EIGHTY-NINTH SESSION

***In re* Hébert** **Judgment No. 1994**

The Administrative Tribunal,

Considering the complaint filed by Mrs Waltraud Hébert against the European Patent Organisation (EPO) on 30 June 1999 and corrected on 12 July, the EPO's reply of 17 September, the complainant's rejoinder of 22 November, and the Organisation's surrejoinder of 14 December 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1960, is a permanent employee at grade B3 with the European Patent Office, the secretariat of the EPO. Her duty station is Munich. Pursuant to a French court order her husband had to contribute to the maintenance of his two children by a previous marriage who lived with their mother in France.

Article 69(1) of the EPO Service Regulations provides that a dependants' allowance shall be payable to a permanent employee for a dependent child who under the terms of Article 69(3) is "mainly and continuously supported by the permanent employee or his spouse". Circular No. 82 of 19 February 1981 set out the guidelines for implementing Article 69 and defined what constituted "mainly supported" for dependent children not in the custody of the permanent employee or his/her spouse. Under those guidelines the permanent employee had to pay a minimum amount in maintenance for the child in order to qualify for the allowance. This consisted in a sum equal to the allowance, plus a "personal contribution", which was a fixed amount determined by the employee's grade. In the complainant's case it amounted to 50 German marks per child, making a total of 100 marks.

In 1996 new guidelines for determining whether a child was dependent within the meaning of Article 69 were adopted by the President of the Office and communicated to the staff in Communiqué No. 6 of 20 March 1996. They announced changes to the way the personal contribution would be calculated. In order to qualify for the dependants' allowance for two children, a permanent employee was now required to contribute an amount equal to "9% of the employee's basic salary plus twice the amount of the dependants' allowance, or 45% of the basic salary of grade C1/1 if this amount is lower".

On 25 April 1996 the complainant addressed a petition to the President of the Office, objecting to the increase of the personal contribution she would have to make in order to receive the dependants' allowance. The President replied on 30 May informing her of the reasons for the increase and granting her an extra month in which to regularise the amount of her payments.

In a letter of 12 June 1996 the Remuneration Department informed the complainant that she would have to pay a total contribution of 1,394.70 marks for her husband's children in order to satisfy the condition of them being "mainly and continuously supported". This corresponded to a personal contribution of 566.10 marks, on top of the 828.60 marks awarded as a dependants' allowance. Her total contribution was calculated as 9% of her basic salary plus twice the amount of the dependants' allowance. Since she was paying less than the sum required, her dependants' allowance was to be discontinued as of July 1996 on the grounds that the monthly maintenance paid for her husband's two children was below the minimum amount payable to qualify for the allowance.

On 20 June 1996 the complainant filed an internal appeal against the application of the new provisions in Communiqué No. 6 which set out new guidelines governing the grant of the dependants' allowance. In its report of 25 January 1999 the Appeals Committee recommended unanimously that her appeal, requesting that the provisions

concerning the minimum financial support be ruled unlawful, should be dismissed as unfounded. With regard to her request for retroactive payment of the dependants' allowance the Committee recommended that her individual case be reviewed. On 6 April 1999 the Principal Director of Personnel informed her that, based on the unanimous recommendation of the Appeals Committee, the President had rejected her appeal. That is the impugned decision.

B. The complainant claims that she is entitled to a dependants' allowance. She states that she continued to pay the full amount of the monthly maintenance required by court order. She paid for both children until November 1997 and for the younger one until December 1998; and her contribution for each child was "considerably higher" than the respective amounts of the dependants' allowance provided for in Article 69. She argues that "mainly and continuously supported by the permanent employee or his spouse" means that a regular contribution of more than 50 per cent of the costs of bringing up the child is being met by the employee. This cost is going to vary in each individual case, due to factors such as age, lifestyle, education, place of residence and it is not dependent on the salary of the employee.

The President of the Office issued Communiqué No. 6 without authority as he has no power to adopt implementing regulations that exclude from receiving the dependants' allowance employees whose contributions nevertheless cover more than 50 per cent of the costs of bringing up the child. The complainant contends that any employee that fulfills that obligation should be entitled to the allowance, as long as the total amount paid for the dependent child is higher than the amount of the allowance; she agrees that the employee should not be able to benefit financially through having a dependent child.

