

**B.-D. R.**

**v.**

**EPO**

**123rd Session**

**Judgment No. 3781**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs I. M. B.-D. R. against the European Patent Organisation (EPO) on 23 January 2012 and corrected on 10 February, the EPO's reply of 1 June, the complainant's rejoinder of 3 July and the EPO's surrejoinder of 10 August 2012;

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 challenges the EPO's refusal to reimburse her for school fees paid in respect of two dependent children.

At the material time the complainant, a permanent employee of the European Patent Office, the EPO's secretariat, had three dependent children. Two of her children, "A" and "B", had attended the European School in Munich (ESM), but the complainant removed them from that school in 2002 and 2005, respectively, in order to enrol them in the Munich International School (MIS). "A" attended the MIS for the school years 2002-2007 and "B" attended for the school years 2005-2008.

In a letter of 30 May 2008 the complainant requested, under Article 120a of the Service Regulations for permanent employees of the European Patent Office, full reimbursement of the school fees charged

by the MIS for both “A” and “B”. In the event that her request was refused, she asked that her letter be treated as an internal appeal.

By a letter dated 16 July 2008 the complainant was informed that the President of the Office considered that, for the period prior to the school year 2007-2008, her request for reimbursement was not admissible as it had not been made within the applicable time limit. In addition, her request could not be granted because the conditions for reimbursement under Article 120a were not satisfied. The matter had therefore been forwarded to the Internal Appeals Committee (IAC) for an opinion.

In an opinion of 26 August 2011, a majority of the IAC members found that the appeal was admissible only insofar as the complainant requested reimbursement of fees for the 2007-2008 school year. For the previous school years, her request was considered to be belated, as she had not claimed reimbursement under Article 120a within the time limit set out in that Article (within three months from the last day of the given academic year). The majority considered that the appeal was unfounded on the merits. It was the EPO’s practice to require a certificate from the ESM indicating that a child could not be educated at the ESM; the complainant had not complied with the EPO’s practice in this regard. In addition, she had failed to demonstrate that her children could not be educated at the ESM for reasons beyond her control (as required by Article 120a). The decision to transfer her children to another school had been freely taken and was “privately motivated”. Also, she could not base her claim on the principle of equal treatment, because her situation was not comparable in fact and law to that of other staff members who had been fully reimbursed under Article 120a. The majority held that moral damages could not be awarded and it recommended that the appeal be rejected. A minority of the IAC members recommended that the appeal should be considered admissible in its entirety, that the complainant should be reimbursed in full for the school fees she had paid for “A” and “B” to attend the MIS, and that she should be awarded 3,000 euros in moral damages.

By a letter of 27 October 2011 the complainant was informed by the Principal Director of Human Resources that, in accordance with the opinion of the majority of the IAC, he had decided, by delegation of

authority from the President of the Office, to reject her appeal as irreceivable insofar as it concerned the period preceding the 2007-2008 school year and unfounded in its entirety. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision. She seeks reimbursement for the school fees she paid in respect of her sons “A” and “B” to attend the MIS and she claims 3,000 euros in moral damages.

The EPO asks the Tribunal to reject the complaint as partly irreceivable and unfounded in its entirety, and to dismiss the complainant’s claims for relief.

#### CONSIDERATIONS

1. This complaint concerns the EPO’s interpretation and practice in the application of Article 120a of the Service Regulations. In relevant part, Article 120a reads:

“Where an employee is unable to have his children 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.

[...]

A permanent employee shall be entitled to the reimbursement provided for under the terms of the present Article, if the relevant request for reimbursement for each academic year is submitted within the given academic year and in any event not later than within three months from the last day of the given academic year.”

2. The complainant removed her son “A” from the ESM and enrolled him in the MIS in 2002. The complainant states that she told the Administration about her son’s problems at the EMS and that the EMS was unwilling to consider her suggestions to resolve those problems. The Administration was also asked about “the modalities of reimbursement” for his MIS school fees. She states that the Administration informed her that her son’s attendance at another school was “[her] free decision” even if it was taken in the interest of her child. Accordingly, she applied for and received the education allowance for her son “A” under Article 71 of the Service Regulations and later for her son “B”.

According to the record, it appears that the complainant's husband also made an inquiry about the reimbursement of school fees in 2005 when he joined the EPO.

3. Subsequently, in 2008, the complainant discovered that the EPO regularly reimbursed school fees under Article 120a for most of the children attending the MIS, in particular, in circumstances very similar to those of her two sons. Consequently, on 30 May 2008, the complainant requested, under Article 120a, reimbursement of the MIS school fees for the years 2002-2007 for her son "A" and for the years 2005-2008 for her son "B". As will be discussed below, the decision impugned in this complaint stems from the rejection of this request.

