In November 2007 the complainant and her husband both applied for a home loan in accordance with the Regulations for the Grant of Home Loans (hereinafter "the Home Loan Regulations"). Article 3(2) of the Home Loan Regulations provides that, the maximum amount awarded to a permanent employee for a home loan shall be 110,000 euros.

However, Article 3(2) further stipulates that this maximum amount shall be increased by five per cent for each dependent child within the meaning of Article 69 of the Service Regulations (hereinafter "home loan supplement").

The complainant's husband submitted one Home Loan Application form in which he applied for a loan in the amount of 126,500 euros, i.e. the maximum amount of 110,000 euros plus the home loan supplement in respect of their three dependent children (i.e. 16,500 euros). His application was granted. The complainant submitted two Home Loan Application forms. On one form she applied for a loan in the amount of 110,000 euros, which was granted. On the other form, she applied for a home loan supplement in respect of their three dependent children in the amount of 16,500 euros.

By a letter of 24 April 2008 the complainant was informed that, based on a recommendation of the Home Loans Committee, her application for the loan of 16,500 euros had been rejected on the grounds that, when two EPO employees are spouses and have children, the additional five per cent increase in the maximum loan amount provided for in Article 3(2) of the Home Loan Regulations for each dependent child within the meaning of Article 69 of the Service Regulations could only be granted to the spouse with the higher basic salary.

In a letter to the President of the Office of 4 June 2008 the complainant challenged that decision. On 1 August 2008 she was informed that the President had referred the matter to the Internal Appeals Committee (IAC) for an opinion.

In the internal appeal proceedings the complainant requested inter alia that the contested decision be quashed and that she be granted the home loan supplement as soon as possible. She sought damages related to her need to find alternate financing, costs in the amount of 1,000 euros and 1,000 euros in moral damages. She also reserved the right to claim additional costs or damages.

In its opinion of 28 February 2011 a majority of the IAC members recommended that the appeal be rejected as unfounded but that the complainant be awarded 200 euros in damages for the delay in the

appeal proceedings. A minority of the IAC recommended that she should be granted the relief she sought.

By a letter of 28 April 2011 from the Director of Regulations and Change Management the complainant was informed that, in accordance with the majority opinion of the IAC, the Vice-President of Directorate-General 4 (DG4) had decided to reject her appeal as unfounded. He had also decided to reject the recommendation that she be awarded 200 euros as compensation for the delay in the internal appeal proceedings. As indicated in the majority opinion, the meaning of "dependent child" was to be found by reading Article 69 of the Service Regulations as a whole. Thus, it was necessary to take into account Article 69(2) which provided that not more than one dependants' allowance shall be paid in respect of any child. The legal framework thus established the principle that only a single payment should be made. That principle applied to the home loan supplement, which could only be paid to an employee in receipt of the dependants' allowance. If the legislator had intended to restrict the meaning of "dependent child" to that specified in Article 69(3) of the Service Regulations, it would have used appropriate wording. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision. She seeks an award of the home loan supplement for dependent children under no worse conditions than those prevailing at the date she received her basic home loan, that is, 1 March 2010. She claims damages caused by the delay since 1 March 2010, including, but not limited to, the additional notary, bank and registration costs related to the financing of 16,500 euros which she had to borrow elsewhere, as well as damages for the delay in the award of the home loan, together with compound interest at the rate of 8 per cent per annum. She seeks exemplary or, in the alternative, moral damages for the "gravity of the offence" of bias in the IAC proceedings, moral damages for delay in the IAC proceedings in an amount no less than 1,000 euros or, in any event, no less than the amount recommended by the IAC. She claims costs in an amount no less than 1,000 euros, and any further relief as appropriate.

The EPO asks the Tribunal to dismiss the complaint in its entirety and to order that the complainant bear her own costs.

CONSIDERATIONS

1. The Home Loan Regulations provide that any EPO permanent employee having active status is entitled to apply for a loan for the building, purchase or conversion of a residential property that is his or her main residence or is intended to be the main residence after retirement. Under Article 3(2) of the Home Loan Regulations, the maximum amount of the home loan shall not exceed 110,000 euros. Article 3(2) further provides that the "maximum shall be increased by 5% for each dependent child within the meaning of Article 69 of the Service Regulations".

2. Article 69 of the Service Regulations provides for the payment of a dependants' allowance for children under the conditions set out in the Article. Relevantly, Article 69(2) and (3) read:

> "(2) Not more than one dependants' allowance shall be paid in respect of any dependent child within the meaning of this Article.
>
> […]
>
> (3) For the purposes of these Regulations a dependent child shall be:
>
> (a) the legitimate, natural or adopted child of a permanent employee, or of his spouse, who is mainly and continuously supported by the permanent employee or his spouse;
>
> […]"

3. The complainant's husband applied for and was granted a home loan for the total amount of 126,500 euros being 110,000 euros plus 5 per cent for each of their three children. However, the complainant's application for the additional 16,500 euros (the home loan supplement) was rejected by the Home Loans Committee. On 28 April 2011 the Vice-President of DG4 dismissed her internal appeal challenging the decision to reject her application for the home loan supplement. The complainant submits that this decision is tainted by error of law and seeks to have it set aside together with other relief.

4. For reasons that will become evident, a detailed account of the positions advanced by the parties largely directed at the principles of statutory interpretation is unnecessary. The complainant submits that as there is no ambiguity in Article 69(3) "[o]bviously, [she and her husband's] children are dependent in the sense of Art[icle] 69(3)(a), which defines a dependent child as '*the legitimate, natural or adopted child of a permanent employee or of his spouse, who is mainly and continuously supported by the permanent employee* ***or his spouse***'. It follows that both [she] and her husband satisfy the requirements of Art[icle] 3(2) [of the Home Loan Regulations], and not only her husband."

5. In effect, the complainant is arguing that as the children are factually dependent on both parents, both she and her husband are entitled to the home loan supplement. This argument is rejected. At the outset, it is noted that Article 3(2) of the Home Loan Regulations states that it is a dependent child "within the meaning of Article 69" and not, as the complainant claims, a dependent child "in the sense of Art. 69(3)(a)". It is the specific meaning ascribed to the term dependent child in Article 69 for the purposes of the Service Regulations that is relevant. The question is not whether the children are in fact dependent on both parents. Instead, the question is whether the complainant is recognised under the Service Regulations as having a dependent child or children.

6. Under the conditions laid down in Section 3 of the Service Regulations, a permanent employee is entitled to family allowances including the dependants' allowance (Article 67). The dependants' allowance is payable to a permanent employee who has one or more dependent children (Article 69(1)(I)) and a dependent child must be a child who is mainly supported by the permanent employee or his or her spouse (Article 69(3)(a)). Additionally, not more than one dependants' allowance is payable for any dependent child within the meaning of the Article (Article 69(2)). In cases where the husband and wife are both employees of the EPO and are both entitled to the dependants' allowance, it is payable only to the permanent employee whose basic

salary is higher (Article 67(3)). Thus, it can be seen that a dependent child for the purposes of the Service Regulations is defined by reference to the permanent employee in receipt of the dependants' allowance.

7. The Tribunal considered an argument analogous to that of the complainant in Judgment 2532, involving two permanent employees of the EPO, who had a natural child together but were not spouses. The mother had sole custody and received the dependants' allowance and the household allowance, while the father paid a monthly contribution for the child's maintenance. The father applied to receive the household allowance on the basis that the child was a dependant under Article 69 and there was no prohibition on the household allowance being paid twice in respect of the same child to unmarried parents. At consideration 5, the Tribunal rejected this argument. It reads:

> "In [the Tribunal's] view the relevant provisions must be applied in the light of the special circumstances of the case. Even though in other circumstances it might have been possible to recognise that the complainant supported his daughter mainly and continuously, according to the applicable provisions, by virtue of providing sufficient financial support for her maintenance, this is not so in the present case. Since the mother, who is an employee of the EPO, is already considered by the Organisation to be her daughter's main provider, so that the latter is deemed to be dependent upon her in the meaning of Article 69(3)(a), the complainant could not also be considered as that child's main support.
>
> This leads to the conclusion that since his daughter, as shown above, could not be considered by the Organisation to be dependent on him, as she had already been recognised as being dependent on her mother in the meaning of Article 69 of the Service Regulations, the complainant did not satisfy the conditions for entitlement to the household allowance."

