

**119th Session**

**Judgment No. 3434**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. R. against the European Patent Organisation (EPO) on 4 April 2011 and corrected on 24 June, the EPO's reply of 10 October, the complainant's rejoinder dated 30 November 2011 and the EPO's surrejoinder of 22 March 2012;

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 German national, joined the EPO in 1999 in The Hague. In September 2005 he was transferred to Berlin at his own request, due to on-going health problems. He ceased to perform his duties with effect from 1 July 2009 on grounds of invalidity.

In the autumn of 2009 the complainant moved to Rio de Janeiro, Brazil, with his Brazilian wife and his three school-age sons. As the Medical Committee had recognized that the complainant's children suffered from a particular condition, the EPO reimbursed the complainant, until the date when he ceased to perform his duties, the school costs foreseen under Article 120a of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations"), which enabled two of his sons to attend British schools in The Hague and Berlin.

On 8 July 2009, before leaving Germany, the complainant requested payment of the fees of international schools in Brazil, such as the British School in Rio de Janeiro, either on the basis of Article 71(1) and/or (2), or on the basis of Article 120a of the Service Regulations. He stated that his sons had special requirements in respect of school education and pleaded that this was a case of hardship, as his transfer to Berlin had been decided solely because of his illness and he would have been paid the education allowance under Article 71(1) had he still been employed in The Hague directly prior to being assigned non-active status. He also explained that he intended to move to Brazil because this would allow his wife to receive support from her family in order for her to cope with assisting him, as well as their children.

By a letter of 20 October 2009 the complainant was informed that his request could not be granted, as the eligibility requirements of both Articles 71 and 120a were not satisfied in his case. He was advised that he would be eligible to claim payment of the school fees under Article 120a if his children continued to attend the British school in Berlin. He was further informed that he could apply for the dependent handicapped children's allowance under Article 69(7)-(13) and could be reimbursed if the eligibility requirements were satisfied.

In November and December 2009 the complainant requested the review of this decision and claimed reimbursement of the school fees for his children attending the British school in Rio de Janeiro, or alternatively, the German School of Rio de Janeiro, under Articles 28, 71 or 120a of the Service Regulations. By a letter of 1 February 2010 the complainant was informed that his requests had been rejected and that his appeal had been referred to the Internal Appeals Committee (hereinafter IAC) for an opinion.

By an email of 4 April 2010, the complainant requested the payment of the school fees for his children under Articles 69(7)-(10), of the Service Regulations, stating that if his request could not be met, it should be regarded as an internal appeal. In subsequent correspondence, he was informed that, for the reimbursement of the school fees under Article 69(7)-(10), he should supply evidence that

the expenses related to education or training costs incurred for his children were specially adapted to their needs and designed to obtain the highest possible level of functional capability. He was also informed that the school fees in question could not be of the same kind as education costs which would be reimbursable to an eligible claimant under Article 71. The complainant replied in early May, explaining that his children's medical condition required that they remain in the school system and the language with which they were familiar, namely the British School in Rio de Janeiro. He pointed out that he had already submitted a medical report by a child psychiatrist and considered that no further evidence was necessary.

By a letter of 7 May 2010 the complainant was informed that his request had been rejected as unfounded. The British School in Rio de Janeiro was a general educational establishment, he had not shown that it provided education or training specially adapted to the particular condition of his children, and the school fees were of the same kind as those taken into account for the purposes of the educational allowance under Article 71. As a result, the requirements of Article 69(7)-(10) of the Service Regulations were not satisfied.

In a single report of 12 November 2010 the IAC recommended by a majority that both of the complainant's appeals be dismissed as unfounded. A minority recommended granting the requested reimbursements for each child under Article 71(1) of the Service Regulations on the ground that the concept of "place of employment" was unclear for staff members who were no longer active and that, as the provision was unclear, the *contra proferentem* rule should apply. The minority also recommended awarding the complainant 5,000 euros in moral damages and 500 euros in costs.

By a letter of 11 January 2011 the complainant was informed that the President had decided to follow the majority opinion and to dismiss his appeals as unfounded. That is the impugned decision.

