Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

118th Session **Judgment No. 3358**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F.P. D. against the European Patent Organisation (EPO) on 20 June 2011 and the EPO's reply dated 29 September 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, 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, who has dual German and French nationality, joined the European Patent Office – the EPO's secretariat – in 2003 as a patent examiner in Munich (Germany).

On 30 July 2008 he was notified that the education allowance he had been receiving since May 2007 for one of his dependent children had been paid to him in error, because only officials who were not nationals of the country in which they served were entitled to the grant, according to Article 71, paragraph 1, of the Service Regulations of the EPO, and because he did not meet one of the conditions in paragraph 2 of that Article, whereby German nationals could receive

the allowance by way of exception. He was therefore informed that he would cease receiving the allowance from 1 August 2008.

On 17 September 2008 the complainant lodged an internal appeal seeking the continued payment of the education allowance. In a letter dated 13 November 2008 he was informed that the President of the Office had decided to dismiss his appeal. He was also told that a complaint was pending before the Tribunal against the EPO's refusal to pay an education allowance to staff members who did not meet the conditions laid down in paragraph 2 of the above-mentioned Article, and that the EPO would apply the Tribunal's ruling on this issue to all staff members concerned. He was therefore asked to inform the Administration, within one month, whether he wished to pursue the internal appeal procedure. On 28 November 2008 the complainant asked for his appeal to be transmitted to the Internal Appeals Committee. On 10 February 2010 he was informed that, in an internal appeal similar to his own, the Committee had confirmed the lawfulness of the decision to cease payment of the education allowance to staff members who had been receiving it erroneously. He was therefore invited to "refrain from pursuing [his] internal appeal". On 22 February the complainant replied that he was maintaining it.

In its opinion of 11 March 2011, the Internal Appeals Committee recommended that the Office pay the complainant the education allowance until the end of his dependent child's educational stage, i.e. until the end of the 2008-2009 school year. On 11 April 2011 the complainant was informed that, in accordance with the Committee's recommendation, it had been decided to pay him the arrears of education allowance, plus interest of 8 per cent per annum, for the period from 1 August 2008 until the end of the 2008-2009 school year. That is the impugned decision.

B. The complainant contends that the EPO acted wrongly by twice inviting him to confirm whether he was maintaining his internal appeal, and that the time limits he was given for doing so were extremely short by comparison with those laid down in the Service Regulations for filing an internal appeal. He also alleges that during

the internal appeal procedure the EPO altered the reason it had given for its error.

Relying on a preparatory document for an amendment to Article 71 of the Service Regulations, the complainant argues that the only correct interpretation of paragraph 1 of that Article is that a staff member with two nationalities, one of which is that of the country of his place of employment, should be treated as a non-national of that country and therefore as being eligible to receive the education allowance. He also seeks to show that he has "strong French roots" and should, according to the principle of equal treatment, "have been treated as more French than German" for the purpose of awarding the allowance. Lastly, he contends that the EPO breached the principle of legal certainty by deciding to cease paying him the education allowance although no new, unpredictable and decisive circumstances had arisen since he was granted it.

The complainant requests that the impugned decision be quashed and that he be awarded, "without time restriction", an education allowance for each of his dependent children.

C. In its reply, the EPO argues that the complainant's claim seeking to "extend the scope of the complaint" to his other dependent children is irreceivable, because he has not exhausted internal remedies in respect of them.

On the merits, the EPO explains that in order to ascertain whether the complainant wished to pursue his internal appeal, it informed him of the progress made in similar appeals. It explains that in setting him time limits, the intention was to maintain communication between him and the Administration. It denies having changed the reason given for its error in the course of the procedure.

The EPO considers that the wording of Article 71, paragraph 1, of the Service Regulations is clear, and that because the complainant has dual German and French nationality and is serving in Germany, he cannot receive the education allowance. Moreover, the principle of equal treatment has not been flouted. The complainant cannot opt for one of his nationalities, depending on the circumstances, while

disregarding the other. Lastly, it contends that, as the decision to award an education allowance to the complainant was based on an erroneous interpretation of the above-mentioned paragraph 1, rectifying the error did not involve any breach of the principle of legal certainty.

CONSIDERATIONS

1. According to Article 71, paragraph 1, of the Service Regulations, "[p]ermanent employees – with the exception of those who are 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".

2. The complainant, who has dual German and French nationality, took up employment at the EPO on 1 April 2003, at its head office in Munich (Germany). He is the father of three dependent children, the oldest of whom was born on 8 May 2003. From May 2007 the complainant received for that child an education allowance within the meaning of paragraph 1 above. He ceased to receive the allowance from 1 August 2008, at the end of the school year, because it had been paid in error. He should not have been receiving the allowance because he was of German nationality and, at the time of his recruitment, was living in Munich.

The complainant filed an internal appeal against that decision. In its opinion of 11 March 2011, the Internal Appeals Committee stated that the language of Article 71, paragraph 1, of the Service Regulations was unambiguous; that it was clear from the text that employees with dual citizenship who held the nationality of the country in which they were serving were excluded from its scope; and that the EPO had rightly brought the situation back into conformity with the law by correcting the error it had made in the complainant's favour. It took the view, however, that "from the standpoint of legitimate expectation" the education allowance should have been

paid to him until his son finished his nursery education. It therefore recommended payment of the allowance to the complainant until the end of the 2008-2009 school year. On 11 April 2011 the complainant was informed that, in accordance with the Committee's recommendation, he would receive the arrears of education allowance, plus interest at 8 per cent per annum, for the period from 1 August 2008 to the end of the 2008-2009 school year.

The complaint is filed against that decision.

3. First, the complainant objects to the fact that the EPO asked him whether, in light of the decisions taken in cases similar to his, he wished to maintain his internal appeal, and gave him "extremely short" deadlines to reply.

This allegation is baseless. Although the EPO drew the complainant's attention to the fact that the President of the Office had decided to dismiss other appeals on the same subject and invited him to consider whether, in these circumstances, it was worth pursuing his appeal, it did not place any pressure on him to withdraw it.

4. The complainant further alleges that during the internal appeal procedure the EPO wrongly altered the reason for the decision to cease paying him the education allowance. According to him, the EPO initially claimed that it wished to "correct an isolated error" concerning his status as a dual national, whereas the real intention, as it later admitted, had been from the outset to change the erroneous practice of applying Article 71, paragraph 1, of the Service Regulations to employees with dual nationality.

This allegation is likewise unfounded. It is true that in its first letter, dated 30 July 2008, the EPO stated that it had noticed in the course of a verification exercise that the complainant had German nationality, though the evidence on file shows that it could hardly have been unaware of this. Nevertheless, it stated clearly in the letter the reason on which it continues to rely before the Tribunal, namely, that Article 71 is not applicable to the complainant because he is a dual national recruited locally. The complainant was not misled by

that letter, nor indeed by the oversight involved in the impugned decision, but corrected on 7 June 2011, whereby the education allowance was stated to have been paid for his daughter although it had actually been paid for his son.

5. On the merits, the complainant submits that Article 71, paragraph 1, of the Service Regulations is ambiguous in its wording and should be interpreted "to the detriment of its author and in favour of the persons to whom it applies". He also alleges a breach of the principle of equality. In his view, it is contrary to that principle to accord different treatment to employees with dual nationality including German nationality, than to employees with only a foreign nationality, since the purpose of the education allowance is to enable employees "whose roots lie abroad" to have their children educated in establishments which offer teaching in their mother tongue. The complainant also argues that he should have been treated more as a French national than a German national for the purpose of the allowance. This solution, he says, would be particularly appropriate in his case, since he has "strong French roots", is married to a woman of French nationality and has children living in Munich who will learn the German language without any effort on his part, whereas he has to "pay extra attention to ensuring that they learn French". The complainant refers to a preparatory document for an amendment to Article 71 of the Service Regulations, leaving the EPO "a wide margin of interpretation" with respect to dual nationals in the same situation as himself.

This line of argument is unconvincing. The wording of Article 71, paragraph 1, of the Service Regulations is unambiguous and not open to interpretation. It excludes from entitlement to the education allowance permanent employees "who are nationals of the country in which they are serving". If the authors of this text had intended to derogate from this exclusion clause in favour of dual nationals, they would have said so *expressis verbis*, which is not the case. As for the preparatory document to which the complainant refers, it does not support his contentions. That document aimed in particular to amend

Article 71 of the Service Regulations so as to offer all employees who are not nationals of the country in which they are serving the possibility of receiving an education allowance for the post-secondary education of their dependent children. This is a different question from the one at issue here.

6. Lastly, the complainant alleges that the EPO breached the principle of legal certainty by ceasing payment of the education allowance "although no new, unpredictable and decisive circumstance has arisen since [his son] met the requirement stated in [paragraph 3 of] Article 71" of the Service Regulations, according to which entitlement to the allowance commences on the first day of the month during which a dependent child not less than four years old begins attending a pre-school educational establishment or primary school.

This criticism is baseless. Indeed, the EPO reversed, without retroactive effect, the decision it had taken one year previously to award the allowance in question to the complainant, on the valid grounds that the decision was legally unfounded and that it had a duty to re-establish a situation in conformity with the law (see, *mutatis mutandis,* Judgment 3195, under 7).

The decision to cease paying the education allowance would be open to criticism only if it had violated acquired rights or a legitimate expectation the complainant might have had that the previous situation would be maintained. But this is clearly not the case here. It should also be noted that the EPO acted generously in not immediately stopping payment of the allowance.

7. It follows that the complaint must be dismissed in its entirety, without there being any need to rule upon the EPO's objections to receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2014, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

CLAUDE ROUILLER
SEYDOU BA
PATRICK FRYDMAN

DRAŽEN PETROVIĆ