NINETY-EIGHTH SESSION

Judgment No. 2411

The Administrative Tribunal,

Considering the complaint filed by Mr E.K. L. against the European Patent Organisation (EPO) on 12 December 2003 and corrected on 19 January 2004, the EPO's reply of 13 April, the complainant's rejoinder of 20 May and the Organisation's surrejoinder of 24 June 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. Article 70 of the Service Regulations for Permanent Employees of the European Patent Office, the Organisation's secretariat, relating to the dependants' allowance reads as follows:

"An allowance for dependants […] 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 supports a parent or other relative, by blood or marriage, by virtue of a legal or judicial obligation."

The complainant is a Spanish national born in 1955. He joined the Office on 1 October 1989 as an examiner. In a letter dated 28 June 1999 he applied under Article 70 for a dependants' allowance in respect of his parents. By letter of 16 November 1999 he supplied the required documentation and requested that the allowance be paid retroactively from August 1996. The Remuneration Department informed the complainant by letter of 3 March 2000 that he would receive the allowance with retroactive effect from 1 January 1999. In a letter of 13 March the complainant pressed his request to be granted the allowance retroactively from 1 August 1996 on the grounds that he had been supporting his parents from that date. The same day, that request was refused by the head of Personnel Administration in the course of a telephone conversation. By a letter of 14 March the complainant requested a reply in writing. On 15 March the head of Personnel Administration confirmed the refusal by e-mail, basing it on the "practice of the Office".

By an e-mail of 30 March 2000 to the same official, the complainant further pressed his request for the allowance to be granted retroactively, but from 1 September 1996. In the case of a refusal, he asked that his e-mail be treated as an internal appeal in accordance with Article 108 of the Service Regulations. By a further e-mail of 19 June 2000 to the head of Personnel Administration he enquired about the status of his internal appeal. Through an exchange of e-mails on 20 November 2000, 15 November 2001 and 26 October 2002 the complainant and an officer in Personnel Administration discussed the "case" pending a "final answer" from the Administration.

By a letter of 8 May 2003 to the Chairman of the Appeals Committee the complainant enquired when his appeal would be dealt with. In a letter dated 4 August 2003 and received on 15 September, the Employment Law Directorate informed the complainant that the decision to grant him the dependants' allowance as from 1999 was final and that, "in view of the Administration's silence, he could have submitted his case directly to the Tribunal". That is the impugned decision.

B. The complainant submits that he has been granted the dependants' allowance under Article 70 of the Service Regulations with effect from 1 January 1999. However, he construes Article 70 to mean that he is entitled to the allowance with retroactive effect from 1 September 1996, given that he has been supporting his parents financially since August 1996.

He seeks the quashing of the decision of 4 August 2003. He wants the EPO to grant him the dependants' allowance with effect from 1 September 1996 and pay him the outstanding amount due.

C. In its reply the EPO states that it is prepared to consider the complaint as receivable because the complainant had sent his internal appeal in due time, even though the appeal did not reach the Personnel Department within the

applicable time limits.

On the merits, it contends that the complaint is unfounded. The purpose of the dependants' allowance for staff members "mainly and continuously" supporting a dependant is only achieved if the allowance is granted on a "regular monthly basis". Staff members are informed of their rights and obligations because copies of the Service Regulations and other relevant texts are made available to them. Citing the case law, it says that "ignorance of the law is no excuse", and the complainant cannot contend that he was not aware of the provisions before 1999, especially as his appointment was confirmed in 1990.

The EPO considers that the Office's practice not to grant full retroactive effect to applications for allowances is legitimate as making retroactive changes heavily increases the Administration's workload. In addition, it is difficult to verify the accuracy of a staff member's statement concerning facts that occurred years previously. The practice is to pay the dependants' allowance retroactively from the beginning of the year in which the application was submitted if the conditions for eligibility are met on 1 January of that year. The complainant submitted his application with the supporting documentation in 1999 and therefore the Office could grant the allowance with retroactive effect only from 1 January of that year.

D. In his rejoinder the complainant submits that his appeal was filed in time and that receivability is therefore not at issue.

On the merits, he submits that as the allowance was granted, the only matter in dispute is the date from which it is to be paid. The complainant says that he did not apply for the allowance in 1996 because he did not need it at that time. He considers that the Administration's workload was not a valid reason for refusing to grant the allowance as from 1 September 1996.

E. In its surrejoinder the EPO points out that it is only because of the particular circumstances of the case that it is prepared to consider the complaint as receivable.

On the merits, it asserts that the principle according to which "ignorance of the law is no excuse" is a general and fundamental principle of law ensuring legal security. If the complainant wished to know which provisions applied, he should have asked the Personnel Department for clarification when he started supporting his parents. Furthermore, it was up to him to submit a timely application for the dependants' allowance. The issue of retroactivity thus arose due to his lack of diligence. The EPO maintains that it acted in line with its practice; it honoured its duty of care towards its staff. In addition, it states that granting full retroactivity over several years would involve a heavy budgetary burden; it would also be contrary to the purpose of the allowance.

CONSIDERATIONS

1. The complainant applied for the dependants' allowance in 1999 under Article 70 of the EPO Service Regulations. He had been supporting his parents since 1996 as his father had no pension. The EPO granted him the allowance with effect from 1 January 1999 but denied his request to have the allowance paid retroactively from September 1996 when his father had reached age 65. It based its refusal on its practice to allow retroactive payment only to 1 January in the year when an application for the grant is made. This was decided in 2000; the complainant was told that there were no written "Guidelines" to that effect, but that such was the "practice of the Office". These facts are uncontested, although it was another three years before the Office told the complainant – on 4 August 2003 – that such was its final position.

2. The defendant Organisation's arguments are based on the principle that no one should be allowed to plead ignorance of the law, and it invokes Judgment 1700 to that effect. Nevertheless, it should be noted that the Service Regulations may provide a time limit for a given allowance (see, for instance, Article 71, section IV, paragraph 12, concerning the education allowance), or they may not. The dependants' allowance is one that belongs to the latter category: Article 70 lays down no time limit, and that is why the Tribunal has found that under this kind of provision there is a "right" to retroactivity (see Judgment 322).

3. Judgment 322 concerned a dependent child allowance, and the Organisation's rules were that no official could claim the family allowance unless he or she notified the Organisation of the birth of a child. The Tribunal found that:

"No time limit is set in the Staff Regulations for such a notification. In particular, entitlement is not subject to a rule of limitation and so does not lapse if birth is not notified within a given period." (See Judgment 322, under 3.)

Any organisation should understand that, following the Tribunal's interpretation of a right to retroactivity when no time limit exists, it can only change that situation by establishing different rules. Indeed, as regards education allowance, there is a special provision in the EPO Service Regulations, so that permanent employees are timely and fairly advised of the time limitations they will face when claiming their rights. No such provision exists for the dependants' allowance provided for under Article 70, which has remained unchanged.

4. The defendant's argument is that the practice of the Office is compatible with Judgment 322. It obviously is not. It is clear, as the Organisation points out, with reference to the case law, that the purpose of the allowance is achieved if the allowance is paid on a monthly basis at the same time as the remuneration, of which it forms a part. However, the Office has already established a practice that declines strictly to apply that reasoning since it granted the complainant the allowance with limited retroactivity – based on his proven assertion of the facts. Its practice is therefore inconsistent.

The Tribunal itself has declared that, when there is no time limit, an official may lose the right to retroactive payment of an allowance unless he or she acts within a reasonable period of time. In Judgment 322 a six-year period was considered an unreasonable delay. It was also considered to be intentional, which is not the case here. In that particular case, the right to retroactivity was forfeited by the complainant's failure to act within a reasonable period of time. The circumstances in the present case were different.

5. The EPO claims practical difficulties in granting full retroactivity. However, there would seem to be no difficulty, in this case, in calculating the allowance for about two and a half years more, provided the Organisation has already accepted the basis for the complainant's claim which is that he had been supporting his parents since August 1996 when his father became 65 years of age. It should also be noted that the Organisation has not challenged the facts alleged by the complainant as to the monthly payments he made to his parents over the period from 1 September 1996 to 31 December 1998.

6. The complainant was no doubt in a position, and indeed had a duty, to be fully aware of the Service Regulations, including Article 70, during the years that elapsed between his entering the Organisation in 1989 and his father reaching the age of 65 in August 1996.

However, that Article does not establish any time limit within which the claim must be presented in order to be admissible. Therefore, the Organisation's "practice" is the sole foundation for limiting the "right" to retroactivity to the beginning of the year in which the claim is made. In Judgment 322 the Tribunal stressed that claiming a retroactive lump-sum payment six years after the fact, for reasons of a personal nature, was to disregard the "purpose of the provisions on family allowances". That can hardly be considered the case here, for the delay was neither wilful nor unreasonable.

7. Even when the Tribunal has dealt with express time-bar limitations it has nonetheless adopted a flexible attitude, saying that in some cases a rule is "not a hard and fast one" and that, in certain circumstances, "justice requires that an exception should be made" (see Judgment 451).

In Judgment 53 the Tribunal found, as in other cases since, that "all the circumstances of the case" should be taken into account, for instance to determine whether a reasonable time has elapsed, "including *inter alia* the *bona* or *mala fides* of the official, the nature of the error, the degree of negligence and […] the hardship caused".

It has also been stated that, even in discretionary matters, "essential facts" should be taken into consideration and that "mistaken conclusions" cannot be drawn "from the facts" (see in particular Judgments 972, 1262 and 1384). These are basic legal principles.

8. In any event, the circumstances of this case are as follows:

(i) Article 70 does not establish a time limit for claiming the dependants' allowance; what the complainant is supposed to have ignored, thereby breaching the principle that "ignorance of the law is no excuse", is the practice of the Organisation, not its rules and regulations. It does not amount to the same thing.

(ii) The complainant inadvertently, rather than wilfully, was late in submitting his claim.

(iii) The delay in raising the issue was substantially shorter than in Judgment 322, and the Tribunal does not find this unreasonable in the context of the case.

(iv) Another factor which is not without importance, and unquestioned by the Organisation, is the complainant's substantial continuous financial help for his parents even before his father became of pensionable age.

(v) The complainant acted in good faith when he became aware of his right to compensation for the assistance he provided to his parents.

(vi) The complainant has also declined to seek moral damages, interest or procedural costs. He thus assumes a reasonable part of the consequences of any delay that may have been on his part.

9. In the light of the circumstances, the Tribunal finds that the complainant has presented a fair and reasonable case for compensation. It is not acceptable that the Administration has attempted to upgrade its practice to the status of law when the law itself says nothing of the sort; nor can the practice of an organisation be invoked to deny its officials their written rights. Fairness, reasonableness, and adherence to the known facts outweigh in this case the principle that ignorance of the law is no excuse. This approach indeed upholds that principle. The complainant did not act against any fundamental tenet of the law; he was simply late – yet not unreasonably late, as well as being in good faith – in claiming his rights, whereas no express time limits are set out in the rules.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The EPO shall pay the complainant arrears of the dependants' allowance from 1 September 1996 up to the date when it commenced actual payment of that allowance.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Flerida Ruth P. Romero

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.