B. Referring in particular to his submissions before the IAC and to the IAC minority opinion, the complainant submits that Article 71(1) of the Service Regulations is applicable to his case. He points out that,

while he served in the country of his nationality during a part of his career, that situation changed when he was declared invalid and stopped active service. He was transferred from the Netherlands to Germany exclusively for health reasons and he is no longer serving in Germany. Therefore, the EPO's selection of Germany, rather than the Netherlands, for the purposes of Article 71 is arbitrary. He also submits that reimbursement under Article 120a is not conditioned by active or non-active status. In his view, for the EPO, as an international organisation employing international staff, to expect retired staff members or those suffering from invalidity to remain in their place of employment in order to keep their children in the same education system and language, is a disproportionate limitation of their right to freedom of movement. It also constitutes a breach of EPO's duty of care, and a breach of the principle of equal treatment and non-discrimination. The EPO's narrow interpretation of Article 69(7)-(13) of the Service Regulations is contrary to Articles 23 and 28 of the United Nations Convention on the Rights of the Child of 20 November 1989. He denies that there is insufficient medical evidence to justify reimbursement of the school fees, as a medical report is available and recommends that the children be kept in the same educational system and language in which they have received their education until now. He asserts that, contrary to the EPO's argument in the internal appeal, his move to Brazil was for reasons beyond his control.

The complainant asks the Tribunal to order the reimbursement of the school fees for his three children in the British School of Rio de Janeiro. Subsidiarily, he asks for the reimbursement of the school fees for his three children in the German School of Rio de Janeiro. He also claims damages and costs.

C. In its reply the EPO submits that, as a German national who served in Germany, the complainant is clearly excluded from the scope of Article 71(1). While this provision does not determine how the place of employment is identified for staff members no longer in active service, that does not justify the application of the *contra proferentem* rule. A systemic interpretation of the provision leads to

the conclusion that the last place of employment should be the basis for the assessment. Furthermore, the complainant's situation does not meet the first of two cumulative conditions laid down in the exception contained in Article 71(2), as his place of employment was not less than 80 km distant from any school or university corresponding to the child's educational stage.

As regards Article 120a, the complainant was informed on numerous occasions that he could have continued to receive benefits under that article had he and his family remained in Berlin. Article 120a, which was introduced to supplement Article 71, applies to exceptional situations and, therefore, must be interpreted restrictively. The requirement that the school be "in the immediate district of a Branch of the Office" cannot be disregarded. The complainant's decision to move to Rio de Janeiro rendered him ineligible for reimbursement under Article 120a. The EPO adds that he has not shown that his move to Brazil was for reasons beyond his control. On the contrary, the special educational needs of his children would have justified staying in Berlin and the fact that the climate in Brazil is beneficial to his health is not compelling. Article 69(10) sets the parameters which have to be met in order to benefit from the dependent handicapped children's allowance, namely that the expenses must have been "incurred in order to provide the handicapped child with education or training specially adapted to his [...] 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 documents submitted by the complainant do not provide sufficient evidence that remaining in the British education system is a medical necessity for his children. Article 69(7)-(13) provides specifically for reimbursement of the costs incurred in a special facility in cases where a handicap does not permit the attendance of an ordinary educational establishment. Even where an ordinary school is attended, reimbursement of the costs under Article 69(10) is not excluded, provided that special therapy programs are included alongside the official curriculum and can be distinguished from the regular non-reimbursable education costs. The complainant did not provide information regarding such

therapy costs. It notes that he receives the increased dependent handicapped children's allowance for all three of his sons. The UN Convention on the Rights of the Child does not apply to the EPO. In any case, the complainant cannot derive any right to a specific social benefit from that instrument. The application of the Service Regulations to the complainant's case was not unfair, nor did it constitute a breach of the EPO's duty of care.

D. In his rejoinder the complainant presses his pleas.

E. In its surrejoinder EPO maintains its position in full.

#### CONSIDERATIONS

1. The issue in this case is concerned with the reimbursement of school fees by the EPO for the special needs of the complainant's children. The complainant is a former employee, who has ceased active service by reason of invalidity. He relocated from Germany, where he last worked, to Brazil. His wife is Brazilian. He seeks the reimbursement of fees that were paid for the attendance of his three children at the British School, or, alternatively, the German School in Rio de Janeiro, Brazil. The children, who were diagnosed with a particular condition, were educated in British Schools in The Hague and in Berlin when the complainant worked for the EPO in those countries. Their school fees were met by the EPO in both places pursuant to Article 120a of the Service Regulations. The complainant had commenced employment with the EPO's Office in The Hague in 1999. He transferred to the Berlin Office in 2005 at his request because of the health problem which eventually led to his invalidity. It was after he ceased active service with the EPO, in June 2009, that he relocated to Brazil. The complainant receives the dependant's allowance for his three dependent children under Article 69, Section II, of the Service Regulations.

2. The complainant challenges the impugned decision dated 11 January 2011, on his two internal appeals which were joined at the

complainant's request. In that decision, the President of the EPO accepted the recommendation of the majority of the IAC to reject the appeals. He asks the Tribunal to set aside the impugned decision on the grounds that it was based on the wrong application of the relevant EPO Service Regulations, involved a breach of the EPO's duty of care towards him and amounted to discriminatory and unequal treatment.

3. One of the complainant's internal appeals was concerned with his claim for the reimbursement of school fees for his children's attendance at an international school, such as the British School in Rio de Janeiro. That claim was made pursuant to Articles 28, 71 or 120a of the Service Regulations. His second internal appeal was against the rejection of his further request for the EPO to meet his children's school fees, under Article 69, Section II, of the Service Regulations, at the British School in Rio de Janeiro. He referred in particular to Article 69(7) and (10). This request was rejected mainly on the ground that that school was a general educational establishment and he had not shown that it provided education or training to meet his children's special needs.

4. It is noteworthy that while the majority of the IAC recommended the rejection of the complainant's two internal appeals, which the President accepted, the minority recommended the reimbursement of the fees under Article 71(1) of the Service Regulations. The minority so found by applying the *contra proferentem* rule on the ground that the provision is ambiguous.

5. The determination of the issue that arises on this complaint hinges on the interpretation of Articles 28, 69 or 120a and 71 of the Service Regulations, which govern the payment of education allowances in the EPO. The Tribunal will return to this shortly. Preliminary, however, it is observed that the submissions that are contained in the brief supporting the complaint refer in part to explanations and submissions which were provided in other documents. On previous occasions, the Tribunal drew attention to Article 6(1)(b) of the Rules of the Tribunal, which states that arguments

of fact and law must appear in the complaint itself, supplemented in the rejoinder if necessary. It was stated in Judgment 2264, under 3(e), for example, that those arguments may not consist of a mere reference to other documents, as that would be contrary to the Rules and would render it difficult for the other party to clearly understand the complainant's pleas. Such references are acceptable only as illustrations. This is particularly so where, as in the present case, the annexes are bulky but are not helpfully demarcated to facilitate identification.

6. The applicable principles for the interpretation of the EPO's provisions for the reimbursement of school fees have been set out, for example, in Judgment 3310, under 7, as follows:

“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.”

7. The complainant submits that the provisions that govern education allowances and the payment of school fees are not drafted with clarity but they have clear social and practical purposes. According to the complainant, they are to ensure that, in order to recruit international staff and to ensure their mobility, there are systems that guarantee that their children can benefit from consistent and appropriate schooling wherever the parents are posted. This in turn underlies the system of international schools. They should therefore be interpreted widely with these things in mind and in favour of the employee in order to promote the social and practical purposes.

8. The Tribunal does not find that there is any ambiguity or lack of clarity in Article 28 of the Service Regulations. Article 28(1) is intended to protect a serving or former permanent employee or household members of his or her family who suffer injury as a result of criminal or tortious acts to the person or property, by reason of the employee's office or duties. Under Article 28(2), the EPO is to compensate a serving or former employee who suffers injury “by

reason of his office or duties”. Article 28 clearly cannot assist the complainant. In the first place, the payment or reimbursement of school fees is not an injury to which this provision refers. Additionally, no reasons of office or duties attach to the complainant’s present non-active status. Accordingly, the plea based on Article 28 of the Service Regulations is unfounded.

9. Article 69 of the Service Regulations is concerned with dependent children allowances. The complainant relies particularly on Article 69(7) and (10). The effect of these provisions is clear. The Tribunal put them into context when it stated as follows in Judgment 3310, under 8:

“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)).”

