Registry's translation, the French text alone being authoritative.

101st Session **Judgment No. 2532**

The Administrative Tribunal,

Considering the complaint filed by Mr M.G. N. against the European Patent Organisation (EPO) on 17 May 2005, the Organisation's reply of 16 September, the complainant's rejoinder of 10 October 2005 and the EPO's surrejoinder of 18 January 2006;

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 provisions that are relevant to the present case – which concerns a request for household allowance – are to be found in the Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat. They read as follows:

"**Article 67**

General provisions

(1) Under the conditions laid down in this Section, a permanent employee shall be entitled to:

a) family allowances:

- household allowance,
- dependants' allowance,
- education allowance;

b) expatriation allowance;

[...]

(3) In cases where a husband and wife employed by the Office are both entitled to family allowances, these shall be payable only to the person whose basic salary is the higher.

Article 68

Household allowance

[...]

(2) The household allowance shall be granted to:

a) a married permanent employee;

b) a permanent employee who is widowed, divorced, legally separated or unmarried and has dependants within the meaning of Article 69;

c) by special reasoned decision of the President of the Office based on supporting documents, a permanent employee who, while not fulfilling the conditions laid down in a) and b), nevertheless actually assumes

family responsibilities.

[...]

Article 69

Dependants' allowance – Children

[...]

(2) Not more than one dependants' allowance shall be paid in respect of any dependent child within the meaning of this Article.

I. Dependent 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;

[...]

Article 72

Expatriation allowance

[...]

(3) The rates of the expatriation allowance shall be 20% of basic salary for permanent employees entitled to the household allowance and 16% of basic salary for other permanent employees.

[...]

(5) Permanent employees who are paid the expatriation allowance and who are not in receipt of an education allowance for a dependent child shall receive, for that child, a supplement to their expatriation allowance as set out in Annex III of these Service Regulations.

[...]"

Also, the annex to the decision of the President of the Office dated 20 March 1966 and published in Communiqué No. 6 entitled "Guidelines for determining whether a child is dependent within the meaning of Article 69(3)(a) and (c) of the Service Regulations" reads as follows:

"**Rule 1**

(1) Subject to paragraph (2), a legitimate, natural or adopted child [Article 69(3)(a) of the Service Regulations] shall be assumed to be mainly and continuously supported by the employee or his spouse if the child is not gainfully employed (Rule 3) **and** is

a) under 18 years of age, **or**

b) aged between 18 and 26 and receiving educational or vocational training, **or**

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

(2) Where a child fulfilling the conditions of paragraph (1) is married or in the custody of a person other than the employee or his spouse, and not resident with the employee or his spouse, the child shall be assumed to be 'mainly and continuously supported' by the employee or his spouse if the financial support provided by the employee or his spouse equals at least the following amounts:

– for one child: 6% of the employee's basic salary plus the amount of the dependants' allowance, or 25% of the basic salary of grade C1/1 if this amount is lower; [...]"

The complainant, a French national born in 1945, joined the European Patent Office in 1981 as an examiner. He has been a member of a Board of Appeal since March 1990 and holds grade A5. He divorced in 1983 and is the father of two legitimate children, for whom he received family allowances until they were 26, that is until the end of August 2002. He is also the father of a natural child, a daughter born in October 1989; he acknowledged his paternity of that child in April 1991. This daughter lives with her mother, also an EPO employee, who has been granted sole custody and to whom the complainant pays a monthly amount for the child's maintenance. The complainant notified the Office of this situation on 3 December 2002. Arguing that he supported his natural daughter "mainly and continuously", and that she should therefore be recognised as a "dependent child" in the meaning of Article 69(3) of the Service Regulations, the complainant claimed, with retroactive effect from September 2002, the payment of a household allowance in accordance with Article 68(2)(b) or 68(2)(c), an expatriation allowance of 20 per cent of basic salary in accordance with Article 72(3), as well as the supplement to that allowance provided for in 72(5). He submitted further arguments in support of his claim in a letter dated 12 December 2002. On 14 February 2003 the Personnel Administration Department replied that, unless he was able to reach an agreement with the child's mother whereby the dependant's allowance would be paid to him, his request could not be granted.

On 30 March the complainant wrote to the President of the Office asking to be granted the household allowance by way of a special decision, under Article 68(2)(c) of the Service Regulations. He added that, in the event that his request was rejected, he wished to file an internal appeal against the decision of 14 February by which he was denied the household allowance on the basis of Article 68(2)(b). On 25 April 2003 the Head of the Employment Law Directorate informed him that his appeal had been referred to the Appeals Committee. In its opinion dated 24 January 2005 the Committee by a majority of its members recommended rejecting his appeal. One member's dissenting opinion was attached. By letter of 17 March 2005, which constitutes the impugned decision, the President of the Office rejected the appeal.

B. The complainant argues that, according to Rule 1(2) of Communiqué No. 6, a child who is in the custody of a person other than the employee or his spouse and is not resident with the employee or his spouse shall be assumed to be "mainly and continuously supported" by the employee provided that the child meets the conditions stipulated in paragraph (1) (if the child is not gainfully employed and is under 18 years of age, for instance) and that the financial support provided by the employee equals at least a certain amount. According to the complainant, these conditions are satisfied, since the monthly allowance he pays for his daughter's maintenance exceeds the stipulated threshold. The only difficulty, in his view, arises from the fact that the child's mother is also an employee of the EPO, although he maintains that as the Regulations stand, there is no reason why the household allowance should not be paid twice considering that Article 67(3) forbids this only in the case of a "husband and wife", that is, a unified family constituting a single household, and that Article 69(2) applies only to the dependants' allowance, which he is not claiming. He argues that the requirement imposed by the Office, that a written agreement between the parents concerning the allowances be furnished, is not only not based on the Service Regulations but is discriminatory and illusory in the case of parents who have a child in common but nothing else. He contends that according to Article 68(2) the notion of household does not necessarily imply that a child lives in the household, and that any employee who is legally obliged to provide support (such as the financial support referred to in Rule 1 of Communiqué No. 6) is entitled to a household allowance. According to him, the Service Regulations are ambiguous and should be interpreted in favour of the staff, as required by the Tribunal's case law.

The complainant requests that the impugned decision be set aside and that, with retroactive effect from September 2002 or, at the latest, the date of his first claim (December 2002), he be granted a household allowance, the corresponding increase in expatriation allowance as well as the supplement to the expatriation allowance. He also claims costs.

C. In its reply the EPO comments that until the complainant acknowledged his paternity in December 2002 the allowances and benefits provided for in the Service Regulations were being paid to the child's mother, since she had sole custody. In its view, those payments complied with the terms of Article 69(3)(a).

The EPO argues that, notwithstanding the fact that the complainant makes a monthly financial contribution to his daughter's maintenance which would normally imply that the child is mainly and continuously supported by him in the meaning of Rule 1(2) of Communiqué No. 6, that contribution is not sufficient in this particular case to justify

the complainant’s entitlement to a household allowance, since it cannot be considered to be more than “a contribution towards the maintenance”, as pointed out by the Appeals Committee. It submits that this is a special case – that of two parents not married to each other but both employees of the EPO who may be eligible for a household allowance – which is not covered by Communiqué No. 6. The Administration’s practice in such cases is to pay the dependants’ allowance to the person with whom the child is living, unless the parents agree otherwise (in which case the parent with whom the child is not living must prove that he or she supports the child mainly and continuously). Failing such agreement, the decisive factor for payment of the dependants’ allowance and hence for payment of the household allowance is who has custody of the child. In the defendant’s view this approach complies with the Tribunal’s case law (see Judgment 743, under 3). There is in fact a link between the dependants’ allowance and the household allowance. Entitlement to the latter depends on whether the person concerned is recognised as having at least one dependant in the meaning of Article 69. Indeed, Article 68(2)(b) expressly refers to Article 69, which implies that the conditions required for the grant of the dependants’ allowance must also be fulfilled for entitlement to the household allowance. This represents a consistent interpretation of the Service Regulations and of the notion of “dependent child” used therein.

According to the Organisation, the complainant could be granted a household allowance only pursuant to Article 68(2)(c) (by special decision of the President), but it maintains that the complainant does not assume sufficient family responsibilities to justify such an exceptional measure.

D. In his rejoinder the complainant contends that in defending its internal practice the EPO is disregarding the Service Regulations and overlooking the ambiguities and contradictions they contain. He maintains that the practice at issue is intended only to deal with the dependants’ allowance, and that the Office is applying it to the household allowance without justification. In his view, there is no provision in the Service Regulations which expressly prohibits the payment of several household allowances in the case of completely different personal circumstances. The provision in Article 69(2) whereby not more than one allowance shall be paid applies only to the dependants’ allowance, since that is the only allowance specifically intended for the child’s maintenance, and it should therefore be payable only to the parent who has custody of the child. He submits that the case law stemming from Judgment 743 “is not applicable to the present case”. The complainant considers that the Service Regulations should be revised, but that as they stand there is no legally valid reason for denying him payment of the household allowance.

E. In its surrejoinder the Organisation denounces the complainant’s attempt to dissociate payment of the dependants’ allowance from entitlement to the household allowance, considering that, in order to receive the latter, the employee concerned, if he is not married, must have “dependants within the meaning of Article 69”. It argues that since the complainant’s specific case is not covered by Communiqué No. 6, a different approach is required. Lastly, it submits that since the complainant’s daughter cannot be considered dependent on her father, his request for a household allowance was rightly rejected.

CONSIDERATIONS

1. The complainant, who is employed by the European Patent Office, is the father of a natural child, a daughter, for whose maintenance he pays a monthly amount to her mother, who is also an employee of the EPO. He considers that he is entitled to the household allowance provided for in Articles 67 and 68 of the Service Regulations.

Arguing that he did in fact assume family responsibilities, he asked the President of the Office on 30 March 2003 to grant him that allowance.

2. The complainant seeks the quashing of the decision taken by the President of the Office on 17 March 2005 in accordance with the opinion of the Appeals Committee, rejecting the appeal he had filed against the decision to refuse him the household allowance. He claims the grant of that allowance and related supplements, as well as costs.

3. The relevant provisions are set out under A above.

4. The complainant contends essentially that, under the provisions of Article 68(2)(b) of the Service Regulations, which contain an express reference to Article 69, he is entitled to the household allowance and that there is no legally valid reason to deny him that allowance. He argues that there is no connection between the

household allowance and the dependants' allowance, since the reference to Article 69 is only intended to establish an entitlement to the household allowance and not to prevent it from being paid in conjunction with the dependants' allowance. He points out that there is no article in the Service Regulations which expressly forbids paying the household allowance twice, since the stipulation in Article 69(2) that not more than one allowance can be paid refers only to the dependants' allowance. He considers that in the circumstances, even taking account of the special situation arising from the fact that his daughter's mother, who is also an EPO employee, is already receiving the household allowance in accordance with the Office's practice, it would not appear untoward for him to receive that allowance as well by virtue of providing sufficient support according to Articles 68 and 69 of the Service Regulations and Rule 1(2) of Communiqué No. 6.

5. The Tribunal does not agree with the complainant.

In its 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.

The reference to the Tribunal's case law whereby any ambiguity in regulations must be interpreted in favour of staff is not relevant in this case, since the Tribunal finds no ambiguity in the applicable provisions. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.