106th Session **Judgment No. 2794**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. M. against the European Patent Organisation (EPO) on 24 April 2007 and corrected on 12 June, the EPO's reply of 25 September, the complainant's rejoinder of 15 November 2007, and the Organisation's surrejoinder of 29 February 2008;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Dutch national born in 1952, joined the European Patent Office – the EPO's secretariat – at its headquarters in Munich on 1 February 1988 as an examiner at grade A3. He was promoted to grade A4 on 1 May 2004 and on 1 September 2004 he was transferred to Directorate-General 1 (DG1) in The Hague (the Netherlands). He has three sons, hereinafter referred to as A, B and C, all of whom were studying at the material time, A and B in the Netherlands and C in Germany.

On 1 October 1986 a new Student Finance Act (*Wet op de studiefinanciering, WSF 18+*) entered into force in the Netherlands. This legislation introduced a system of student grants to replace the previous system of children's allowances and supplementary student benefits. The new student grants, payable to students aged between 18 and 30, had two components: one was paid without reference to parents' income (*basisbeurs*) and the other was dependent on means (*aanvullende beurs*). Both components were paid directly to the student and were not achievement related. In response to this legislation, the EPO issued a staff notice dated 8 January 1987 outlining its policy regarding family allowances. According to this notice, employees receiving the EPO's dependants' allowance who were also receiving allowances of a like nature from other sources would have an amount equal to the minimum amount of the Dutch child allowance (*AKW-kinderbijslag*) for one child deducted from their EPO dependants' allowance. For employees receiving the EPO education allowance, the total amount of the *basisbeurs* minus the amount already deducted from the employees' dependants' allowance, and all the other education allowances, would be deducted from the actual educational expenses taken into account for each child.

At the material time, the complainant's sons A and B were receiving monthly *prestatiebeurs* payments in the amounts of 209.20 euros and 228.20 euros respectively. The *prestatiebeurs* – introduced in September 1996 – is a loan from the Dutch government paid directly to the beneficiary which, subject to certain conditions, may be converted into a non-repayable grant. In particular, students must complete their studies within ten years and attain certain grades. As a general rule, if the student is unable to meet these conditions, the loan must be repaid.

Pursuant to Article 67(1) of the Service Regulations for Permanent Employees of the European Patent Office, permanent employees are entitled to family allowances consisting of a household allowance, a dependants' allowance and an education allowance. As a father of three sons aged between 20 and 22 who were receiving educational training, the complainant qualified for a dependants' allowance under Article 69(4) of the Service Regulations for all three of his children.

Pursuant to Article 71 of the Service Regulations he also qualified for an education allowance for his sons A and C. As his son B was studying in The Hague, which was the complainant's place of employment, under Article 71(2)(a) of the Service Regulations, the complainant was not entitled to an education allowance for him.

Article 67(2) of the Service Regulations stipulates that "[a] permanent employee in receipt of family allowances shall declare allowances of like nature paid to him, to his spouse or his dependants from other sources; these allowances shall be deducted from those paid under these Service Regulations". Article 71 of the Service Regulations relevantly provides in relation to education allowances, that any allowance received from other sources for a child's education may be deducted, where appropriate, from the education allowance.

On 13 September 2004 the complainant completed a "Declaration concerning dependants' allowance – children" form for his son B and "Claim for education allowance" forms for his sons A and C. By a note dated 21 October 2004 the Salary Section informed the complainant that a negative adjustment had been made to his salary as from September 2004. The adjustment, in the sum of 117.74 euros, resulted from a deduction of 58.87 euros from each of the dependants' allowances for his sons A and B.

On 11 January 2005 the complainant filed an appeal with the President of the Office arguing that there was no basis in the Codex, the compendium of rules applicable to staff, for the deduction of 117.74 euros per month from his salary. He submitted that Article 67(2) of the Service Regulations did not apply to the *prestatiebeurs*, and in his view the EPO's staff notice of 1987 was outdated and could not be considered as a basis for the deduction. He requested payment, in full, of the dependants' allowances for his sons A and B.

The complainant was advised by a letter of 8 March 2005 that the President had concluded that the relevant rules had been correctly applied and that his request could not be granted; the matter had therefore been referred to the Internal Appeals Committee. In its opinion dated 28 November 2006 the Committee unanimously

recommended that the appeal be dismissed as unfounded. The complainant was informed by a letter dated 24 January 2007 that the President had decided to follow the Committee's opinion and to reject his appeal. That is the impugned decision.

B. The complainant contends that the *prestatiebeurs* is not an "allowance of like nature" within the meaning of Article 67(2) of the Service Regulations. In his view, the relevant law defines it as an interest-bearing loan and for as long as it remains repayable, it is a loan, not an allowance or an allowance-like benefit. If and when the *prestatiebeurs* becomes a gift it is then equivalent to a state educational grant, and as such it would be an allowance similar to the education allowance under Article 71 of the Service Regulations. He submits that the staff notice of 1987 cannot be used as a basis for the deduction. That notice was issued in response to the introduction of new legislation in 1986, and the law has since changed.

