

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R.
v.
EPO

140th Session

Judgment No. 5068

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. A. R. against the European Patent Organisation (EPO) on 5 June 2020 and corrected on 20 July, the EPO's reply of 10 November 2020, the complainant's rejoinder of 11 December 2020 and the EPO's surrejoinder of 4 March 2021;

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 may be summed up as follows:

The complainant contests the EPO's decision to pay to his former wife, rather than to him, the dependants' allowance for their two children.

The complainant joined the European Patent Office, the secretariat of the EPO, on 1 January 1996. From 2002 until 2010, he was married to Ms R., also a staff member of the Office, with whom he had two children. During the marriage and up until the divorce in 2010, the dependants' allowance for the couple's two children was paid to the complainant, who earned a higher basic salary than Ms R. This was consistent with Article 67 of the Service Regulations for permanent employees of the European Patent Office, which provided that "where

a husband and wife employed by the Office are both entitled to family allowances, these shall be payable only to the person whose basic salary is the higher". Since the couple's divorce in 2010, the dependants' allowance was paid to Ms R., now the complainant's former wife, who was given full custody of the children.

On 4 April 2016, the complainant requested that the Office pay to him the dependants' allowance for the couple's two children. As the reason for his request, the complainant cited an Austrian Court order increasing his monthly child support payments to his former wife by 20 per cent. The Austrian Court order, which was rendered upon request by the complainant's former wife, increased the complainant's child support payments to the maximum amount foreseen for child support under Austrian law. Prior to that, the complainant's child support payments covered 80 per cent of the maximum amount foreseen under Austrian law and the remaining 20 per cent was covered by the Office's dependants' allowance paid to his former wife. The Office rejected the complainant's request that the dependants' allowance be paid to him, rather than his former wife, on the ground that he had not demonstrated that he "mainly and continuously" supported the couple's children, as per the requirement of the applicable Service Regulations.

On 26 September 2016, the complainant submitted a request for review of this decision, which was rejected on 25 November 2016. On 24 February 2017, he lodged an internal appeal requesting payment of the dependants' allowance as from 1 July 2016, 16,522 euros as partial compensation for not paying to him the allowance since 2010, and 3,500 euros in legal costs. In its opinion of 15 January 2020, the Appeals Committee recommended rejecting the appeal as irreceivable in part, namely insofar as the complainant's claim for payment of the dependants' allowance extended to the period prior to 1 October 2016, and unfounded in the remainder. It also recommended awarding the complainant 150 euros in moral damages for the legal uncertainty created by the unreasonable length of the internal appeals procedure.

By a letter of 9 March 2020, to which the Appeals Committee's opinion was attached, the Chief Corporate Policies Officer informed the complainant of her decision, taken by delegation of authority from the

President of the Office, to follow the Appeals Committee's unanimous recommendation. This is the impugned decision.

The complainant asks the Tribunal to encourage the EPO (i) to publish the currently unpublished rules governing the payment of the dependants' allowance to employees sharing children; (ii) to consider paying the dependants' allowance to the "higher earner" of two divorced Office employees (by extending the rule applied to two married Office employees) or, given the modern concepts of same-sex and registered relationships, to only maintain the criterion of "higher earner". The complainant further asks the Tribunal to order the EPO to pay to him, rather than to his former wife, the dependants' allowance for their two children, as from 1 July 2016. He claims compensation for the EPO's decision not to pay to him the dependants' allowance between 2010 and 2016 in the amount of 16,522 euros, which is equal to the amount the Austrian Court ordered him to pay to his former wife for his "underpayment of child allowance". He also claims 3,500 euros in costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in its entirety for failure to exhaust internal remedies or, alternatively, as irreceivable in part, insofar as the complainant's claim for payment of the dependants' allowance extends to the period prior to 1 October 2016, and unfounded in the remainder. On a subsidiary basis only, the EPO asks the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant is a staff member of the EPO as is his former wife. The facts are sufficiently set out earlier in this judgment. He filed his complaint on 5 June 2020, impugning a decision made on 9 March 2020 by the Chief Corporate Policies Officer, on delegation of authority from the President, to reject an appeal he had submitted on 24 February 2017.

2. The EPO challenges the receivability of the complaint. It is convenient to address this at the outset. The initial decision, which ultimately led to the underlying appeal is not in evidence. However, it is described by the Appeals Committee in its opinion as a decision rejecting a request of the complainant for payment of the dependants' allowance for his two sons. In context, it was clearly a decision to refuse to pay him the dependants' allowance but rather to continue paying it to his former wife, as had hitherto been the case since they divorced in 2010.

3. The inference which can be drawn is that the EPO made a decision in 2010 to pay the complainant's wife the dependants' allowance, and not to pay him, in circumstances where he was then being paid the allowance. There is material on the file which supports this inference. Indeed, in his brief the complainant said: "Based on the ILO judgment 3002, consideration 14, I implicitly asked the Office to review the original decision to switch the payment of the dependants allowances [sic] from me to my wife in May 2010."

4. The complainant did not challenge in 2010, by way of internal appeal, this decision at that time. His more recent request, on 4 April 2016, that he, rather than his former wife, be paid the dependants' allowance is, in substance, even if not in form, inviting a decision to elect between him and his former wife as to who would be the payee of the allowance. This is the very issue resolved by the decision in 2010. Consequently, the EPO's decision to reject his 4 April 2016 request to pay him, rather than his former wife, the dependants' allowance was not a new decision and can only be understood as a purely confirmatory decision. As the Tribunal recalled in Judgment 3870, consideration 4:

"[F]or a decision, taken after an initial decision has been made, to be considered as a new decision (setting off new time limits for the submission of an internal appeal) and not a purely confirmatory decision, the following conditions are to be met: the new decision must alter the previous decision and not be identical in substance, or at least must provide further justification, and it must relate to different issues from the previous one or be based on new grounds (see Judgments 660, 2011, under 18, and 3735, under 4)."

5. In arguing that his complaint is receivable, the complainant draws on observations of the Tribunal in Judgment 3002, consideration 14, that:

“[T]he 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).”

The complainant identifies, as a fact of decisive importance, that his “[former] wife would raise and win a legal action in 2016 by convincing the Austrian courts to ignore that the EPO dependants [sic] allowance is of like nature to national child support”.

6. But the former wife’s alleged success has no obvious bearing on which of the parents should be paid the dependants’ allowance. That is to say, to whom the allowance should be paid. Its purpose remains the same irrespective of who is paid it. It is to improve the situation of the children (see Judgment 1994, consideration 11). The reasoning of the Tribunal in Judgment 3002, consideration 14, has no application to the present case and does not justify what is, in effect, a reopening of the final decision made in 2010, notwithstanding the fact that it was not challenged at the time.

7. The complaint is irreceivable and will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

RENÉ M. VARGAS M.