115th Session **Judgment No. 3195**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A.G. H. against the European Patent Organisation (EPO) on 26 March 2010, the EPO's reply of 13 July, the complainant's rejoinder of 28 October 2010, the Organisation's surrejoinder of 3 February 2011, the complainant's additional submissions of 18 February and the EPO's final comments thereon of 14 June 2011;

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 is a national of Germany and Hungary who was born in 1965. He joined the European Patent Office, the Secretariat of the EPO, in February 2002, as an examiner, at grade A3, in Munich (Germany).

On 11 December 2002, following the amendment of Article 71 of the Service Regulations for Permanent Employees of the European

Patent Office, the complainant applied for an education allowance in respect of his daughter who had enrolled in a school in the United States. Article 71(1) of the Service Regulations provides that permanent employees who are not nationals of the country in which they are serving may request payment of the education allowance in respect of each dependent child regularly attending an educational establishment on a full-time basis. Article 71(2) provides that, by way of exception, a permanent employee who is a national of the country in which she or he is serving may request payment of the education allowance if the employee's place of employment is not less than 80 kilometres distant from any school or university corresponding to the child's educational stage, and if her or his place of employment is not less than 80 kilometres distant from the place of domicile at the time of recruitment. In February 2003 the complainant filled in the specific form for claiming the education allowance and received an allowance for his daughter's education as from September 2002.

By a letter of 30 July 2008 a senior Human Resources Officer informed the complainant that, following a review of his application for the payment of the education allowance for the 2008/2009 academic year, it had been established that he had German nationality and that he was not entitled to the said allowance because the conditions of Article 71(2) of the Service Regulations, which would allow him to receive the allowance by way of exception, were not met in his case. The payment of the allowance would therefore be discontinued effective 1 August 2008, but the Office would not seek to recover the amounts already paid to him.

On 4 September 2008 the complainant wrote to the senior Human Resources Officer requesting him to review his decision. He asserted that the Office knew that he was German and that the conditions laid down in Article 71(2) of the Service Regulations were met. Indeed, at the time of recruitment he lived in Berlin, which is more than 80 kilometres from Munich, and his daughter had been living in the United States since she was one year old and had always attended school there. Given that the Office had paid the allowance for several

years, he had a legitimate expectation that it would continue to do so. He added that his daughter would suffer "serious disadvantage" if the payment of the allowance were discontinued because she was due to complete high school in 2009 and intended to enrol in a university in the United States.

By a letter of 3 November 2008 the senior Human Resources Officer informed the complainant that, as he had been receiving the education allowance since 2002, albeit erroneously, and in order to avoid unnecessary hardship, the Office would exceptionally continue to pay it for the 2008/2009 academic year. He noted that the complainant had erroneously received such allowance since 2002. He added that if he wished to pursue his appeal, he should inform the Administration of this within one month of receipt of the letter. The complainant confirmed by a letter of 5 November that he wished to pursue his appeal, indicating that he wanted the education allowance to be paid without limit of time and not merely for one additional year. That same day, the Director of the Employment Law Directorate informed him in writing that the President of the Office considered his appeal to be unfounded and that the matter had therefore been referred to the Internal Appeals Committee for an opinion.

In its opinion of 27 November 2009 the Committee unanimously recommended that the appeal be rejected. It considered it was plausible that the EPO had paid the complainant the education allowance on the mistaken assumption that employees with dual nationalities fell under Article 71(1). It also noted that, in his case, one of the conditions laid down in Article 71(2) was not met, given that there was a university corresponding to his daughter's educational stage within 80 kilometres from Munich. In the Committee's view, the Office was right in giving a narrow interpretation to Article 71(2), as that provision creates an exception to the rule laid down in Article 71(1). The fact that the complainant's daughter might encounter difficulties because her level of German was not sufficient for university studies in Germany did not mean that the courses available in Munich were not suitable. A different conclusion might have been reached had she had

no knowledge at all of German. The Committee also observed that the complainant's specific circumstances had been taken into consideration, since he had continued to receive the allowance until September 2009, when his daughter finished high school, and he had not been asked to reimburse the amount unduly paid to him.

By a letter of 25 January 2010 the complainant was informed that, for the reasons put forward by the Office during the internal appeal proceedings and in accordance with the Committee's recommendation, the President of the Office had decided to reject his appeal as unfounded. That is the impugned decision.

B. The complainant contends that the Office gave a "favourable interpretation" to Article 71(2) for the six years during which it granted him the education allowance, and that it is therefore estopped from modifying its approach to his detriment under the pretext that it committed an error. Indeed, in his view the Organisation has not proved that there was an error in granting him the allowance. He indicates that he was given different reasons over time for the decision to discontinue the payment of the allowance. The senior Human Resources Officer first implied, in a letter of 30 July 2008, that the Office had only recently noticed that he was German, but he subsequently told him that the error concerned the nature of his daughter's school. Later, in September 2009, the reason given was that an employee in the Human Resources Principal Directorate had mistakenly considered that German dual nationals were entitled to the allowance under Article 71(1). The complainant submits that these reasons are not convincing, given that that provision expressly excludes non-expatriates from entitlement to the education allowance and that he informed the Office upon joining it that he was both German and Hungarian. Moreover, he referred to Article 71(2) in his letter of 11 December 2002 when applying for the education allowance. He adds that, since four different employees processed his claims for the education allowance between 2002 and 2008, the alleged error of one employee is not plausible.

