

EIGHTY-SIXTH SESSION

In re Mahr von Staszewski

Judgment 1835

The Administrative Tribunal,

Considering the complaint filed by Mr. Guillermo German Rodolfo Mahr von Staszewski against the European Patent Organisation (EPO) on 2 February 1998 and corrected on 16 February, the EPO's reply of 6 May, the complainant's rejoinder of 12 June and the Organisation's surrejoinder of 25 August 1998;

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, who was born in 1949, is a citizen of both Argentina and Germany. On 1 January 1991 he joined the European Patent Office, the secretariat of the EPO in Munich. At the material time he was an examiner of patents at grade A3.

On 23 October 1995 he claimed payment under Article 71 of the Service Regulations of an education allowance for his son, who was taking combined courses in engineering and economics (*Wirtschaftsingenieurwesen*) at the University of Kaiserslautern, in Germany. In its 1993 version Article 71 reads in part:

"(1) Permanent employees entitled to the expatriation allowance - with the exception of those who are nationals of the country in which they are serving - may request payment of the education allowance in respect of each dependent child, within the meaning of the Service Regulations, regularly attending an educational establishment on a full time basis.

(2) By way of exception, permanent employees who are nationals of the country in which they are serving or who are not entitled to the expatriation allowance may request payment of the education allowance provided that the two following conditions are met:

a) the permanent employee's duty station is not less than 80 km distant from any school or university corresponding to the child's education cycle;

b) the permanent employee's duty station is not less than 80 km distant from the place of domicile at the time of recruitment."

By a letter of 5 December 1995 an official of the Remuneration Department refused the complainant's claim on the grounds that the University of Munich offered courses in engineering and economics and he therefore failed to meet the condition in 71(2)(a). By a letter of 8 December 1995 to the President of the Office he appealed. He argued that Munich and other universities in Bavaria were not offering the same course as Kaiserslautern, that at Munich his son would have had to follow separate courses, one in engineering and one in economics, and that he therefore qualified for the allowance under 71(2). By a letter of 11 November 1997, the decision under challenge, the Director of Personnel Development told him that on the Appeals Committee's unanimous recommendation of 30 September the President was rejecting his appeal.

B. The complainant submits that the case turns on the construction to be put on the words "school or university corresponding to the child's education cycle" in 71(2)(a). He contends that to qualify for the same degree at the University of Munich his son would need, before reading economics, to get a diploma in engineering. For that he would have to take a purely technical course, which was not at all what he wanted and which he would have been unable to do anyway, his secondary education not being technical. So the "education cycle" offered by the

University of Munich was not the same as the one available at Kaiserslautern.

The complainant points out that the EPO has granted applications for education allowances for students who because of a *numerus clausus* could not enrol at a university at the employee's duty station. The *numerus clausus* is just a "temporary limitation" that merely delays graduation. So the EPO obviously takes the view that the time needed to get a degree does matter. And it is a criterion that is relevant to the case of the complainant's son because a degree takes much longer at Munich than at Kaiserslautern.

The complainant seeks the quashing of the impugned decision and the grant of the education allowance.

C. In its reply the EPO submits that the President's decision, being a discretionary one, is subject only to limited review. Article 71(2) applies only "by way of exception" when suitable education is unavailable at the duty station. Since Munich is an important university city the EPO puts a narrow construction on the rule: it takes the term "education cycle" to refer to the level and broad field of study, not to "subjective" criteria such as the length or substance of courses.

In applying Article 71(2) it merely checks whether the chosen courses are available at the duty station. Here the courses differ in that Kaiserslautern offers combined ones and Munich successive ones. But the degree is the same and so the length of the courses is immaterial. The *numerus clausus* bars the student from the chosen course and is therefore akin to *force majeure*.

D. In his rejoinder the complainant challenges the EPO's interpretation of Article 71. He contends that exceptions made thereunder are not at the discretion of the President, to whom the provision does not even refer. Nor is it true to say that it applies only "by way of exception" or in the case of *force majeure*. The narrow interpretation is unwarranted because the text is clear.

Citing a pamphlet from the German centre for university admissions, the complainant says that anyone who waits long enough will eventually get into the chosen university. The student just has to wait before starting study, and that affords sufficient grounds for the grant of the allowance. The complainant's son did not enrol at Kaiserslautern because of any preference of his own: he was driven to do so by *force majeure*.

E. In its surrejoinder the EPO maintains that where, as here, a provision of the Service Regulations has to be construed the matter is perforce at the President's discretion. It observes that it spoke of *force majeure* only in reference to the *numerus clausus*: it is not saying that *force majeure* is a condition of payment of the allowance. At all events it was the choice of the complainant's son to enrol at Kaiserslautern.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office (EPO) on 1 January 1991. He is stationed in Munich.

Article 71(1) and (2) of the Service Regulations are reproduced in A above.

On 23 October 1995 the complainant claimed payment of the education allowance provided for in Article 71(2) towards the costs of his son's taking combined courses in engineering and economics (*Wirtschaftsingenieurwesen*) at the University of Kaiserslautern.

2. On 5 December 1995 the Remuneration Department refused to pay him the allowance. On 8 December 1995 he filed an internal appeal and by the decision of 11 November 1997 that is now under challenge the President of the Office rejected it.

3. The case is about the construction to be put on Article 71(2)(a). The complainant contends that he is entitled to the allowance on the grounds that his son is enrolled at Kaiserslautern for a course that is not available at Munich, his duty station. The EPO replies that the University of Munich does offer a course in engineering and another in economics and the fact that it does not combine the two disciplines into a single course does not warrant payment of the allowance.

4. The rule allows the grant of the allowance in exceptional circumstances, and how it is to be applied is at the discretion of the President of the Office. So the Tribunal will ordinarily interfere with his decision only in the

exercise of its limited power of review. It will do so where the decision shows a procedural flaw or a mistake of fact or law, or overlooks some material fact, or amounts to misuse of authority, or rests on mistaken findings of fact.

5. Here the complainant is contending that the President made a mistake of law and acted arbitrarily in interpreting Article 71(2) in his case. The Tribunal is satisfied that the impugned decision does not show either of those fatal flaws: the EPO's interpretation is the right one.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Julio Barberis, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Julio Barberis

James K. Hugessen

A.B. Gardner