The Administrative Tribunal,

Considering the complaint filed by Mr D.M.W. against the European Patent Organisation (EPO) on 19 August 2005 and corrected on 23 September, the Organisation's reply of 21 December 2005, the complainant's rejoinder of 31 March 2006 and the EPO's surrejoinder of 2 May 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 complainant, a German national born in 1941, joined the European Patent Office, the secretariat of the EPO, in 1985 as an examiner in The Hague. His place of domicile at the time of recruitment was Hohenschäftlarn, near Munich in Germany. In 1989 he was transferred to Munich and he moved back to Hohenschäftlarn.

On 6 February 2002 the complainant claimed payment, under Article 71 of the Service Regulations for Permanent Employees of the European Patent Office, of an education allowance for his daughter, who had enrolled in September 2001 in a course in Media Arts and Management Studies at the University of Surrey in England. In its version of July 2001, Article 71 read as follows:

"(1) Permanent employees entitled to the expatriation allowance — with the exception of those who are nationals of the country in which they are serving — and permanent employees who are excluded from receiving the expatriation allowance under Article 72(1)(b) may request payment of the education allowance, under the terms set out below, in respect of each dependent child, within the meaning of Article 69, regularly attending an educational establishment on a full-time basis.

(2) By way of exception, permanent employees who are nationals of the country in which they are serving or who are not entitled to the expatriation allowance may request payment of the education allowance provided that the following two conditions are met:

a) the permanent employee's place of employment is not less than 80 km distant from any school or university corresponding to the child's educational stage;

b) the permanent employee's place of employment is not less than 80 km distant from the place of domicile at the time of recruitment."

On 26 February 2003 the complainant filed an internal appeal with the President of the Office against the implicit decision to reject his application for the payment of an education allowance. The Directorate of Employment Law informed the complainant on 15 May that the President had decided that Article 71 had been correctly applied and that his request could not be granted; the matter was subsequently referred to the Internal Appeals Committee for an opinion and the appeal registered under the reference RI/20/03.

On 7 August 2003 an official of Personnel Administration wrote to the complainant to inform him that his application for an education allowance could not be granted on the grounds that the condition set out in Article 71(2)(a) was not met. He explained that the University of Augsburg near Munich offered the basic discipline of the course that his daughter wished to pursue, and that consequently a university corresponding to his daughter's educational stage was located within 80 km of his place of employment.

On 22 October 2003 the complainant filed a second appeal, challenging the decision contained in the letter of 7 August 2003. He contended that although a new course in "Media and Communications" had been introduced at the University of Augsburg in the winter semester of 2001/2002, at that time it was not open to applicants from all over Germany or to first-year students. The Director of Conditions of Employment and Statutory Bodies replied on

12 November 2003 stating that according to available information it was possible to enrol in a course in "Communications Studies" as part of a Masters Degree at the University of Augsburg. He acknowledged that this course was "supplemented by a new option, the BA/MA in Media and Communications", which had only been opened to applicants from all over Germany in the academic year 2002/2003. Noting that the condition set out in Article 71(2)(b) – concerning the distance between place of employment and place of domicile at the time of recruitment – was not fulfilled, he concluded that "for this reason, too, the education allowance [could] not be granted".

The complainant wrote to the President of the Office on 12 December 2003 informing him that he "extended" his internal appeal to the decision of 12 November 2003. He emphasised that it had not been possible to take a course in "Communications Studies" as a "major" subject at the University of Augsburg in the academic year 2001/2002. The Acting Director of Employment Law indicated in a letter of 13 January 2004 that this appeal would be treated together with the appeal registered as RI/20/03.

In its report dated 19 April 2005, the Appeals Committee unanimously recommended that the complainant's appeal be dismissed. As a result of his transfer to Munich, at the time he applied for the education allowance the complainant's place of employment was no longer at least 80 km distant from his original place of domicile; therefore the condition set out in Article 71(2)(b) of the Service Regulations was not met. The Committee considered it unnecessary, in these circumstances, to examine whether the condition set out in Article 71(2)(a) was met.

By a letter of 23 May 2005 the Director of Conditions of Employment and Statutory Bodies informed the complainant that, in accordance with the recommendation of the Appeals Committee, the President had decided to reject his appeal. That is the impugned decision.

B. The complainant contends that the requirements of Article 71(2) of the Service Regulations were met and consequently that he was entitled to receive an education allowance. He maintains that it was not possible to study Communications as a "major" subject at the University of Augsburg in the winter semester of 2001/2002, and that the courses offered did not correspond to his daughter's educational stage. Thus, there was no university "corresponding to [his] child's educational stage" within an 80 km radius of his domicile.

He also points out that his place of domicile at the time of recruitment was Hohenschäftlarn, which was at least 80 km distant from his place of employment, The Hague, as required under Article 71(2)(b) of the Service Regulations, and that it is "immaterial" that he was subsequently transferred to Munich. He submits that a literal interpretation of that provision does not permit the inference that "at the time of recruitment" means the period for which the education allowance is requested. He emphasises that the layout of the article justifies a literal interpretation because Article 71(2)(b) "contains a precise indication of time", unlike Article 71(2)(a), which merely refers to the "place of employment". He adds that the Organisation's reference, in its submissions to the Appeals Committee, to the purpose of Article 71(2)(b) does not justify interpreting that provision in a way that conflicts with its "literal wording". He adds that "any interpretation on the basis of legislative intent must always be limited by the literal wording of the law".

Referring to two colleagues who, according to him, were in a similar position and were awarded an education allowance, he submits that the EPO breached the principle of equal treatment by deviating from its general practice.

The complainant asks the Tribunal to set aside the decision of 23 May 2005 by which the President of the Office rejected his internal appeal. He claims the payment of the education allowance or, in the alternative, an award of 10,000 euros in moral damages. He also claims costs.

C. In its reply the EPO points out that under Article 71(2) permanent employees who are nationals of the country in which they serve can only claim an education allowance for their dependent children "by way of exception" under certain cumulative conditions. Considering that the requirement set out in Article 71(2)(b) was not fulfilled, it shares the view of the Internal Appeals Committee that there is no need to determine whether the condition set out in Article 71(2)(a) had been met.

The Organisation explains that the requirement of Article 71(2)(b) was not met because by the time the complainant applied for an education allowance he had already been transferred back to Munich; consequently his place of employment was no longer situated at a distance of at least 80 km from his "original" place of domicile. It

submits that the “place of employment” must be defined by reference to the period for which the education allowance was requested. Such a definition is in line with a literal interpretation of Article 71(2)(b) because the expression “at the time of recruitment” refers only to the place of domicile. To support its view it draws attention to the use of the present tense in that provision: “is not less than 80 km distant”. It adds that the intention and purpose of Article 71(2) do not justify the payment of the education allowance in the complainant’s case, because the allowance aims at mitigating the disadvantages arising from geographical separation and at facilitating the education of the employee’s children within their family’s previous environment. As the complainant returned to his original place of domicile, “the disadvantages incurred from recruitment in the Hague no longer exist”.

Rejecting the allegation of unequal treatment, the EPO points out that one of the colleagues mentioned by the complainant was not in a similar situation to him, whilst the other, who was, received the education allowance through error. It submits that, in requesting the education allowance, the complainant cannot rely on a case that occurred ten years ago and was taken in breach of applicable rules. Lastly, it contends that the complainant should have made enquiries with Personnel Administration prior to his daughter’s enrolment at the University of Surrey, in order to find out whether he was entitled to receive an education allowance.

D. In his rejoinder the complainant maintains that the condition set out in Article 71(2)(b) is met. He denies that Article 71(2) was “designed to facilitate the education of the employee’s children within their family’s previous environment”. To support his view he refers to Judgment C-152/81 of the European Court of Justice, according to which the object of an education allowance is to ensure that every employee is able to provide for his children’s upbringing and education.

As regards the breach of the principle of equal treatment and the reference he made to a case which occurred ten years ago, he points out that Article 71(2) only applies to “exceptional cases”, which by definition are infrequent. He also refers to the case law of the European Court of First Instance, which, in its judgment on three cases brought by staff of the European Central Bank, held that a rule denying an education allowance to staff who could not claim an expatriation allowance unlawfully discriminated against those staff members. According to the complainant, the EPO’s interpretation of Article 71(2)(b) has virtually the same effect.

Moreover, he says, by basing its refusal to grant him the education allowance only on the condition set out in Article 71(2)(b), the Office breached the duty of care it owes him. He also draws attention to the fact that the Organisation took more than a year to consider his request for the allowance.

E. In its surrejoinder the Organisation maintains its position. It argues that the complainant is wrong to say that Article 71(2)(b) is rarely applied; in fact, the provision “is regularly” applied to EPO’s employees.

Regarding the reference to the case law of the European Court of Justice and the Court of First Instance, it submits that neither the EPO nor the Tribunal is bound by decisions of those Courts. The cited judgment of the Court of First Instance has no “persuasive authority”, since the provisions relating to education allowances that are applicable in the European Central Bank differ from those applicable in the EPO. Moreover, irrespective of any education allowance, permanent employees receive a dependants’ allowance for each child who receives educational training.

The EPO observes that the complainant requested an education allowance more than six months after his daughter had begun university, so it assumed that there was no urgency in dealing with his case. It was not aware of the fact that the course of study chosen by the complainant’s daughter “depended on its decision”.

CONSIDERATIONS

1. Article 71(2) of the Service Regulations provides, “[b]y way of exception”, and subject to two specific conditions, for the payment of an education allowance for children of permanent employees who are nationals of the country in which they are serving. The general rule is that the education allowance is not payable to persons serving in their own country, and the exception requires that:

“a) the permanent employee’s place of employment is not less than 80 km distant from any school or university corresponding to the child’s educational stage; [and]

b) the permanent employee’s place of employment is not less than 80 km distant from the place of domicile at the

time of recruitment".

2. The complainant asserts that there was no university corresponding to his daughter's educational stage within 80 km of his place of employment, and that the place of employment to be taken into account was not the one corresponding to the period for which the education allowance was requested, but the place of employment at the time of recruitment, which in his case was not in his own country. He argues that Article 71(2)(b) should be interpreted literally, meaning exclusively the place of domicile of the employee at the time of entering service for the first time. He contends, therefore, that since his domicile was near Munich when he entered service in The Hague in 1985, he is entitled to the education allowance even though at the time when his daughter studied at the University of Surrey in England, in 2001-2004, he was again domiciled near Munich, where he had been working since 1989.

3. That construction, however, would seem to defy the logic of the allowance, which is to compensate for inconveniences and greater disbursements due to the employee's displacement and the necessary further displacement of his children to pursue their studies at a suitable place. In this case, there was no such displacement at the time when his daughter went to study at the University of Surrey. The contention of the Organisation, that for the purposes of Article 71(2)(b) the place of employment has to be defined by reference to the period for which the education allowance is requested, is correct.

In his rejoinder the complainant refers in particular to Judgment C-152/81, delivered by the European Court of Justice on 14 July 1983. That judgment, however, merely confirms the interpretation made by the Organisation of the rules that are presently at issue, which the Tribunal shares. The purpose of such rules is to provide allowances to help children study in their country of origin if their parents are stationed elsewhere, and not to help children study abroad when their parents are stationed in their own country.

4. It follows that the President of the Office was right in considering that the complainant did not satisfy the requirement of Article 71(2)(b). In view of that finding, the Tribunal sees no need to determine whether the condition of Article 71(2)(a) was met or not, as it would not change the result of the decision, one way or another.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 May 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

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