Moreover, according to the complainant no guidelines are available with respect to the application of Article 71(2). He states that he was under the impression that he had been granted the education allowance because his daughter was in the United States as a result of his own career. In his view, the purpose of Article 71 is to support employees who have an international background and compensate those who are willing to relocate for professional reasons.

The complainant submits that he relied in good faith on his entitlement to the education allowance and that the Office's unexpected change of position put him under the sudden obligation to pay the entire cost of his daughter's education. He had expected to receive the allowance during his daughter's years at college, and he therefore did not ask his daughter to prepare to study in Germany, which would have proved less costly. By the time he was informed that the Office would discontinue the payment of the education allowance, his daughter had already taken some examinations and was in the process of applying to universities in the United States. He adds that, in any case, the curriculum that she chose to follow has no equivalent within 80 kilometres of Munich.

The complainant asks the Tribunal to set aside the impugned decision and to order the payment of the educational allowance with retroactive effect from 1 August 2009 until his daughter has completed her studies. He also claims moral damages and costs.

C. In its reply the EPO submits that the two requirements laid down in Article 71(2) of the Service Regulations were not met in the complainant's case, and that the Office has a narrow interpretation of that provision, given that it creates an exception to the rule that employees who are nationals of the country in which they work are not entitled to an education allowance. Moreover, the Office has a "margin of discretion" in assessing whether there is a university corresponding to a child's educational stage within 80 kilometres from Munich. It contends that the complainant did not provide evidence to show that there was no university satisfying that requirement.

The Organisation indicates that the complainant's specific circumstances were taken into account in that the Office paid him the education allowance until September 2009, thus allowing his daughter to complete high school. As from that date she started a "new phase of her education", and that change of circumstances justified the decision to stop payment of the allowance at that point. The defendant stresses that the fact that the conditions for admission to the Munich University were "[m]ore difficult" than those applying to the University in the United States does not warrant the application of Article 71(2). In its view, the courses undertaken by the complainant's daughter in the United States, though not identical, are comparable to courses at the University of Munich. It adds that the fact that German is not the mother tongue of the complainant's daughter is not enough to consider that there is no university in Munich which corresponds to her educational stage.

According to the EPO, the complainant is not entitled to continued payment of the education allowance on the basis that it had been paid to him for several years and that he had "legitimate expectations" that it would continue to be paid. It explains that he was paid the allowance on the mistaken assumption that employees with dual nationality fell under Article 71(1), as explained to him in the letter of 30 July 2008. The same mistake was made with respect to several other employees who had dual nationality. It adds that, once the decision was made to grant him an education allowance under Article 71(1) in 2002, the allowance was "automatically granted" for the subsequent academic years, since that provision, unlike Article 71(2), does not require a regular review of the applicant's circumstances. Nevertheless, the decision to grant an allowance is not a decision having "permanent effect" and, according to general principles of law, an administrative error can, and indeed must, be rectified.

The Organisation stresses that it did not ask the complainant to reimburse the allowance unduly paid to him and agreed to pay the allowance for the 2008/2009 academic year in order to avoid unreasonable hardship. Moreover, the complainant was given notice in

July 2008 that the allowance would no longer be paid to him as from August 2009; thus he had ample time to take the necessary decisions with respect to his daughter's education.

Referring to the Tribunal's case law, the EPO considers that the complainant is not entitled to moral damages, since he has not shown that he had suffered "grave moral prejudice" caused by the Organisation's action. It adds that his request to be awarded costs should be rejected on the ground that his complaint is unfounded and that he is not represented by an external lawyer.

D. In his rejoinder the complainant maintains that he had an acquired right to the continued payment of the education allowance, particularly given that the circumstances in which it was initially granted have not changed. He submits that, since the EPO paid him the allowance for several years knowing that he was German, it must have considered that he fulfilled the conditions laid down in Article 71(2); consequently, it is not for him to establish that he met the conditions laid down in that provision. In any event, he reiterates that a curriculum such as that undertaken by his daughter is not available within 80 kilometres from Munich. He provides details of the differences between the courses available at the University of Munich and those available in the university where his daughter is studying.

E. In its surrejoinder the Organisation asserts that it has always given the same reason to explain the error that occurred in the complainant's case, i.e. an employee mistakenly considered that dual nationals holding German nationality were entitled to the education allowance in accordance with Article 71(1) of the Service Regulations. Indeed, the employee did not check whether the complainant met the conditions of Article 71(2) precisely because the education allowance was not granted to him on that basis. The EPO indicates that it contacted the University of Munich and it maintains that the University offers courses similar to those existing in the United States.