4. The complainant states that the EPO did not tell her about the possibility of payment under Article 120a and that such payments could be extended to siblings. She contends that she could, in good faith, expect to be informed of the practice and requirements for reimbursement under Article 120a. In particular, the EPO failed to inform her of its alleged practice of requiring a certificate from the ESM attesting that it was not possible for the ESM to provide suitable education for her children. She submits that the EPO's failure to do so constitutes a breach of its duty of care and was misleading. Additionally, no information was available in any of the EPO documentation informing employees about the EPO's practice regarding its interpretation and application of Article 120a. The complainant also alleges unequal treatment by the EPO. She states that information provided by the EPO to the IAC at the latter's request showed that the EPO reimbursed the school fees for an increasing number of children who experienced problems at the EMS that were "administratively similar to [her] case".

5. Turning first to the question of receivability, the majority of the IAC reasoned that although the internal appeal for the 2007-2008 school year was filed within the time limit in Article 108(2) of the Service Regulations, the appeal in relation to the claim for the 2002-2007 school years was irreceivable because the "request was belatedly filed, as [the complainant] should have filed a request under Art[icle] 120a of the

[Service Regulations] within the time limit stipulated in the last paragraph of this Article”. In the letter to the complainant containing the impugned decision the Principal Director of Human Resources endorsed the above reasoning of the majority of the IAC in relation to the claim for the reimbursement of school fees for the 2002-2007 school years and dismissed the internal appeal regarding this part of the claim as irreceivable. He noted that having regard to the principle of legal certainty “the time limits for filing an appeal can only be lifted exceptionally”. He added that “[s]uch exceptional circumstances do not exist in the present case, [and], more specifically, the Office has not shown any bad faith in handling [her] request”.

6. In summary, the EPO submits that as the complainant’s internal appeal in relation to the claim for the reimbursement of the school fees for 2002-2007 was time-barred, her complaint is irreceivable pursuant to Article VII, paragraph 1, of the Tribunal’s Statute for failure to exhaust the internal means of redress. Moreover, the complainant has not shown that the EPO intentionally misled or concealed some documents from her for which an exception could be made to the rule of strict adherence to the relevant time limit.

7. The reasoning in the IAC majority opinion adopted by the Principal Director concerning the school fees for 2002-2007 is fundamentally flawed as it confounds one of the conditions of the receivability of an internal appeal and a condition that must be met for the entitlement to reimbursement of school fees under Article 120a.

8. At the material time, Article 106(2) of the Service Regulations relevantly provided that an employee could submit to the President a request that a decision be taken relating to the employee. The President was required to provide the employee with a reasoned decision within two months of the date of the request. The version of Article 107 of the Service Regulations then in force provided that a person to whom Article 106 applied could lodge an internal appeal. The version of Article 108(2) of the Service Regulations then in force stipulated that an internal appeal from a decision taken under Article 106(2) of the

Service Regulations had to be lodged within three months. In the present case, as contemplated in Article 106(2), on 30 May 2008, the complainant submitted a request to the Administration for reimbursement of school fees under Article 120a of the Service Regulations. The President's 16 July 2008 decision rejected the complainant's request, and it is not disputed that the complainant lodged the internal appeal from that decision within the time limit contemplated in Article 108(2).

9. In contrast, the time frame in Article 120a has no bearing on receivability. It only establishes a condition that must be met for entitlement to reimbursement. Accordingly, the complainant's internal appeal in its entirety was clearly receivable and the Principal Director erred in law in his decision to the contrary. It is also noted that the IAC's majority view regarding the complainant's failure to appeal the decisions granting her partial reimbursement of the school fees under Article 71 of the Service Regulations made prior to the 2007-2008 academic year has no relevance to the receivability of an appeal launched against an unrelated decision.

10. In its pleadings before the IAC and the Tribunal, the EPO did not provide its interpretation of the phrase "for reasons beyond his control" in Article 120a of the Service Regulations. In its 27 January 2009 position paper submitted to the IAC, citing document CA/80/79, the EPO took the position that the purpose of Article 120a of the Service Regulations was to put employees at other duty stations on a par with Munich employees who could send their children to a European School at no cost. For this reason, the condition "for reasons beyond his control" was strictly applied because the aim of Article 120a was to include only those cases where a European School was not available. At the first oral hearing in the internal appeal, the EPO took the position that "reasons beyond his control" was a statutory term to be defined and filled out by administrative practice to ensure a certain flexible approach by the Administration, which might change and be adapted to the circumstances.