He also contends that the EPO treated the *basisbeurs* as comprising two components, one covering living costs, the other covering education costs, and on that basis provided that deductions in respect of the *basisbeurs* should be made partly from the dependants' allowance and partly from the education allowance. In his view, the *basisbeurs* should have been considered as similar to an educational allowance within the meaning of Article 71 of the Service Regulations. Consequently, if any part of the *basisbeurs* should have been deducted, that deduction would properly have been applied to the education allowance and not the dependants' allowance. Similarly, the *prestatiebeurs* is not a combined dependants' and education allowance.

The complainant asks the Tribunal to quash the impugned decision and to order reimbursement of the deductions applied to his salary from September 2004 "with respect to family allowances granted" for his sons A and B. He requests that the EPO be ordered to refrain from applying future deductions to his family allowance in respect of the *prestatiebeurs* paid to his son B. Subsidiarily, if the Tribunal finds that the *prestatiebeurs* is a type of family allowance, he asks it to order the

EPO to apply the deduction to the education allowance he receives and not to the dependants' allowance. He also seeks costs.

C. In its reply the EPO argues that the *prestatiebeurs* is an "allowance of like nature" within the meaning of Article 67(2) of the Service Regulations because it is paid directly to students to cover their education costs as well as daily maintenance costs. Of particular importance is the fact that the *prestatiebeurs* is aimed at exempting the majority of students from loan repayment. It asserts that, as the *prestatiebeurs* is the sole form of state support for students, it is "absolutely necessary and legitimate" to take it into account under Article 67(2) of the Service Regulations. It adds that the Organisation enjoys a certain degree of discretion when deciding whether payments "from other sources" constitute an "allowance of like nature".

It submits that the EPO's dependants' allowance is likewise intended to help staff provide for their children's maintenance and its conclusion that the *prestatiebeurs* corresponds in part to the dependants' allowance is consequently not open to criticism. The Organisation considers that it has the right and, in the light of the principle of equal treatment, also a duty of care, "to prevent employees from benefiting twice". In addition, it contests the complainant's characterisation of the *prestatiebeurs* as a loan equivalent to a bank loan.

The Organisation asserts that it correctly applied its staff notice of 1987 to the *prestatiebeurs*. It points to a finding by the Court of First Instance of the European Communities that the nature of the *basisbeurs* corresponds to the education and the dependent child allowances provided for by the European Community rules.

Lastly, citing the Tribunal's case law, the EPO notes that there is no acquired right to the payment of a specific amount of an allowance.

D. In his rejoinder the complainant elaborates on his pleas. He asserts that staff notices are normally incorporated into the Service Regulations, and since the notice in question was not so incorporated, he disputes the Organisation's assertion that its reduction of his

dependants' allowance was "legally based on Article 67(2)" as applied in the Office's practice "notified to staff on 8 January 1987".

E. In its surrejoinder the EPO maintains its position. It submits that because the *prestatiebeurs* is partly applied to a student's maintenance costs, it corresponds in part to the dependants' allowance and can therefore be deducted from it. The portion of the *prestatiebeurs* that is related to education is deducted from the education allowance. It asserts that the Office's policy outlined in its staff notice was extended *mutatis mutandis* to the *prestatiebeurs* and consequently there was no change in that policy that required a publication.

CONSIDERATIONS

1. The complainant has three sons, two of whom were studying in the Netherlands and one who was studying in Germany at the material time. On 13 September 2004 he applied for a dependants' allowance for his son B who was studying in The Hague and was receiving a *prestatiebeurs* of 228.20 euros per month. However, the complainant was not eligible to receive an education allowance in respect of this son in accordance with Article 71 of the Service Regulations; the Organisation subsequently deducted 58.87 euros from the dependants' allowance. He also applied for education allowances for his sons A and C. The former received a *prestatiebeurs* of 209.20 euros per month and the complainant's dependants' allowance for this son was likewise reduced by 58.87 euros by the Organisation. The complainant received both the dependants' allowance and the education allowance in full for his son C who was studying in Germany.

2. It is not disputed by the parties that the *prestatiebeurs* is an interest-bearing loan from the Dutch government which, if certain conditions are fulfilled, is later converted into a grant. This is a type of educational funding which serves to help the beneficiary to cover his education and living costs. If the beneficiary does not complete his education within ten years, he is required to pay back the loan plus

interest. The Organisation considers that the *prestatiebeurs* is an "allowance of like nature" and that in accordance with Article 67(2) of the Service Regulations, it is therefore legally deductible from family allowances (which include household allowances, dependants' allowances and education allowances) in the interest of maintaining that employees "should not benefit twice".

3. The complainant filed an appeal before the Internal Appeals Committee, challenging the decision to deduct 117.74 euros from the dependants' allowances for his sons A and B. In its opinion dated 28 November 2006 the Committee was unanimously of the view that the appeal was unfounded and therefore recommended that it be dismissed. The Committee pointed out that the Dutch system has "moved away from unconditional grants to alternative forms of financial aid. It is no longer appropriate to assess cases such as these according to strict formal criteria. By focusing on the legal form and arguing that a loan is always a loan, no matter what, the [complainant] is overlooking this fact. […] The '*prestatiebeurs*' is not comparable to a commercial loan to which no conditions apply except that it must be repaid when it becomes due." The Committee also considered that "a correction must be made in cases where the loan actually has to be repaid. […] If the Office retained the deductions for good, the person concerned would end up not receiving a dependants' allowance from any source, even though he or she was […] entitled to same." It went on to say: "The rationale behind Article 67(2) [of the Service Regulations] is simply to stop people from drawing the same allowances twice over, but not to disadvantage them." It concluded that "repayments should be made with an appropriate level of interest, possibly defined in relation to the rate of interest at which the '*prestatiebeurs*' is to be repaid". The complainant was informed, by letter of 24 January 2007, of the President's decision to follow the opinion of the Committee and to reject his appeal. This decision is impugned before the Tribunal.

4. The complainant contests that the Office was entitled to apply deductions on the dependants' allowance and puts forward two

main arguments in support of his complaint: to wit that the *prestatiebeurs* is not an allowance of like nature as a family allowance and that the split in the deductions from the dependants' allowance has no basis in the Service Regulations. He argues that in the event the *prestatiebeurs* is considered to be a family allowance, "[t]he most logical 'allowance of a like nature' […] would only be the education allowance".

5. The arguments are unfounded. The only question raised in the present case is whether or not the *prestatiebeurs* can be considered an "allowance of like nature" and whether, consequently, the total deduction of 117.74 euros per month from the complainant's dependants' allowance is justified. Prior to its amendment in 2007, Article 67 of the Service Regulations relevantly provided:

> "(1) Under the conditions laid down in this Section, a permanent employee shall be entitled to:
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> a) family allowances:
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> - household allowance,
> - dependant's allowance,
> - education allowance;
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> b) expatriation allowance;
>
> c) installation allowance;
>
> d) rent allowance;
>
> e) language allowance.
>
> (2) A permanent employee in receipt of family allowances shall declare allowances of like nature paid to him, to his spouse or to his dependants from other sources; these allowances shall be deducted from those paid under these Service Regulations."

The Tribunal is of the opinion that the phrase "of like nature" (which is not a legal term of art) does not refer to similarities of a legal nature. Instead, it refers to the purpose of the allowances in question. The purpose of the *prestatiebeurs* corresponds with the purpose of the education allowance and the dependants' allowance, that is to help

cover the daily maintenance costs of the dependants, and to defray their educational expenses. The aim of the Service Regulations applicable in the present case, is to prevent permanent employees from benefiting twice from the same allowances.

6. It should be noted that the *prestatiebeurs* has replaced the *basisbeurs* of the previous Dutch 1986 Student Finance Act. The Court of First Instance of the European Communities, in its judgment dated 10 May 1990 (case T-117/89), stated inter alia: "[t]he very title of the Netherlands law ('*studiefinanciering*') makes it immediately clear that the allowance in question [the *basisbeurs*] is intended both to contribute to daily living expenses (fulfilling in that respect the same function as the Community dependent child allowance) and to cover the purchase of books and other educational material (a function corresponding to that of the Community education allowance)" and that "the [1986 Student Finance Act] gives rise to no doubt about the nature of the *basisbeurs*, that is to say the fact that that allowance corresponds to the education allowance and the dependent child allowance provided for by the Community rules". The Tribunal is not bound by the rulings of the Courts of the European Communities, but inasmuch as Article 67(2) of the Service Regulations of the EPO derives from the Article bearing the same number in the Staff Regulations of the European Communities (see Judgment 1296, under 7) and as the same issue arises in this complaint as in case T-117/89, that decision carries persuasive authority.

7. As the dependants' allowance, in accordance with Article 69(4) of the Service Regulations, has to be granted "[…] on application by the permanent employee, with supporting evidence, for children aged between eighteen and twenty-six who are receiving educational or vocational training", the Tribunal is of the opinion that the *prestatiebeurs* can be considered an "allowance of like nature" in accordance with Article 67(2) of the Service Regulations as regards both the education allowance and the dependants' allowance, and that they are therefore both subject to deduction. Considering that, at the

time of need, the staff member is provided with the financial allowance through the State, it is logical that the Organisation make the deduction at that time from the family allowances, with the understanding that in case the loan is later to be paid back, the Organisation will likewise reimburse the staff member for the deductions made, plus the same interest requested in repayment to the State.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet