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

111th Session **Judgment No. 3002**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. W. against the European Patent Organisation (EPO) on 10 April 2009 and corrected on 11 May, the EPO's reply of 24 August, the complainant's rejoinder of 11 September and the letter of 29 September 2009 by which the EPO informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII 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 German national, born in 1965, who joined the European Patent Office – the EPO's secretariat – in November 1998 as an examiner at grade A2. He currently holds grade A4.

In October 2000 he asked the Office to recognise his partner's two children as dependent children with a view to claiming the family allowances provided for in the Service Regulations for Permanent Employees of the European Patent Office. At that time he was not

married to his partner, and she had sole custody of her children, but the complainant explained, referring expressly to Article 69(3)(c) of the Service Regulations, that the children were residing with him and that they were mainly and continuously supported by him. He offered to provide evidence of these facts if required.

Article 69(3) of the Service Regulations provides as follows:

"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;

b) the child for whom an application for adoption has been lodged and the adoption procedure started;

c) any other child who is normally resident with and mainly and continuously supported by the permanent employee or his spouse."

Guidelines for determining whether a child is "dependent" within the meaning of these provisions are set out in Communiqué No. 6, which entered into force on 1 April 1996. Rule 1 of the Communiqué relevantly provides, in paragraph (1), that:

"[…] a legitimate, natural or adopted child […] shall be assumed to be mainly and continuously supported by the employee or his spouse if the child is not gainfully employed […] **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."

Rule 2 of the Communiqué provides:

"Any other child normally resident with the employee or his spouse […] shall be assumed to be mainly and continuously supported by the employee or his spouse if, in addition to fulfilling the conditions set out under Rule 1(1), the child is not married or under the parental authority of a third person, except where the child's spouse or the third person is, for reasons beyond his control, unable to support the child."

The complainant's request was denied on the grounds that he had not provided evidence that his partner was unable, for reasons beyond

her control, to support her children. He then submitted evidence and asked the Office to re-examine his request, but the Director of Personnel informed him by a Note dated 26 April 2001 that the documents he had provided were not "appropriate proof" and that the initial decision not to recognise his partner's children as dependants therefore remained unchanged. Having enquired in vain as to what might constitute "appropriate proof" in this context, the complainant lodged an internal appeal on 20 June 2001 challenging the decision of 26 April. In the meantime, he had married his partner and the Office had recognised her children as dependants as from the date of the marriage. He therefore indicated that his appeal concerned only the period from August 2000 to April 2001. In an opinion issued on 9 December 2002, the Internal Appeals Committee recommended unanimously that the appeal should be rejected as unfounded. The President of the Office accepted that recommendation and the complainant was so informed by a letter of 20 December 2002.

On 13 August 2004, shortly after the delivery of Judgment 2359, which likewise concerned a claim based on Article 69(3)(c) of the Service Regulations, the complainant wrote to the President seeking reconsideration of the request he had submitted in October 2000 in light of that judgment. In the event that this request was denied, he asked that his letter be treated as an internal appeal. The Director of Personnel replied, on 12 October 2004, that his request could not be granted, as he had not challenged the final decision of which he had been notified on 20 December 2002 within the applicable time limit.

By a letter of 1 November 2006 the complainant enquired as to the status of his internal appeal. He pointed out that he had asked that his letter of 13 August 2004 be treated as an appeal if the request contained therein were denied. On receiving this letter the Office discovered that the matter had never been referred to the Internal Appeals Committee. It apologised to the complainant for this omission and informed him that, since the decision of 12 October 2004 could no longer be challenged, his letter of 1 November 2006 was being treated as a new request, which had been referred to the Committee.