In addition, the practical application of the EPO's requirement will trigger new disputes for some employees who, as in her case, try to pay maintenance at a higher rate than that stipulated on the court order.

She asks the Tribunal to: establish that "the decision of the President ... to require the minimum amounts set out in Rule 1(2) of his Communiqué [No.] 6 was taken in breach of Article 69(3) of the Service Regulations and is therefore null and void; [and that] the condition 'mainly and continuously supported by the permanent employee or his spouse' in Article 69(3) ... is fulfilled, as long as the person to whom the Service Regulations apply pays for his dependent child the amounts he is obliged to as sole contributor by national law or court decree, on condition that said amount is at least equal to the amount of the dependants' allowance under Article 69". She also wants the Tribunal to order that the defendant will pay the complainant the amount of the dependants' allowance "for one child from July 1996 to November 1997 (inclusive) and for the second child from July 1996 to December 1998 (inclusive)"; and asks for an award of 2,500 marks in costs.

C. In its reply the Organisation argues that setting a precondition for entitlement to an allowance is not a breach of the Service Regulations, and that the amount of the required personal contribution is justified. Since the Service Regulations themselves do not define "mainly and continuously supported" it is up to the President, and within his discretionary power, to give an exact meaning, something that is particularly important when the child is not resident with the permanent employee.

In making maintenance payments the complainant has to pay the personal contribution and the Organisation contributes twice the sum of the dependants' allowance. Its contribution comes by way of the independently adopted Service Regulations; therefore, it can be set irrespective of national laws or court decisions. The President has correctly used his discretionary power in the adoption of the 1996 guidelines. It also points out that the President offered to review the complainant's case upon presentation of supporting documents.

D. In her rejoinder the complainant reiterates her argument that the criterion "mainly and continuously supported" should be objective and based on the needs of the dependent child and not on the Organisation's salary scheme. When a court order imposes an obligation to bear the costs of maintenance, and this obligation is met, the requirements of Article 69(3) should be deemed fulfilled.

She argues that the legislators could not have intended to allow the President to set the level of maintenance which constitutes "mainly and continuously supported" in a way that excludes employees from receiving the allowance even though they have satisfied a court order; in fact, as it now stands, the President could continue to raise this level thereby excluding even more employees. She says she is not contending that the President and the Administration in assessing whether the requirement of Article 69(3) is met were "directly bound [by] a national court order", but rather that they are bound by the Service Regulations and must apply objective criteria; in her view proof of carrying out a court order is such an objective criterion.

E. In its surrejoinder the Organisation presses its argument that the phrase "mainly supported" required defining and that this was within the President's discretionary authority. Furthermore, according to the Tribunal's case law, the Organisation is free to amend the conditions for granting allowances as long as it does not do away with the allowance itself. In addition, international organisations are not required to apply national laws or court orders in their dealings with staff.

CONSIDERATIONS

1. The complainant paid maintenance for her husband's two children by a former marriage who lived with their mother in France. She paid for the older child until November 1997 and for the younger one until December 1998.

2. The complainant was entitled to claim a dependants' allowance for both children under the conditions laid down in Article 69(3) a) of the Service Regulations. This provides that for the purposes of the Regulations a dependent child shall be:

"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."

3. There is no definition in the Article of the meaning of "mainly and continuously supported by the permanent employee". By Communiqué No. 6 dated 20 March 1996 all the staff were informed of new guidelines, drawn up by the President of the Office, for determining whether a child is dependent within the meaning of Article 69(3) a) and c). One of the changes concerned the amount of financial support a staff member had to provide for a child not in the custody of the staff member or his spouse in order to have the child recognised as being "mainly and continuously supported" by the staff member. The new guidelines - insofar as they were relevant to the complainant - provided that where a child is in the custody of a person other than the employee or spouse and is not resident with them "the child shall be assumed to be 'mainly and continuously supported' by the employee or spouse" if the financial support provided by either of them equals at least the following amounts:

"for two children: 9% of the employee's basic salary plus twice the amount of the dependants' allowance."

4. Prior to the introduction of those guidelines the relevant criteria, set out in Circular 82 dated 19 February 1981 required that, in order to qualify for the dependants' allowance the permanent employee had to pay a minimum amount in maintenance which included a personal contribution of a fixed amount in German marks, payable over and above the dependant's allowance. In the case of the complainant the fixed amount which exceeded the allowance was 50 marks for each dependant, the rate applicable to grades C to B4.

5. The amount of financial support that the complainant had to pay after the coming into force of the 1996 guidelines was twice the amount of the dependants' allowance, totalling 828.60 marks (414.30 marks multiplied by 2) plus 566.10 marks - representing 9 per cent of her basic salary. The complainant was so informed by a letter dated 12 June 1996.

6. The complainant filed an internal appeal against the new provision set out in Communiqué No. 6 in June 1996. In the course of the internal appeal the Organisation said the guidelines do not limit the entitlement to the dependants' allowance. It also said the Office would review individual cases retrospectively (in accordance with Judgment 743, *in re* Flick) to see if payment of a dependants' allowance was justified even though the minimum level of support fixed in the guidelines was not being paid in full.

7. The Appeals Committee concluded that her claim, that the provision concerning financial support be ruled unlawful, should be dismissed but recommended that with regard to retroactive payment the complainant's case be reviewed.

8. By a letter dated 6 April 1999 the Principal Director of Personnel informed the complainant of the President's decision to reject her appeal in accordance with the unanimous recommendation of the Committee. He added that this would not preclude a review of her case and he indicated what further information was required from her. That is the decision impugned.

9. The complainant claims retrospective payment of the dependants' allowance for the period from July 1996 to November 1997 for one child and from July 1996 to December 1998 for the second child plus a sum for costs.

10. According to the complainant the court order placed the financial burden of providing for the children's maintenance solely on her husband. It referred to the "contribution to maintenance" to be paid by him. The complainant submits that the wording of the phrase "mainly and continuously supported" in Article 69 indicates that the relevant criterion is whether the employee contributes more than 50 per cent of the costs of bringing up the child. It is an objective test. Costs vary in each case. In her view it follows that the President has no power to adopt an implementing regulation under which employees who pay less than the minimum fixed in the regulation are excluded from receiving the dependants' allowance. If the employee fulfils a legal obligation to bear alone the costs of bringing up the child as fixed by law or court order, he is entitled to the dependant's allowance as long as the amount he is legally obliged to pay equals or exceeds the allowance. If the implementing regulation results in maintenance payments over the legally set amount, this could mean that new disputes would be triggered between the divorced parties. Even if the minimum amounts payable under the guidelines did not apply in all cases, the employees would still be at the mercy of the Organisation as to what criteria would be applied and what evidence would be sufficient. There would be no legal certainty.

11. The Organisation argues that the method of calculating the personal contribution due for each child based on a proportion of the employee's basic salary and the number of dependent children, is justified by the principle that the employee must support the child having regard to his personal resources and provide each child with the same standard of living. The *raison d'être* of the dependants' allowance system is to improve the situation of the child. It claims it is up to the Office to lay down and apply its own conditions irrespective of national laws and decisions taken by national courts. The President of the Office is under no obligation to take account of a child's rights to maintenance under national law or by court order when he sets the general condition on which entitlement to a dependants' allowance depends. Such rights, being defined according to different criteria in each country, do not necessarily correspond to main support. Taking them into account would be tantamount to an inconsistent application of Article 69 which sets out the terms of the dependants' allowance. Any problems arising between the complainant and the mother of the children are of no relevance in this case. The court order dated 26 July 1983 refered to "the contribution to maintenance" fixed for the complainant's husband: it did not say that the entire financial burden for the maintenance of the two children was to be borne by him.

12. The contribution to maintenance set by the national courts varies from country to country. Contrary to what the complainant contends the Organisation is not limited to the amounts fixed by any court order when interpreting the meaning of "mainly and continuously supported". The President can lay down the criteria for what is meant by "mainly supported". There is nothing to suggest that the amount of the personal contribution is excessive. In any event, the new guidelines do not have the effect of doing away with the allowance, since the Organisation accepted the possibility of reviewing the personal contribution in individual cases, if circumstances so required. Therefore, the claim fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet