Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

117th Session **Judgment No. 3310**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. F. S. against the European Patent Organisation (EPO) on 29 September 2010, the EPO's reply of 11 January 2011, the complainant's rejoinder of 8 February and the EPO's surrejoinder of 18 May 2011;

Considering the applications to intervene submitted by Messrs T. H., A. K. and P. T. and the EPO's comments of 26 September 2011 informing the Registrar of the Tribunal that it considered those applications to be irreceivable as the persons concerned were not in the same situation in fact or in law as the complainant;

Considering Article II, paragraph 5, 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, a United Kindgom national, is a permanent employee of the EPO serving at its Headquarters in Munich. On 23 February 2007 she requested, under Article 69(7) of the Service Regulations for Permanent Employees of the European Patent Office

(hereinafter referred to as "the Service Regulations"), a dependent handicapped children's allowance for her daughter who was attending a school in the United Kingdom also catering for children with special educational needs (SEN).

Article 69 of the Service Regulations provides for the payment of a dependant's allowance for children, on the one hand, and for handicapped children, on the other (at the material time the dependent child allowance was 271.04 euros per month whereas the dependent handicapped child allowance was 542.08 euros per month).[*] Subject to the conditions set out in Article 71 of the Service Regulations, permanent employees may also be entitled to an education allowance for their children. According to paragraph 6 of that article, the amount of this allowance is calculated by reference to the rate of "the dependent child allowance".

The conditions for the payment of the dependent children's allowance and the dependent handicapped children's allowance are set forth in Article 69(3) to (6) and (7) to (13) respectively. According to Article 69(7), a permanent employee with a handicapped child may claim, in addition to the actual dependent handicapped child's allowance, "reimbursement of educational or training expenses […] under the conditions laid down in the following paragraphs". One such condition, articulated in Article 69(10), is that a claim of reimbursement shall be made solely in relation to expenses for the handicapped child's special education or training, which are "not of the same kind as those taken into account for the purposes of the education allowance". Article 69(12) further provides that such educational or training expenses may be reimbursed at the rate of 90 per cent.

By a letter of 12 June 2007 the complainant was informed that her request had been granted and that she would receive the said allowance with effect from February 2007. She responded in an e-mail of 21 June 2007 that, as a result of that decision, she also expected to receive, as

[*] The rates of the dependent children's and the dependent handicapped children's allowances are indicated in table 5, paragraphs 2(a) and 2(b) respectively, of Annex III to the Service Regulations.

from February 2007, the increased education allowance provided for in Article 71(6) – the complainant effectively requested that the amount of the education allowance paid to her under Article 71(6) be calculated on the basis of the dependent handicapped child allowance, rather than on the basis of the dependent child allowance. In addition, she requested reimbursement under Article 69(10) of the Service Regulations of the fees paid for her daughter's SEN training. The Personnel Administration Department replied on 7 December 2007 that Article 71(6) referred to the dependent children's allowance, not to the dependent handicapped children's allowance, and that therefore the amount payable to her under that Article had been correctly calculated on the basis of the dependent children's allowance. It would nevertheless consider covering certain of the complainant's daughter's SEN needs under Article 69(10). On 20 February 2008 the complainant appealed this decision, requesting that her education allowance be calculated on the basis of the dependent handicapped children's allowance. The Internal Appeals Committee (IAC), to which the matter was referred, unanimously recommended that the appeal be rejected as unfounded. By a letter of 26 July 2010 the complainant was informed of the Administration's decision to accept the IAC's recommendation. That is the impugned decision.

B. The complainant argues that the EPO has failed to show due diligence and to correctly interpret the rules in calculating the amount of her education allowance. Whether on the basis of a literal or a teleological interpretation, the "dependent child allowance" mentioned in Article 71(6) must be understood to refer, in her case, to the dependent handicapped child allowance, which is the actual allowance that she is receiving for her daughter. Consequently, the amount of her entitlement to the education allowance must be calculated on the basis of the dependent handicapped children's allowance, i.e. the higher amount indicated in Annex III to the Service Regulations, not the lower pertaining to the dependent children's allowance. According to the complainant, the EPO's calculation of her entitlement to the education allowance is discriminatory and contrary to the principle of equal treatment, especially when her circumstances are compared to

those of most EPO staff in Munich who are able to send their children to local international schools. She strongly objects to the IAC's characterisation of her daughter's school as a regular school, emphasising that all its staff have special SEN training and that 70 per cent of its pupils have SEN requirements. She notes that, if the EPO has difficulty applying her interpretation of Article 71(6), it could instead decide to apply Article 69(10) and (12), thereby covering 90 per cent of all expenses related to her daughter's education. This, she explains, would be fully justified by the special circumstances of her daughter's situation, i.e. her need to attend a school in the United Kingdom with expertise in SEN, and would be equally helpful to her family.

She requests that her entitlement to the education allowance under Article 71(6) of the Service Regulations be calculated on the basis of the dependent handicapped child allowance, i.e. the amount indicated in table 5, paragraph (2)(b), of Annex III to the Service Regulations. She also requests that the EPO give proper consideration to the alternative financing solution through the application of Article 69(7), (10), (12) and (13) of the Service Regulations. She claims material damages.

C. In its reply the EPO submits that neither a literal interpretation of Article 71(6) of the Service Regulations nor the design of the EPO's set of allowances for children can support the complainant's arguments. It argues that Article 71(6) refers to the dependent children's allowance, not to the dependent handicapped children's allowance, and that the said Article would have been written differently, if the legislator had intended otherwise. It thus asserts that it has correctly calculated the complainant's entitlement to the education allowance on the basis of the dependent child allowance provided for in Article 69(3) to (6). It explains that the education allowance under Article 71 includes the standard educational cost for a child and that expenses arising in connection with a handicapped child's SEN training are covered up to 90 per cent under Article 69(10). It considers that it has fully met its social obligations towards the complainant. Indeed, it has granted her

the dependent handicapped child allowance, which is twice as high as the dependent child allowance, and it has also granted her reimbursement at the rate of 90 per cent of the expenses incurred for her daughter's SEN training in accordance with Article 69(10). It nevertheless denies that the latter provision may allow for the reimbursement of 90 per cent of all expenses related to her daughter's education. It notes that the IAC's characterisation of the complainant's daughter's school as regular was correct, as it was based on the fact that the school is not fully dedicated to SEN teaching. It rejects as unfounded the allegations relating to discrimination and breach of equal treatment.

D. In her rejoinder the complainant presses her pleas. Regarding the relief claimed, she specifies that she seeks material damages in the amount of 51,460 euros and an equal amount in moral damages.

E. In its surrejoinder the EPO maintains its position in full. It invites the Tribunal to dismiss as irreceivable the claim for moral damages, given that the complainant entered it for the first time in her rejoinder.

CONSIDERATIONS

1. The complainant is employed by the EPO and is stationed in Germany. She is a British national. She has a handicapped daughter born on 25 November 1994. In February 2007, the complainant requested payment of a dependent handicapped children's allowance under Article 69 of the EPO's Service Regulations in relation to her handicapped daughter. The complainant's handicapped daughter was being educated in the United Kingdom at a school that was not run only to cater especially for the needs of handicapped children.

The EPO acceded to this request on 12 June 2007. On 21 June 2007, the complainant requested the recalculation of an education allowance payable to her under Article 71 of the Service Regulations in relation to the education of her handicapped daughter. Article 69 confers a benefit on permanent employees with children. Two benefits are provided for in Article 69. One is an allowance for dependent children. The other

is an allowance for dependent handicapped children. As at 1 July 2006, the dependent handicapped child allowance (542.08 euros) was double the dependent child allowance (271.04 euros).

The basis of the complainant's request for recalculation of the educational allowance was this. The allowance had earlier been calculated by reference to the dependent child allowance. The complainant requested that it be recalculated by reference to the dependent handicapped child allowance that the EPO had then recently agreed to pay her. The educational allowance payable to the complainant would have increased significantly if recalculated on the basis advanced by the complainant. This request was refused by the EPO on 7 December 2007.

The complainant lodged an internal appeal against the 7 December 2007 refusal in a notice of appeal dated 20 February 2008. On 15 June 2010 the IAC published its opinion. It rejected the appeal as unfounded. By letter dated 26 July 2010, the EPO rejected the appeal as unfounded. This is the impugned decision.

2. It is convenient to set out the relevant provisions in the Service Regulations. Article 69 provides:

"**Dependants' allowance – Children**

(1) A dependants' allowance shall be payable, under the conditions laid down in this Article, to a permanent employee who has:

I. one or more dependent children;

II. one or more dependent handicapped children.

(2) Not more than one dependants' allowance shall be paid in respect of any dependent child within the meaning of this Article."

The remainder of the Article is divided into two sections. The first section is headed "I. Dependent children". This section specifies the circumstances in which the allowance is payable and declares in Article 69(6) that: "The amount of the allowance shall be as set out in Annex III." The second section provides:

"II. Dependent Handicapped Children

(7) A permanent employee with a dependent child medically certified as suffering from a handicap necessitating either special care, supervision or special education or training, not provided free of charge, may claim a dependent handicapped children's allowance and reimbursement of educational or training expenses for said child under the conditions laid down in the following paragraphs, whatever the age of the child.

(8) The decision to pay this allowance and this reimbursement shall be taken by the President of the Office after consulting the Medical Committee provided for in Article 89 as to the nature and degree of the handicap. This decision shall determine the period for which the permanent employee shall be granted these benefits; it shall be subject to periodical review.

(9) The criterion for assessing entitlement to these benefits shall be the serious and continuing impairment of the physical or mental activities. Children may be deemed to be handicapped when they suffer from:

[…]

(10) A claim for reimbursement shall be made solely in relation to expenses incurred in order to provide the handicapped child with education or training specially adapted to his or her needs and designed to obtain the highest possible level of functional capability and which are not of the same kind as those taken into account for the purposes of the education allowance.

The President of the Office shall satisfy himself as to whether the expenses for which reimbursement is claimed are reasonable.

(11) The amount of the dependent handicapped children's allowance shall be as set out in Annex III; it shall not be paid concurrently with the dependent children's allowance.

(12) Reimbursement of educational or training expenses above shall be at the rate of 90 per cent of the expenses defined in paragraph 10.

(13) The amount of expenses incurred as defined in paragraph 10 shall be calculated after deduction of any payment received from any other source for the same purpose."

3. Article 71 of the Service Regulations confers a benefit on permanent staff called the "Education allowance". The Article provides:

"**Education allowance**

I. Conditions of award

(1) Permanent employees – with the exception of those who are nationals of the country in which they are serving – may request payment of the education allowance, under the terms set out below, in respect of each

dependent child, within the meaning of Article 69, regularly attending an educational establishment on a full-time basis.

(2) […]

(3) […]

(4) […]

II. Expenditure for educational purposes

(5) Within the limits prescribed in Section III, the education allowance shall cover the following:

a) direct education costs, namely registration and examination fees, and general fees for schooling and education charged and invoiced by the educational establishment;

b) miscellaneous education costs, namely all other expenses connected with education, such as expenses for board and lodging, books, private tuition and daily travel;

c) travel expenses between the educational establishment and the place of employment.

III. Amount of the education allowance

(6) The amount of the education allowance shall be made up of:

a) reimbursement of the total (pre-school, primary and secondary education) or 70% (post-secondary education) of direct education costs up to a limit of 2.5 times the annual dependent child allowance applying in the country where the studies are pursued. This limit shall be raised to 3 times the dependent child allowance where the direct education costs submitted for reimbursement include expenses for half-board, and to 3.5 times the dependent child allowance where the direct education costs submitted for reimbursement include expenses for board and lodging;

b) a lump sum intended to cover miscellaneous education costs and expressed as a percentage of the dependent child allowance applying in the country where the studies are pursued, as shown in the table below:

[…]"

4. As noted earlier, an amount was fixed in the Service Regulations (in relation to Germany) for the dependent child allowance and another for the dependent handicapped child allowance. These amounts were specified in table 5 of Annex III in paragraphs 2(a) and 2(b) respectively.

5. It is necessary to describe some of the factual background in a little more detail. Firstly, the school the complainant's handicapped daughter was attending in the United Kingdom was approved for the admission of pupils who had statements of SEN for specific learning difficulties. In November 2005 about 70 per cent of the pupils had these special educational needs.

6. Secondly, in her request of 21 June 2007, the complainant claimed reimbursement for the part of the additional school fees paid for SEN. This claim was made under Article 69(10) of the Service Regulations. In the EPO response of 7 December 2007, the Head of the Personnel Administration Department indicated that the EPO "may be able to treat certain costs that you have under the provisions of Article 69.10, in particular the fees for Special Education Needs" and further information was sought. However in the response the Head rejected the proposition that the handicapped child allowance could "be used as the basis for calculating expenses under the rules applying to the educational allowance". He said it could not be. It was that latter issue only which was raised by the complainant in her notice of internal appeal filed on 20 February 2008 and remains the only issue to be determined by the Tribunal. This is apparently acknowledged by the complainant in her rejoinder in these proceedings when she says "the true issue is and remains a simple calculation of Article 71.6 based on Annex III Table 5.2b". Notwithstanding this, the complainant stated in her complaint form under the heading "Relief claimed" that the "EPO has also not given proper consideration to the alternative funding solutions cited in Art. 69 (7, 10, 12 and 13)" and adverted to this issue at various points in her pleas. This matter is discussed later.

7. The issue raised by the complainant is fundamentally one of interpretation. The applicable principles have been discussed by the Tribunal in many judgments. The primary rule is that words in a statutory text are to be given their obvious and ordinary meaning and any ambiguity in a provision should be construed in favour of staff and not of the Organisation (see Judgment 2276, consideration 4). The

construction of any instrument of this character entails the Tribunal endeavouring to ascertain the objectives sought to be achieved by the instrument having regard to the language used. In the present case, the central issue is the meaning of Article 71(6) and, in particular, the meaning of the words "dependent child allowance". Article 69 commences with a description of the circumstances in which a "dependants' allowance" is payable. The circumstances embrace a permanent employee with a dependent child or a dependent child with a particular characteristic, namely that the child is handicapped. By way of first impression, it might be thought that the words "dependent child allowance" in Article 71(6) comprehend the allowance payable in either of these circumstances. If so, the allowance paid to a permanent employee with a handicapped child could be the yardstick for calculating the education allowance under Article 71(6) in relation to a child who is handicapped.

8. However other elements of Article 69 strongly suggest this first impression is wrong. In particular, Article 69(7) and (10) makes special provision for the reimbursement of expenses in relation to the education of a handicapped child. This provision is discretionary and is influenced by the "nature and degree of the handicap" (Article 69(8)). It is intended to compensate for the costs of providing "the handicapped child with education or training specially adapted to his or her needs and designed to obtain the highest possible level of functional capability and which are not of the same kind as those taken into account for the purposes of the educational allowance" (Article 69(10)).

9. It is tolerably clear that any sum provided by way of reimbursement is intended to augment or supplement the educational allowance otherwise payable. Indeed the concluding words of Article 69(10) ("which are not of the same kind as those taken into account for the purposes of the educational allowance") make this quite clear. Thus the provisions dealing with a dependent handicapped child in Article 69, insofar as they deal with education, are intended to supplement the provisions of Article 71. It is highly unlikely that the framers of these provisions had in mind a special provision providing

for supplementary payments (by way of reimbursement) for the education of a handicapped child and, in addition, the calculation of the education allowance payable in relation to a handicapped child by reference to the higher and special allowance payable for such a child under Article 69. As a matter of both logic and policy such an outcome is highly unlikely to have been intended. These considerations point to the expression "dependent child allowance" in Article 71(6) being a reference only to the allowance payable under Article 69(3) to (6). Another textual consideration points in the same direction. In Article 69(11) a clear distinction is drawn between the "dependent children's allowance" and the "handicapped children's allowance". The former is the allowance payable in the ordinary course for a dependent child while the latter is the allowance payable in unusual circumstances, namely when the child is handicapped.

10. The Tribunal rejects the complainant's contention that the education allowance payable under Article 71(6) should, in her circumstances, be calculated by reference to the dependent handicapped child allowance to which she was entitled. The approach of the EPO was correct. However one conclusion of the IAC should be noted. It said, in effect, that the school the complainant's handicapped daughter was attending, was a "regular" school. As a matter of fact, this is a mischaracterisation of the school that has a strong orientation towards the education of children with learning difficulties. In addition it is highly arguable that the operation of Article 69(10) is based on the nature of the education or training provided to the child (specially adapted in the way described in the article) and not based on the broad characterisation of the school providing the education or training. The IAC implied that in those circumstances (that it was a regular school) the complainant was not entitled to reimbursement for educational expenses under Article 69(10). This approach was based on a false premise and, in any event, the IAC was addressing an issue not raised in the internal appeal. Indeed as noted earlier, the Head of the Personnel Administration Department adverted, in his e-mail of 7 December 2007, to the possibility that payment by way of reimbursement might be made under Article 69(10). Whether and in what way reimbursement

might be made under that provision to the complainant is initially a matter between the EPO and the complainant to resolve. However it is not an issue before the Tribunal because, amongst other things, the complainant has not exhausted her internal remedies in relation to this question.

11. In addition, to the extent that the complainant raised an issue of discrimination or unequal treatment in her pleas, that is an issue that would really arise having regard to the way the EPO applies Article 69(10). Superficially, Articles 69 and 71 provide different treatment for people in relevantly different situations (parents of handicapped children). However whether this difference of treatment is appropriate and adapted to the difference can be influenced by whether decisions made applying rules make reasonable provision for the difference in situation (see Judgment 1990, consideration 7). But, in this case, that can only be assessed after a discretionary decision has been made by the EPO under Article 69(10) having regard to the decision actually made. It is not entirely clear whether such a decision has been made and, in any event, if it has been it is not expressly challenged in these proceedings and was not challenged in the internal appeal.

12. The complainant's complaint should be dismissed as unfounded. Three other EPO employees have sought to intervene. However none of them have put forward any evidence establishing that they are in the same situation in fact and in law as the complainant (see Judgment 2237, consideration 10). Accordingly, each application to intervene is dismissed.

DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