F. In his additional submissions the complainant argues that the Organisation is mistaken as it has taken into account courses offered at the University of Munich prior to the autumn of 2009 which no longer exist. Moreover, it refers to courses in which only students holding a bachelor's degree may enrol, whereas his daughter will obtain a bachelor's degree in 2013 at the earliest.

G. In its final comments the EPO maintains its position.

CONSIDERATIONS

1. Article 71 of the EPO Service Regulations relevantly provides:

> "(1) Permanent employees – with the exception of those who are nationals of the country in which they are serving – may request payment of the educational 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 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."

2. The complainant is a German national serving in Germany. He is also a Hungarian national, thus holding dual nationality. He is divorced from his wife who lives in the United States with their daughter. Because of the terms of the exception in Article 71(1) of the EPO Service Regulations, the fact that he is a German national serving in Germany would ordinarily preclude him from requesting payment of the education allowance in relation to his daughter's education in

the United States. However, the complainant argues that he is entitled to payment of the allowance.

3. He first requested, in writing, payment of the education allowance for his daughter on 11 December 2002. At that time his daughter was being educated in the United States. In his request to the Office he made reference to Article 71(2) indicating that "[s]ince in the amended [Article] 71(3) the limitation to direct school costs for education[al] allowance under Art. 71(2) [had] been deleted" he would like to apply for an education allowance. He made a formal application on 4 February 2003. The allowance was paid from 2002 to 2008. In July 2008 he was informed that payment of the allowance would cease on 1 August 2008 because it had been paid in error. Subsequent discussions led to the payment of the allowance for the school year 2008/2009 (when his daughter finished high school). She was then to enter university. The complainant sought payment of the allowance for his daughter's university education. The EPO refused to pay the allowance on the footing that the complainant was not entitled to it.

4. The complainant lodged an internal appeal. During the appeal process an issue arose about whether the condition in Article 71(2)(a) could be met which involved a comparison of courses at the University in Munich and the university attended by his daughter in the United States. However, the internal appeal was unsuccessful. On 25 January 2010 the complainant was informed in writing that the President of the Office had "reject[ed] his appeal". This decision is impugned before the Tribunal.

5. The complainant's argument has three pleas. The first is that when the education allowance was first paid, it was not paid because of any error on the part of the EPO. Rather, the EPO was exercising a discretion in his favour. The second, and related plea, is that against a background where the allowance was paid for a number of years, the EPO is estopped from ceasing payment or withdrawing the benefit.

The third is that Article 71(2)(a) operates in his favour having regard to the course being undertaken by his daughter at the University in the United States and he does not bear the burden of establishing this is so. The EPO contests each of these pleas.

6. As to the first plea, the Tribunal accepts that there is no clear documented evidence explaining why the allowance was first paid to the complainant and the basis upon which the payment was made. But it must be said, the complainant's contention that because he referred to Article 71(2) in his letter of 11 December 2002 and that the EPO knew he was a German national, a considered decision was made to pay him the allowance notwithstanding that ordinarily under Article 71(1) he would not have been entitled to it, should not be accepted. It is probable that a mistake was made by the EPO and the foundation of the mistake concerned the position of dual nationals. That was the conclusion of the Internal Appeals Committee and that conclusion does not appear to the Tribunal to be demonstrably wrong.

7. As to the second plea, the fact that the complainant was paid the allowance between 2002 and 2009 does not oblige the EPO to continue to pay the allowance nor does it create, for the complainant, a right to insist upon its continued payment. This is not one of those limited class of cases where an organisation abandons a practice involving a payment where the payment formed a fundamental part of the official's terms of appointment and, for that reason, can be required to continue the practice (see Judgment 2632, under 13). In any event, as discussed in the following consideration, from mid-2009 the factual circumstances in which the complainant's entitlement to payment was to be assessed, changed materially.

8. In relation to the plea concerning Article 71(2)(a), it is necessary to bear in mind that the operation of this exception arises, now, in circumstances which differ from those in 2002 to 2009 before the complainant's daughter concluded her high school education. How it might have operated in those years cannot be determinative of

how it might operate in the future in new and different circumstances involving education at a higher level and different educational institutions. Accordingly, it is entirely orthodox for the EPO to take the position that the complainant must demonstrate that he falls within the exception in Article 71(2)(a). The Tribunal's approach is that the review of a decision of the Organisation concerning the operation of the exception is narrow in compass. It will not involve the substitution by the Tribunal of the view taken by the President of the Office. The Tribunal will intervene if there has been a procedural error, a mistake of fact or law, the drawing of a clearly mistaken conclusion or misuse of authority (see Judgment 2357, under 4). It is no answer to say, as the complainant does, that the EPO "has already brought [him] within the rule". As just noted, the earlier circumstances differ from those arising in mid-2009 and following. While the complainant pointed to some possible differences between the course at the University in the United States and at the University in Munich, the points he sought to make fall well short of establishing error of the type which would warrant intervention by this Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet