

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
EPO

123rd Session

Judgment No. 3793

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 30 August 2011 and corrected on 25 November 2011, the EPO's reply of 6 March 2012, the complainant's rejoinder dated 8 May and the EPO's surrejoinder of 10 August 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 decision not to grant him a dependants' allowance for his mother.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat. In January 2005 he submitted a claim for a dependants' allowance in respect of his widowed mother, who was living in Cairo (Egypt). According to Article 70 of the Service Regulations for permanent employees of the European Patent Office, such an allowance may be granted where a permanent employee, or her/his spouse, "mainly and continuously supports a parent or other relative, by blood or marriage, by virtue of a legal or judicial obligation". In January 2008, after the complainant had provided further information and documents to support

his claim, he was informed that he was not entitled to receive a dependants' allowance for his mother. It was not disputed that, pursuant to a ruling of an Egyptian court, he had a legal obligation to pay 2,000 Egyptian pounds per month to his mother for her maintenance. However, because her own income amounted to more than half the average cost of living for a one-person household in Cairo, the complainant could not be considered to be "mainly supporting" her within the meaning of Article 70 of the Service Regulations, and the conditions of that article were therefore not satisfied.

The complainant submitted a request for review of this decision to the President of the Office, arguing that the cost of living statistics on which the EPO was relying were incorrect. This request was rejected and the matter was referred to the Internal Appeals Committee (IAC) for an opinion. The IAC noted that the EPO's practice in determining whether an employee was "mainly and continuously supporting" a relative for the purposes of Article 70 was based on two cumulative conditions. The first was that the financial support provided by the employee must amount to more than half the average cost of living of the relative in question. The second was that the financial support must amount to more than 6 per cent of the employee's base salary, plus the dependants' allowance. The IAC found that this second condition was clearly not met in the complainant's case and on that basis it recommended that the complainant's appeal should be dismissed as unfounded. By a letter of 30 May 2011, the Director of Regulations and Change Management informed the complainant that he had decided, by delegation of power from the President of the Office, to reject his appeal as unfounded, in accordance with the IAC's opinion.

The complainant impugns that decision in his complaint before the Tribunal, requesting that it be set aside.

The EPO submits that the complaint is irreceivable on the basis that it was filed more than 90 days after the complainant was notified of the impugned decision, in breach of Article VII, paragraph 2, of the Tribunal's Statute. Subsidiarily, it argues that the complaint is unfounded.

CONSIDERATIONS

1. The EPO submits that the complaint is irreceivable. According to the complaint form, the complainant received notification of the impugned decision on 30 May 2011. However, the complainant filed his complaint on 30 August 2011, more than 90 days after the notification of the decision. The complainant states that the date on the complaint form was a clerical mistake and that he actually received the decision on 1 June 2011. Therefore, according to the complainant, the complaint was filed within the 90 day time limit in Article VII, paragraph 2, of the Tribunal's Statute.

2. The case law is clear that "the burden of proof is on the sender to establish the date on which a communication was received. If that cannot be done (perhaps because the document was sent by a system of transmission that does not permit actual proof), the Tribunal will ordinarily accept what is said by the addressee about the date of receipt [...]" (see Judgment 3253, under 7). Based on information received from the Munich Post Office, the EPO states that the complainant "most likely" received the decision on 31 May. This is insufficient to prove actual receipt. Accordingly, the complainant's statement that he received the decision on 1 June is accepted and it follows that the complaint is receivable.

3. On the merits, the complainant submits that he meets all three conditions of Article 70 of the Service Regulations for the granting of a dependant's allowance. He claims that the EPO introduced an additional condition, namely, that the level of support must exceed 6 per cent of the basic salary plus the dependants' allowance by reference to Circular No. 82 that only concerns the allowance for dependent children. The complainant also argues that when considering a request for a dependants' allowance, the EPO cannot apply conditions that are not stipulated in Article 70 of the Service Regulations. He adds that the EPO's practice has never been made public.

4. Article 70 of the Service Regulations states:

“An allowance for dependants as set out in Annex III may be granted by the President of the Office on the basis of supporting evidence where a permanent employee or his spouse mainly and continuously support a parent or other relative, by blood or marriage, by virtue of a legal or judicial obligation.”

5. The issue between the parties concerns the EPO’s practice in its application of the phrase “mainly and continuously”.

6. The EPO argues that, in keeping with its long standing practice, the third criterion requires that two conditions must be met. First, the support of the agent must exceed half of the cost of living of the dependant; and, second, the support of the agent shall exceed 6 per cent of the base salary plus the allowance for the dependant.

7. The complainant’s assertion that the EPO introduced an additional condition, namely, that the level of support must exceed 6 per cent of the employee’s basic salary plus the dependants’ allowance is without foundation. In fact, as shown in Judgment 1142, the same requirement regarding the level of support was part of the EPO’s practice in relation to Article 70 of the Service Regulations as early as 1992, and this Judgment is on public record.

8. The EPO acknowledges that an error was made in the calculation of the cost of living in Egypt and that the complainant does contribute more than half of the average cost of living for his mother. However, it is clear and not disputed that the complainant does not meet the second condition since his contribution does not exceed 6 per cent of the base salary plus the allowance for dependants.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2016, Mr Giuseppe Barbagallo, Vice-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 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