10. It is pellucid from these words that the critical determinant of entitlement to reimbursement under these provisions is the nature of the education or training provided to the child. The reimbursement is in respect of education or training that is especially adapted to the special needs of the child. It is not concerned with the characterization of the institution or with the fact of disability *per se*. Rather, it is for payments incurred to meet the special education or training which their special needs require.

11. The EPO has rejected the request for reimbursement under Article 69(7) and (10) of the Service Regulations. It states, in effect, that whilst the evidence which the complainant has provided emphasises the type of school which the children attend, it does not show that the fees for which the complainant seeks reimbursement were incurred for their education or training in a program that meets their special needs. Neither has the EPO accepted that the requirement

for entitlement is met by the complainant's assertion that the diagnosis of their particular condition necessitates the continued education of the children in the British education system to which they had grown accustomed in Europe or in a German School because of their familiarity with that language. The Tribunal finds the decision by the EPO to reject the complainant's request under Article 69(7) and (10) of the Service Regulations to be within the discretion of the EPO. Accordingly, the complaint is unfounded on this ground as well.

12. Consideration of entitlement to the education allowance under Article 71 of the Service Regulations focusses attention on paragraphs (1) and (2) of that article. They state as follows:

- “(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) By way of exception, permanent employees who are nationals of the country in which they are serving may request payment of the education allowance provided that the following two conditions are met:
  - (a) The permanent employee's place of employment is not less than 80 km distant from any school or university corresponding to the child's educational stage;
  - (b) The permanent employee's place of employment is not less than 80 km distant from the place of domicile at the time of recruitment.”

13. Although the provisions refer to “permanent employees”, the EPO does not make an issue in the present case of whether the complainant's present status meets that definition. It has considered whether he qualifies for the allowance under Article 71. Although the complainant submits that these provisions should be given a wide interpretation, they are quite clear and unambiguous leaving no ground for the application of the *contra proferentem* rule as the minority of the IAC did. They bear plain interpretation in their context, as recent Judgments by the Tribunal confirm.

14. Judgment 3358, under 5, is quite instructive on the interpretation of Article 71(1). It states as follows:

“5. On the merits, the complainant submits that Article 71, paragraph 1, of the Service Regulations is ambiguous in its wording and should be interpreted ‘to the detriment of its author and in favour of the persons to whom it applies’. He also alleges a breach of the principle of equality. In his view, it is contrary to that principle to accord different treatment to employees with dual nationality including German nationality, than to employees with only a foreign nationality, since the purpose of the education allowance is to enable employees ‘whose roots lie abroad’ to have their children educated in establishments which offer teaching in their mother tongue. The complainant also argues that he should have been treated more as a French national than a German national for the purpose of the allowance. This solution, he says, would be particularly appropriate in his case, since he has ‘strong French roots’, is married to a woman of French nationality and has children living in Munich who will learn the German language without any effort on his part, whereas he has to ‘pay extra attention to ensuring that they learn French’. The complainant refers to a preparatory document for an amendment to Article 71 of the Service Regulations, leaving the EPO ‘a wide margin of interpretation’ with respect to dual nationals in the same situation as himself.

This line of argument is unconvincing. The wording of Article 71, paragraph 1, of the Service Regulations is unambiguous and not open to interpretation. It excludes from entitlement to the education allowance permanent employees ‘who are nationals of the country in which they are serving’.”

15. As a German national, the complainant was excluded from entitlement to receive the education allowance under this provision at his last duty station in Berlin. He is also now excluded from entitlement under this provision.

16. Article 71(2) of the Service Regulations provides two compendious pre-conditions, which must both be satisfied, for entitlement to education allowance by a permanent employee who is a national of the country in which he or she is serving. The Tribunal’s approach to the interpretation of Article 71(2) is mirrored by the following statement in Judgment 3195, under 8:

“The Tribunal’s approach is that the review of a decision of the Organisation concerning the operation of the exception is narrow in compass. It will not

involve the substitution by the Tribunal of the view taken by the President of the Office. The Tribunal will intervene if there has been a procedural error, a mistake of fact or law, the drawing of a clearly mistaken conclusion or misuse of authority (see Judgment 2357, under 4). It is no answer to say, as the complainant does, that the EPO ‘has already brought [him] within the rule’.”