On 9 January 2009 the Committee issued a divided opinion on this second appeal. The majority of its members considered that it should be rejected as irreceivable on the grounds that its subject matter was *res judicata*. The minority held that the principle of *res judicata* was not applicable, as the decision challenged was not a judicial decision but an administrative one, and that in dealing with the complainant's request the Office had committed the same error of law as in the case leading to Judgment 2359. By a letter of 13 March 2009 the complainant was informed that the President had decided to reject his appeal in accordance with the recommendation of the majority of the Committee, not on the basis of the principle of *res judicata*, but for reasons of legal certainty. That is the impugned decision.

B. The complainant contends that the delivery of Judgment 2359 created a new situation in law which justified his new request for retroactive recognition of his partner's children as dependants. He points out that in rejecting that request the President relied on the principle of legal certainty. According to the complainant, that principle concerns the protection of legitimate expectations and the rule of non-retroactivity. He argues that, by virtue of Article 69(3)(c), he had a legitimate expectation that his partner's children would be granted the status of dependants if they were mainly and continuously supported by him, and that the Office violated that expectation by wrongly considering the relevant provisions of Communiqué No. 6 to be definitional. In the above-mentioned judgment the Tribunal held that that interpretation involved an error of law. As for the rule of non-retroactivity, he contends that it is inapplicable to his case, since Article 69 was in force and remained unchanged throughout the period at issue.

The complainant asks the Tribunal to set aside the impugned decision and to give him the benefit of the new interpretation of the Service Regulations resulting from Judgment 2359. He requests that his partner's children be recognised as dependants for the period from August 2000 to April 2001 and that he be granted for the same period

the benefits provided for in the Service Regulations in respect of dependent children. He also claims moral damages.

C. In its reply the EPO contends that the complaint is irreceivable under Article VII, paragraph 2, of the Tribunal's Statute, because the complainant did not challenge the President's decision of 20 December 2002 rejecting his request for recognition of his partner's children as dependants within ninety days of the date on which he was notified of it. Referring to Judgment 612, it argues that even if the Office might have decided differently on his request following the delivery of Judgment 2359, this would not afford grounds for making an exception to that time limit.

Alternatively, the Organisation submits that the complaint is unfounded. It considers that, in view of the principle that a judgment has effect only as between the parties to it, Judgment 2359, to which the complainant was not a party, cannot have any effect which would alter the President's decision on his request – a decision which had become final long before that judgment was delivered. Furthermore, it maintains that the complainant has not provided sufficient proof that his partner's children were, at the material time, dependent within the meaning of Article 69(3)(c) of the Service Regulations. In this regard it points out that evidence of unsuccessful job applications by the children's mother does not in itself constitute proof of her inability to support her children, and that no information was provided as to whether the children's biological father was under any obligation to support them.

D. In his rejoinder the complainant submits that the EPO's arguments relating to receivability are irrelevant, since they fail to address the principle of legal certainty on which the President based the impugned decision. He adds that, according to the case law, time limits may be waived where an organisation has acted in breach of good faith. He reiterates his arguments on the merits and criticises the Organisation for acting as though Judgment 2359 had never been issued.

CONSIDERATIONS

1. The complainant, who joined the EPO on 1 November 1998, is employed as a patent examiner at grade A4. On 13 October 2000 he requested that his partner's two children who, like her, were resident in his home, be recognised as dependent children for the purposes of Article 69 of the EPO Service Regulations, concerning the dependants' allowance, and of other articles of the Service Regulations making provision for allowances granted on account of that status.

2. The above-mentioned Article 69 states in paragraph (3)(c) that "any […] child who is normally resident with and mainly and continuously supported by the permanent employee or his spouse" shall be regarded as a dependent child.

3. The complainant's request, in support of which he subsequently provided various items of documentary evidence, was rejected by a decision of the Director of Personnel on 26 April 2001. In the Office's opinion this request could not be met, because the complainant had not fully satisfied the conditions laid down by Rule 2 of Communiqué No. 6, which had been issued in 1996 in order to provide guidelines for the application of Article 69 of the Service Regulations. The main objections were that the children in question were not under the complainant's parental authority and that it had not been shown that his partner was unable to support them for reasons beyond her control.

4. On 20 June 2001 the complainant lodged an internal appeal against this decision under Articles 107 and 108 of the Service Regulations. The appeal specified that the request at issue concerned the period August 2000 to April 2001. Indeed, as the complainant had married his partner on 2 May 2001, the two children had been recognised as dependants from that date onwards in accordance with Article 69(3)(a) and he therefore now received the corresponding allowances.

5. By a decision of 20 December 2002, taken on the unanimous recommendation of the Internal Appeals Committee, the President of the Office rejected the complainant's internal appeal as unfounded. The complainant did not challenge this decision before the Tribunal.

6. However, by Judgment 2359 delivered on 14 July 2004, concerning a complaint filed by an EPO employee in a situation similar to that of the complainant, the Tribunal held that the Office's interpretation of the relevant provisions was incorrect. It took the view that the purpose of Rule 2 of Communiqué No. 6 was not to define the requirements for meeting the condition laid down in the above-mentioned Article 69 of the Service Regulations that the child must be "mainly and continuously supported" by the employee, but to relieve an applicant for a dependants' allowance of the burden of producing detailed evidence that he or she met this condition where the provisions of the Communiqué were satisfied. The Tribunal observed that any other interpretation would render this rule of Communiqué No. 6 inconsistent with the terms of the superior rule in Article 69 of the Service Regulations, and that an employee whose application did not satisfy the requirements of the Communiqué might nevertheless establish by other evidence that the children in question were "mainly and continuously" supported by him or her. Having determined that the Office's decision impugned in that case therefore involved an error of law, it found that the employee concerned had in fact shown that he met the condition in question and accordingly ordered that he be paid the dependants' allowance for his partner's children.

7. As the complainant believed that he was entitled to have this precedent applied to his case, in a letter of 13 August 2004 he asked the Office to "reconsider" the initial decision taken with regard to him and to grant him the allowances requested for the period August 2000 to April 2001. The Director of Personnel denied this request on 12 October 2004 and the complainant then referred the case again to the Internal Appeals Committee, which on this occasion issued a divided opinion on 9 January 2009. Three of the five committee members held that the applicant's claims were barred by *res*

judicata, because the decision of 20 December 2002 had not been challenged within the time limit for submitting an appeal, whereas the two other members were of the view that they should be entertained, particularly because the delivery of Judgment 2359 constituted a new fact justifying a review of that decision.

8. On 13 March 2009 the President of the Office rejected the complainant's second appeal. While this decision was thus consonant with the majority opinion of the Internal Appeals Committee, the specific reason given for rejection was not the principle of *res judicata*, but the final nature of the decision of 20 December 2002, which could not be challenged on account of the principle of legal certainty.

9. The complainant has now brought this new decision of the President of the Office before the Tribunal. He asks that it be set aside and seeks to be awarded the allowances under the Service Regulations to which he would have been entitled if his partner's children had been recognised as his dependants during the period August 2000 to April 2001. He also claims moral damages.

10. In support of his complaint, the complainant submits that the delivery of Judgment 2359 created a "new situation of law" enabling him to impugn the President's decision. He also contends, on the merits, that he did satisfy the requirements for having his partner's children recognised as dependants under Article 69 of the Service Regulations.

11. On the latter point it must be noted that the Organisation's submissions are unconvincing insofar as they seek to deny that the decision of 20 December 2002 was unlawful, because it is plain that this decision, which essentially rested on the consideration that the complainant's request did not meet the conditions laid down in Rule 2 of Communiqué No. 6, is tainted with the same error of law as the decision which was set aside by the Tribunal in Judgment 2359. Furthermore, it is clear from the submissions that in the instant case the complainant did furnish sufficient proof that his partner's

children were "mainly and continuously" supported by him. They should therefore have been regarded as dependent children within the meaning of Article 69 of the Service Regulations.

12. However, as the facts set out above show, the complainant did not impugn the decision of the President of the Office of 20 December 2002 refusing to grant him the disputed allowances within the ninety-day period available to him under Article VII, paragraph 2, of the Statute of the Tribunal. Although, as he states, he constantly protested against this decision, it thus became final and therefore he could no longer reapply for these allowances. Yet that was precisely the purpose of the request which he submitted on 13 August 2004, since it sought the granting of allowances for the same children and for the same period as those referred to in the initial appeal. In these circumstances the decision of the President of the Office of 13 March 2009 must be regarded as purely confirmatory of the previous decision and consequently it could not set off a new time limit for an appeal by the complainant (see, for example, Judgments 698, under 7, 1304, under 5, or 2449, under 9).

13. As the Tribunal has repeatedly stated, for example in Judgments 602, 1106, 1466 and 2722, time limits are an objective matter of fact and it should not entertain a complaint filed out of time, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar. In particular, the fact that a complainant may have discovered a new fact showing that the impugned decision is unlawful only after the expiry of the time limit for submitting an appeal is not in principle a reason to deem his or her complaint receivable (see, for example, Judgments 602, under 3, 1466, under 5 and 6, or 2821, under 8).

14. It is true that, notwithstanding these rules, the Tribunal's case law allows an employee concerned by an administrative decision which has become final to ask the Administration for review either when some new and unforeseeable fact of decisive importance has

occurred since the decision was taken, or else when the employee is relying on facts or evidence of decisive importance of which he/she was not and could not have been aware before the decision was taken (see Judgments 676, under 1, 2203, under 7, or 2722, under 4). However, the fact that, after the expiry of the time limit for appealing against a decision, the Tribunal has rendered a judgment on the lawfulness of a similar decision in another case, does not come within the scope of these exceptions.

15. In particular, in the instant case, the complainant's argument that the delivery of Judgment 2359 constitutes a new and unforeseeable fact of decisive importance, within the meaning of the above-cited case law, is to no avail. In Judgment 676 the Tribunal did accept that the delivery of one of its judgments could be described in these terms and could therefore have the effect of reopening the time limit within which a complainant could lodge an appeal. But the circumstances of the case were very special in that the Tribunal, in previous judgments which it cited in that case, had formulated a rule which had greatly altered the position of certain staff members of an organisation and which, although already applied by the organisation, had until then not been published or communicated to the staff members concerned. No exceptional circumstances of this nature exist in the instant case where the criticism expressed in Judgment 2359 of the conditions set by the Office for the recognition of a dependent child – which moreover confirmed the soundness of the complainant's own criticism in this respect – cannot be regarded as unforeseeable.

16. In his rejoinder the complainant endeavours to rely on the line of precedent established by Judgments 752, 1466 and 2722, inter alia, according to which an appeal may not be time-barred if there has been a breach of good faith. But this other exception to the rules governing time limits, which concerns the situation where an organisation has deprived one of its employees of the possibility of exercising his/her right of appeal by deliberately misleading him/her, or by concealing some paper from him/her with the intention of

injuring him/her, can obviously not be applied in this case, where no such machinations may be ascribed to the Office.

17. In addition to the fact that this complaint is consequently irreceivable, the complainant's second internal appeal was filed out of time. As the President of the Office rightly noted, the Internal Appeals Committee was wrong to hold in the recommendation adopted by the majority of its members that this appeal was barred by *res judicata*, for such authority is possessed only by judicial rulings, and not by administrative decisions. She, on the other hand, was correct in relying on the fact that the decision of 20 December 2002 had become final in the decision conveyed to the complainant on 13 March 2009. Contrary to the complainant's contentions, the President was also right, in this connection, to invoke the principle of legal certainty. As stated above, the rules governing time limits are indeed justified by the need for stability in legal situations, which is one aspect of that principle (see Judgment 2487, under 4).

18. It follows from the foregoing that the complaint can only be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2011, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2011.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet