NINETY-SEVENTH SESSION

Judgment No. 2359

The Administrative Tribunal,

Considering the complaint filed by Mr E. G. A. against the European Patent Organisation (EPO) on 28 April 2003, the Organisation's reply of 22 September, the complainant's rejoinder of 19 November 2003 and the EPO's surrejoinder of 20 February 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant was born in 1964 and has Swedish nationality. He joined the European Patent Office – the EPO's secretariat – in 1989 as an examiner at grade A1, in Directorate General 1 (DG1) in The Hague. His current grade is A3.

In June 2000 the complainant's partner took up residence with him. She had two children and until then had been supporting them with a small income from part time employment supplemented by social security benefits. Once she was cohabiting with the complainant, the Netherlands authorities assessed her entitlement to social security benefits on the basis of the couple's combined income. As a result, from June 2000 she ceased to receive one of the two social security benefits to which she had previously been entitled.

On 24 July 2000 the complainant applied for a dependants' allowance in respect of his partner's children on the basis of Article 69 of the EPO Service Regulations for Permanent Employees of the Office. The complainant was not married to his partner at that time. The children themselves were not married, and they were not the complainant's legitimate, natural or adopted children. Nor was he in the process of adopting them. Under those circumstances, the complainant's entitlement to the dependants' allowance was subject to the conditions set out in Rule 2 of Communiqué No. 6, which took effect on 1 April 1996: the children had to be "mainly and continuously" supported by him, and they could not be under the parental authority of a third person, unless that third person was, for reasons beyond his or her control, unable to support them.

On 18 September 2000 the complainant was informed by Personnel Administration that, although no decision had yet been taken on his application, the Office was working on the assumption that the children were under the parental authority of a third person, namely their mother. Referring expressly to Rule 2 of Communiqué No. 6, Personnel Administration also pointed out that the application contained no evidence of the mother's inability to support the children. The complainant responded the following day, explaining that he considered that he did exercise parental authority over his partner's children.

By a note of 31 October 2000 the Director of Personnel rejected the complainant's application on the grounds that the conditions laid down in Article 69(3)(c) of the Service Regulations and Rule 2 of Communiqué No. 6 were not fulfilled, because the children were not under the complainant's parental authority. The complainant wrote to the Director of Personnel on 6 November 2000, asking him to reconsider that decision or to treat his letter as initiating an internal appeal. Following a meeting with the Director of Personnel, the complainant was informed that a final decision would be taken once he had provided further evidence of his partner's inability to support her children, and that in the meantime his appeal would be postponed. The complainant submitted further evidence and arguments on 28 November 2000, 21 March and 6 April 2001.

By a letter of 18 May 2001 the complainant was informed that his appeal had been referred to the Appeals

Committee, the President of the Office having decided, after an initial examination of the case, that his request could not be granted. The reason for that decision, namely that the conditions laid down in Article 69(3)(c) and in Rule 2 of Communiqué No. 6 were not fulfilled, was conveyed to him in a note of 21 May 2001 from the Director of Personnel, who also indicated that the Office would reconsider his application in the event that he was granted parental authority over one or both children by virtue of a legal decision.

On 12 September 2001 the complainant obtained joint custody of his partner's children pursuant to a ruling of the competent Netherlands court. The Office then granted his request for a dependants' allowance with effect from 1 September 2001. However, the complainant maintained his internal appeal, claiming the payment of the allowance, with interest, as from 24 July 2000, the date of his application. He also claimed moral damages and costs.

In an opinion dated 9 December 2002, the Appeals Committee, by a majority of its five members, recommended that the appeal be dismissed. The three members forming the majority considered that the mother had partially forfeited her entitlement to social security benefits of her own free will by deciding to cohabit with the complainant. Noting that she had also chosen not to enforce maintenance claims against the children's biological father, the majority concluded that her inability to support her children was not due to circumstances beyond her control and that the conditions of Article 69(3)(c) in combination with Rule 2 of Communiqué No. 6 were therefore not fulfilled. The two other members of the Committee took the view that the complainant's partner was already unable to support her children before she took up residence with the complainant, her financial incapacity being evidenced by the fact that she was then entitled to social security benefits. They recommended that the claim for payment of the allowance be allowed and that the complainant be awarded costs. The members of the Appeals Committee were, however, unanimous in considering that there were no grounds for awarding moral damages.

By a letter of 6 February 2003 the complainant was informed that the President of the Office had decided to reject his appeal in accordance with the majority opinion of the Appeals Committee. That is the impugned decision.

B. The complainant submits that under Article 69 of the Service Regulations a permanent employee is entitled to an allowance in respect of a dependent child who is "normally resident with" and "mainly and continuously supported" by either the permanent employee or his spouse. He argues that this is not a discretionary matter, but a clearly expressed entitlement, and it only remains to be determined what is meant by "continuously supported". He points to the wording of Communiqué No. 6, which states, inter alia, that the child shall be assumed to be continuously supported by the employee if the child is "not married or under the parental authority of a third person, except where the child's spouse or the third person is, for reasons beyond his control, unable to support the child".

Prior to obtaining joint custody of his partner's children he was already supporting them mainly and continuously and they were normally resident with him and his partner. Before cohabiting with him, his partner was unable to support her children for reasons beyond her control, insofar as her working hours were considerably limited by the fact that her handicapped son required additional care. She was therefore entitled to social security benefits. Under those circumstances, and since neither the Service Regulations nor the application form for the dependant's allowance mentions the issue of parental authority, the complainant considers that all the criteria for entitlement to the allowance were met at the time of his application.

The complainant describes the Office's interpretation of Article 69 as "perverse" in the light of "almost universally applied concepts of child support payments". He queries the legality of Communiqué No. 6, arguing that if the Office's narrow interpretation of Article 69(3)(c) in conjunction with Rule 2 were to prevail, an entitlement clearly conferred by the Service Regulations would in effect have been illegally withdrawn by means of a mere communiqué.

In support of his claim for moral damages, he accuses the Office of "anti social conduct". He asserts that it responded to his application with "obfuscation and suspicion", made him feel as though it was assumed that he and his partner had "entered into an arrangement for the purposes of extracting money from the Office" and attempted "to enforce a concept of family unit that does not correspond to contemporary norms".

He claims the payment of the dependants' allowance in respect of both children for the period from 24 July 2000 to 31 August 2001, with interest; an award of moral damages; and costs for both the internal appeal proceedings and the present proceedings.

C. In its reply the Organisation dismisses the complaint as entirely unfounded. It emphasises the exceptional nature of the provision under Rule 2 of Communiqué No. 6 whereby a child may be considered dependent notwithstanding the parental authority of a third person. It justifies its narrow interpretation of the Rule on the grounds that the recognition of a child as dependent has far reaching financial consequences, since it may also create an entitlement to other benefits.

The Organisation maintains that the complainant's partner was not unable to support her children for reasons beyond her control. Since it was foreseeable that the decision to cohabit would lead to a reduction in her social security benefits, it was of her own free will that she lost her ability to support the children. The Organisation considers that its duty of care does not oblige it to grant an allowance as a replacement for another allowance previously paid by a national social security scheme but deliberately forfeited by the recipient. It also observes that the complainant's partner voluntarily renounced another source of financial support for her children by choosing not to enforce maintenance claims against their biological father.

The Organisation argues that it is consistent with the rationale of Article 69(3) to use parental authority as the criterion for permitting an exception, under Rule 2 of Communiqué No. 6, to the general rule whereby the dependants' allowance is confined to legitimate, natural or adopted children of permanent employees or their spouses. The provisions of Article 69(3) show that the allowance is payable only where there is a legal relationship between employee and child. Thus, the decision to refuse payment of the allowance until the complainant had assumed parental authority over the children was correct. That being the case, the complainant's accusations of "anti-social conduct" are unfounded and, as noted by the Appeals Committee, there are no grounds for awarding him moral damages.

Regarding the complainant's reference to "almost universally applied concepts of child support payments", the Organisation observes that it is not bound by national legislation; it applies its own rules, subject to review by the Tribunal.

D. In his rejoinder the complainant maintains his position. He reiterates that parental authority is not mentioned as a criterion in the Service Regulations and queries the fact that the Organisation insists on the existence of a legal relationship recognised under national law whilst asserting that it is bound only by its own rules.

E. In its surrejoinder the Organisation presses its pleas, emphasising the need for a legal relationship between employee and child as a condition for entitlement to a dependants' allowance.

CONSIDERATIONS

1. Since 16 June 2000 the complainant's partner has been living in partnership with him. Until then, she was the sole support for her two children. Because of the need to care for one of them who is handicapped, she was not able to work full time. They were maintained out of her income as supplemented by child allowance and social security benefits. The social security payments were withdrawn with effect from 16 June 2000 when she commenced living with the complainant, on the ground that their joint income rendered her ineligible for them.

2. On 24 July 2000 the complainant applied for a dependants' allowance from the EPO in respect of his partner's children, who were then residing with him. His application was refused on 31 October and he lodged an appeal with the Appeals Committee on 6 November 2000.

3. While the internal appeal was pending, the complainant and his partner were, on 12 September 2001, granted joint custody of the two children by the District Court of The Hague. His application for payment of the dependants' allowance was then granted with effect from 1 September 2001. He maintained his internal appeal with respect to the period 24 July 2000 until 31 August 2001.

4. By a majority, the Appeals Committee recommended, on 9 December 2002, that the complainant's appeal be dismissed. On 6 February 2003 the President of the EPO rejected his appeal "for the reasons put forward [...] during the appeals procedure and in accordance with the majority opinion of the Committee". That is the decision challenged before this Tribunal.

5. The complainant contends that, under Article 69 of the EPO Service Regulations and Communiqué No. 6, he is entitled to payment of a dependants' allowance as claimed. He seeks payment of that allowance together with

interest, moral damages and the costs of these proceedings and of the internal appeal.

6. The EPO maintains that the complainant is not entitled to payment of the claimed allowance because, in terms used in
Rule 2 of Communiqué No. 6, the children's mother was not "for reasons beyond [her] control, unable to support [them]".

7. Article 69 of the EPO Service Regulations relevantly provides:

"(1) A dependants' allowance shall be payable, under the conditions laid down in this Article, to a permanent employee who has:

I. one or more dependent children;

II. one or more dependent handicapped children.

[…]

(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;

b) the child for whom an application for adoption has been lodged and the adoption procedure started;

c) any other child who is normally resident with and mainly and continuously supported by the permanent employee or his spouse."

8. Communiqué No. 6, which came into force on 1 April 1996, contains guidelines for determining whether a child is dependent within the meaning of Article 69(3)(a) and (c) of the Service Regulations. Rule 1 of the Communiqué relates to a "legitimate, natural or adopted child" and relevantly provides, in paragraph (1), that such a child:

"shall be assumed to be mainly and continuously supported by the employee or his spouse if the child is not gainfully employed [...] <u>and</u>is

a) under 18 years of age, <u>or</u>

b) aged between 18 and 26 and receiving educational or vocational training, <u>or</u>

c) prevented by serious illness or invalidity from earning a livelihood, irrespective of age."

9. Rule 2 of the Communiqué, which is the rule directly in issue in the present case, provides:

"Any other child normally resident with the employee or his spouse (Art. 69(3)(c) Service Regulations) shall be assumed to be mainly and continuously supported by the employee or his spouse if, in addition to fulfilling the conditions set out under Rule 1(1), the child is not married or under the parental authority of a third person, except where the child's spouse or the third person is, for reasons beyond his control, unable to support the child."

10. The complainant's request for a dependants' allowance was rejected and his subsequent appeal dismissed because, according to a majority of the members of the Appeals Committee, the conditions for recognition as a dependent child under Article 69(3)(c) of the Service Regulations in conjunction with Rule 2 of Communiqué No. 6 were not met. In this regard, it was said in the majority opinion that the condition of being "mainly and continuously supported" by the employee or his spouse "is defined in more detail in Communiqué No. 6".

11. The notion that Rule 2 of Communiqué No. 6 is definitional is repeated in the EPO's reply and surrejoinder. Thus, for example, it is said that Rule 2, insofar as it refers to the parental authority of a third person is "an exception" and that the condition of being mainly and continuously supported "is defined in greater detail in Communiqué No. 6".

12. The reasoning of the majority of the Appeals Committee, repeated in the EPO's submissions to this Tribunal, was that, until 12 September 2001 when the complainant and his partner were granted joint custody, the children were under the parental authority of a third person, namely their mother, and, as she had voluntarily joined the complainant's household and chosen not to enforce maintenance claims on the children's biological father, her inability to support them was not "for reasons beyond her control".

13. There are two distinct problems with the reasoning outlined above. The first is that it is not obvious that the words "third person" in Rule 2 of Communiqué No. 6 refer to the partner of a person seeking a dependent child allowance. The second is that to say the complainant's partner was not able to support her children because she voluntarily joined his household is to adopt an unduly simplistic view of causation, rather than to look for the real and effective cause of her inability. The complainant relies on both of these matters to argue that he in fact met the conditions of Rule 2 of the Communiqué prior to his being granted joint custody. However, it is not necessary to consider these matters as there is a more fundamental problem raised by the complainant's argument that the EPO's interpretation of Rule 2 of the Communiqué is "a perverse interpretation, which goes against the clear intention of Article 69".

14. The fundamental problem is not in adopting "a perverse interpretation", as such, but in treating Rule 2 of the Communiqué as definitional rather than evidentiary. It is clear from the use of the word "assumed" in the Rules in the Communiqué that those rules are intended to be evidentiary in the sense that they relieve an employee of the burden of producing detailed evidence that he or she "mainly and continuously" supports the children in question if the various matters specified in the rules are established. An employee who cannot establish those matters may, nevertheless, establish by other evidence that the children in question are "mainly and continuously" supported by him or her, or by his or her spouse. Were that not so, Rule 2 of the Communiqué would be inconsistent with the terms of the superior rule in Article 69(3)(c).

15. The view that Rule 2 of the Communiqué is definitional rather than evidentiary is an error of law. Since the President's decision to dismiss the complainant's appeal was based on that view, the decision must be set aside. The evidence is that, leaving aside the child allowance paid by the Dutch authorities, no person other than the complainant and his partner contributed in any way to the support of the children and that, of the two, the complainant was the main breadwinner. Thus, the children were mainly and continuously supported by him at the relevant time. Accordingly, he is entitled to be paid an allowance for the two dependent children for the period from 24 July 2000 until 31 August 2001.

16. The decisions to reject the complainant's request for the dependants' allowance and to reject his subsequent appeal involved not only an error of law, but also an unduly legalistic approach to the relevant provisions of the Service Regulations and of Communiqué No. 6. Even so, this is not a case for moral damages.

DECISION

For the above reasons,

1. The decision of the President of the Office of 6 February 2003 is set aside.

2. The EPO shall pay the complainant an allowance for two dependent children for the period from 24 July 2000 until 31 August 2001 together with interest at the rate of 8 per cent per annum until the date of payment.

3. It shall pay the complainant's costs for his internal appeal – which were claimed but refused in those proceedings – in the sum of 1,000 euros, as well as 2,000 euros in costs for the present proceedings.

4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.