8. The complainant argues that this reasoning does not apply to her because she and her husband, who received the dependants' allowance at the relevant time, are married. Therefore, in her view she comes within Article 69(3) because her spouse is considered by the EPO to "mainly and continuously" support the children. However, this text simply recognises family situations in which the spouse of the permanent employee of the EPO has natural, legitimate or adopted

children who are mainly and continuously supported by either the permanent employee or the spouse.

9. It follows that for the purposes of Article 3(2) of the Home Loan Regulations, a "dependent child within the meaning of Article 69" means a dependent child as defined in Article 69(3) of the Service Regulations who is not already deemed to be the dependant of another permanent employee for the purposes of Article 3(2).

10. The complainant raises three additional arguments. First, she submits that the IAC's manifest failure to apply the law properly suggests that it was biased in favour of the EPO. Leaving aside the question of receivability raised by the EPO, there is no foundation for this claim of bias in the internal appeal proceedings. The analysis of the majority of the IAC displays no reason to believe that its members failed to bring an impartial and objective mind to the issues.

11. Second, the complainant submits that the impugned decision is *ultra vires* as it was signed by the Director of Regulations and Change Management and not by the Vice-President of DG4 (Administration), who has authority to take a decision when the opinion of the IAC is not unanimous. She insists that as there is no evidence of sub-delegation of authority, it follows that the decision was taken by the Director without authority and should be set aside.

This claim is rejected. In Judgment 3352, under 7, the Tribunal held that it was sufficient if the letter notifying the staff member of the decision clearly stated that the decision was taken by the person having the requisite authority and that the writer of the letter was merely informing the staff member of the decision.

12. Third, the complainant claims that the EPO exceeded its authority by not following the IAC's recommendation that it award her moral damages for delay. As well, the request for moral damages for delay is justified. The IAC noted that it took two years for the EPO to produce a position paper, which warranted an award of damages. Whether the complainant's request for the grant of the home loan

supplement was founded or not (the latter being the Vice-President's reason for rejecting this recommendation) has no bearing on the complainant's right to have her appeal treated diligently and resolved within a reasonable period of time.

13. While the Vice-President of DG4 was entitled to decline to follow the unanimous recommendation of the IAC, in the circumstances, it was not enough to state that the recommendation was not followed because the appeal was considered unfounded. Both the IAC majority and minority, in making their respective recommendations, relied on Tribunal decisions where complainants were awarded moral damages for excessive delay even though the main claims were determined to be unfounded (see in particular Judgments 2744, under 8 and 9, 2957, under 6 and 7, and 2851, under 9 and 10). In the impugned decision the Vice-President of DG4 failed to identify those facts that distinguished the complainant's case from the cited case law.

14. As to the delay itself, the case law is clear that a total delay of over two and a half years to reach a final decision is excessive and warrants an award of moral damages, on the basis of an organisation's breach of its positive obligation to ensure that internal appeal procedures move forward with reasonable speed (see, for example, Judgment 2197, under 33). The EPO notes that once it submitted its position paper, the internal appeal proceedings were conducted diligently. This may be so, but the submission of the parties' positions is an integral part of the internal appeal proceedings and the failure to submit a position paper in a timely manner contributes to the overall delay in the proceeding. Moreover, the EPO offered no explanation for the two-year delay in making its submission to the IAC.

15. Accordingly, the complainant is entitled to an award of moral damages for excessive delay in the internal appeal proceedings in the amount of 1,000 euros. As the complainant only succeeds on this claim, the Tribunal awards 200 euros in costs.

DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the amount of 1,000 euros.
2. It shall pay the complainant costs in the amount of 200 euros.
3. All other claims are 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