17. In Judgment 2564, under 3, the Tribunal stated that the purpose of Article 71(2)(b) is to provide allowances to help children to study in their country of origin if their parents are stationed elsewhere, and not to help children to study abroad when their parents are stationed in their own country. On its plain words, the complainant does not qualify for the education allowance under Article 71(2)(b) of the Service Regulations. Given that the complainant must meet the requirements of both limbs of Article 71(2) in order to qualify and he does not meet Article 71(2)(b), his plea based on this provision is unfounded.

18. Article 120a of the Service Regulations relevantly states that where an employee is unable to have his child educated at a European School “for reasons beyond his control”, the Office shall on request pay the fees charged by an international school for educating the child. It further provides that the Office shall pay fees in respect of schools whose level of education corresponds to that of a European School and “which are in the immediate district of a branch of the Office” and are not run on a profit-making basis. Entitlement to the education allowance under Article 120a arises if both requirements are met.

19. The EPO is not averse to considering Berlin, the last branch of the Office of the complainant, for the purpose of this provision. It states that it would have continued to pay the fees charged for the education of the complainant’s children at the British School in Berlin had he remained there in order to provide for the continuation of allowances of a social nature, as it does for employees who are in non-active status. It however insists that the complainant does not now meet the requirement because the British or German Schools in Rio de Janeiro are not in the immediate vicinity of a branch of the Office.

That is not an unreasonable interpretation and application of the rule on the plain words of the provision.

20. The EPO has also rejected the complainant's request to pay for his children's education at the British or German Schools in Rio de Janeiro, under Article 120a, on the ground that the complainant has not shown that it is not possible to have the children educated at a European School "for reasons beyond his control". It does not accept his reasons that he relocated to Brazil for more convenient family care; the availability of a family support structure for himself and his children given their disabilities, and a climate that is more conducive to his health, as sufficient evidence that they are not now being educated at a European School for reasons beyond his control. The EPO could reasonably have made that decision to deny the request for the education allowance, as it has, on the ground that the factors put forward by the complainant reflect convenience, rather than reasons beyond his control. Accordingly, the complainant's plea that his request met the requirements of Article 120a of the Service Regulations is unfounded.

21. The complainant urges the Tribunal to find that a wide approach to the interpretation of Articles 28, 69, 71 and/or 120a of the Service Regulations is desirable in the interest of not restricting the freedom of movement of pensioners, as he is, in violation of their fundamental rights and in breach of the EPO's duty of care to him as such. He argues in effect that, given the issues that are raised, a decision that is not in his favour would fail to meet the standards of the UN Convention on the Rights of the Child; it would be discriminatory and would lead to unequal treatment.

22. The Tribunal has consistently stated that the staff regulations and staff rules of an international organisation are to be interpreted without resort to international instruments. Such instruments bind State Parties. Moreover, consistent precedent has it that discriminatory or unequal treatment does not inhere in the EPO's and similar provisions for education allowances. This is borne out in the

statements that are reproduced in consideration 14 of this Judgment, citing Judgment 3358, under 5, on the interpretation of Article 71(1). Similarly, in Judgment 2638, under 9, the Tribunal made it clear that the provisions for education allowances are not discriminatory because they accrue to staff members who are non-nationals in the countries in which they are assigned, which may not accrue to nationals working in their own countries. This, as the Tribunal states, is because the principle of equality must not lead to their being treated in identical manner when a difference in treatment is appropriate and adapted.

23. The following statement by the Tribunal in Judgment 2870, under 10, in relation to Articles 71 and 120a, is also instructive on this issue:

“The complainants argue that Article 120a indicates that nationality is an irrelevant distinction and that the EPO accepts that that is so. On the contrary, Articles 71(2) and 120a recognise that, at least in the circumstances therein specified, the educational needs of the children of nationals may equate to those of non-nationals and that nationals and non-nationals should, to that extent, be treated equally. Similarly, Article 71(4) provides that the education allowance is not payable in respect of ‘a child attending a European school at the place of employment or where the education costs are covered under Article 120a’, thereby also treating nationals and non-nationals equally in those circumstances.”

24. Accordingly, the plea of discriminatory or unequal treatment is unfounded, as is the plea based on an alleged breach of the EPO’s duty of care towards the complainant, which he has not proved.

25. In the foregoing premises, the complaint must be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

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