11. At the same hearing, the EPO indicated that it had reimbursed school fees for about 30 children in Munich under Article 120a. The EPO added that the submission of a certificate from the ESM stating

that the nature of the educational establishment was not apt for the child in question was decisive in its application of Article 120a. The EPO also noted that reimbursement of school fees had been granted in other circumstances. Those other circumstances are set out below.

12. After the first oral hearing, the IAC asked the EPO for additional information. In addition to providing the requested information, subsequently, at the complainant's request, the EPO provided the IAC with a heavily redacted copy of a 25 June 2010 Audit Report No. 102 entitled "Cost of school education (Munich)" (hereinafter the "Audit Report").

13. In the IAC majority opinion, the EPO's practice in relation to the reimbursement of school fees pursuant to Article 120a is described in the following terms:

"The Office plausibly stated that until 2005/2006 the Office required a certificate from the ESM for reimbursement of school fees under Art. 120a of the [Service Regulations] stating that an employee's child could not be educated there for reasons beyond his control. The Office has maintained this practice so far. As the [complainant] failed to submit such a certificate, she did not comply with the Office's reimbursement practice in this regard."

The IAC majority concluded:

"[T]he [complainant] failed to show that her children could not be educated at the ESM for reasons beyond her control. The [complainant] had provided certificates from a teacher and a [...] therapist showing that her two sons faced [...] problems at the ESM such that the attendance [at] another school had been desirable for the further development of her children. The [complainant] and her representative thus had wilfully taken the decision not to have their sons educated at the ESM motivated by the latter's situation. The decision to transfer the children to another school must be considered to be freely taken and is thus privately motivated. The fact that the transfer corresponded to her sons' specific educational requirements is not able to deem the decision extrinsically motivated. In line with the Office's practice to strictly construe Art[icle] 120a of the [Service Regulations], the [complainant] can not be deemed to be unable to have her child educated at the European School for reasons beyond her control, such that the requirements of Art[icle] 120a of the [Service Regulations] were not met."

14. In its consideration of the complainant's argument that the EPO had breached the principle of equal treatment, the IAC majority

noted that according to the Audit Report the EPO's reimbursement of school fees under Article 120a was not limited to those cases where a certificate from the ESM was produced. Reimbursement was also made in cases involving "mobility", "contractual arrangements" and "enrolment of siblings at the same school on request of their parents". In the view of the IAC majority, as the complainant was not in the same position in fact and law as the employees in those other cases or in the case that was the impetus for the complainant's 30 May 2008 request, the principle of equal treatment was not violated.

15. In summary, on the merits of the claim for the 2007-2008 school year, the EPO takes the position that the decision rejecting the claim for reimbursement of school fees at the MIS was grounded on common practice, that is, the complainant did not meet the conditions for reimbursement under Article 120a. She did not submit a medical certificate or a decision of the ESM attesting to the fact that the school could not provide a suitable education for the child in question. The EPO adds that her request was "rejected because [the complainant] failed overall to prove – notably with a written document – that her request met the requirements of 'reasons beyond [her] control'" in Article 120a. In its surrejoinder, the EPO describes the requisite proof in the following terms:

"Such proof could have been brought, for example, by a letter spontaneously handed by the European School in Munich (ESM), explaining to the [c]omplainant that the school could not provide suitable education for her children, because of a specific reason (language disorder, psychological risks, etc.).

[I]f the [c]omplainant truly had been *compelled* to send her children to another school, she would not have had to ask for an ESM decision or medical certificate: such documents are not supposed to be demanded *a posteriori* by an employee, [...] in order to justify his decision to remove his child from his initial school. It is the other way around: such certificate must be handed in spontaneously so that it demonstrates that the decision to remove a child from his school does not belong to his parents and that it is required by a reason beyond the latter's control."

16. The EPO also disputes the complainant's assertion that it breached its duty of care. The EPO maintains that it was not under a duty to inform the complainant about the possibility of making a claim under

Article 120a because the complainant did not provide any information at the time from which it could be assumed that her situation matched the conditions of Article 120a. Although the complainant's reason for moving her sons to another school may appear to be legitimate, it cannot be considered as a "reason beyond [her] control". As to the claim of unequal treatment, the EPO points out that the complainant has not adduced any evidence that reimbursement has been granted to other employees similarly situated to her in fact and in law.

17. Some preliminary observations are necessary before dealing with the merits of the complaint. It is not disputed that the phrase "for reasons beyond his control" is open to more than one interpretation. However, as confirmed in the Audit Report, the EPO has never articulated a meaning or definition for the phrase "reasons beyond his control" in Article 120a. Although the EPO stresses its strict application of Article 120a, it emerges from the record that in the EPO's view, and as reflected in its practice, a decision to reimburse school fees under Article 120a is discretionary in nature. On this last point, the wording of Article 120a does not support this view. The language of the provision makes it clear that where it is established that an employee is unable to have his child educated at a European School "for reasons beyond his control", the EPO shall pay the school fees charged by an international school. It must also be added that even if a decision made pursuant to a regulation or a rule is discretionary in nature, it does not permit the application of an alternative interpretation of the provision as appears to have been the view at various times in relation to Article 120a of the Service Regulations.

18. The importance of establishing a settled interpretation of a phrase in a regulatory provision that is subject to more than one interpretation and an organisation's obligations in the application of that interpretation are discussed in Judgment 3541, under 28. It reads:

"While it is true that the phrases [...] may arguably be subject to more than one interpretation, it does not follow that in the application of [the phrases], different interpretations may be applied on a case-by-case basis. Instead, the first task is to determine the meaning of the phrases on the basis of the applicable principles of statutory interpretation. This is essential to the

uniform application of this type of provision that is not discretionary. It is also true that the meaning or the interpretation of a particular provision adopted by the Administration may be subject to challenge. However, until the interpretation is overturned, the Administration is obliged to make the interpretation known to its employees and to apply the adopted interpretation consistently across the organisation.”

These observations are equally applicable in the present case.

19. The EPO’s handling of this case constitutes a serious breach of its duty of care. The EPO’s position, that in 2002 when the complainant made inquiries about the reimbursement of school fees for her son “A” it did not breach its duty of care because the complainant did not provide information from which it could be assumed that her situation met the conditions of Article 120a of the Service Regulations, reflects a complete lack of appreciation of its obligations to a staff member in these circumstances. First, in accordance with the Tribunal’s recent decision in Judgment 3541, under 28, in addition to arriving at an interpretation of the phrase at issue, the EPO was obliged to make the interpretation known to the employees through circulars or whatever other means used to communicate such information to employees. As well, if there was a requirement in terms of the steps or documentation necessary to prove entitlement, this had to be made known to employees. The EPO did not meet any of its obligations in this regard. Moreover, when the complainant made the inquiries about alternative means of reimbursement, the EPO breached its duty of care in failing to inform her about the alternatives and the requirements to establish that the condition had been met. This was essential for the complainant to make an informed decision.

20. Turning to the merits of the complaint, as the complainant did not make a request for the reimbursement of the MIS school fees in each year within the time frame stipulated in Article 120a for the 2002-2007 school years, the statutory condition for reimbursement, noted in consideration 9, was not met and the claim for these years must fail.

21. The claim for reimbursement for the 2007-2008 year only concerns the complainant’s son “B”. As set out above, the EPO simply

takes the position that the complainant's request failed because she did not submit a medical certificate or document from the ESM.

The fundamental issue in this case is the interpretation of Article 120a of the Service Regulations. 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.”

In broad terms, the objective of Article 120a of the Service Regulations is clear, namely, that the EPO will pay the school fees for a child who cannot be educated at a European School. It is equally clear that whatever the reason is, it must be one beyond the employee's control. The meaning of this provision has to be discerned in the context of the provision's objective and the condition limiting entitlement to matters beyond the employee's control. Bearing this in mind, if circumstances or conditions arise which are not brought about by the employee, either in whole or in part, which has the result that it is undesirable and inappropriate, viewed objectively and reasonably, for the child to attend a European School, Article 120a of the Service Regulations is engaged.

The EPO does not take issue with the complainant's statement that her son “B” encountered the same difficulties as her son “A” at the ESM and had to be removed for that reason. As described in the complainant's brief, there were medical conditions supported by expert professional advice.

As the complainant's claim for reimbursement comes within the above interpretation of Article 120a of the Service Regulations, the EPO will be ordered to reimburse the complainant for the school fees that she paid for the 2007-2008 school year, together with interest at the rate of 5 per cent per annum from the due date to the date of payment.

22. As to the complainant's claim of unequal treatment, beyond the assertion that others received reimbursement in circumstances

“administratively similar” to hers, she did not adduce any evidence demonstrating that she was in the same situation in fact and in law as those employees who received reimbursement.

23. In conclusion, in addition to material damages the complainant is entitled to moral damages for the EPO’s serious breach of its duty of care in the amount of 20,000 euros. The complainant is also entitled to costs in the amount of 750 euros.

#### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The EPO shall reimburse the complainant for the school fees that she paid for the 2007-2008 school year together with interest at the rate of 5 per cent per annum from the due date to the date of payment.
3. The EPO shall pay the complainant moral damages in the amount of 20,000 euros.
4. The EPO shall pay the complainant costs in the amount of 750 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 24 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