Registry's translation, the French text alone being authoritative.

THIRTY-FIRST ORDINARY SESSION

In re HEROUAN (No. 1)

Judgment No. 219

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute (IPI) drawn up by Mr. Emile Hérouan on 21 September 1972 and brought into conformity with the Rules of Court on 27 October 1972, and the Institute's reply of 21 December 1972;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rule 21 and Appendix II-9, Comments B/2 and B/3, of the former IPI Staff Rules and Articles 36, 40-43, 47, 49, 82, 83, 87 and 98 of the new Staff Regulations;

Having examined the documents in the dossier, the oral proceedings requested by the complainant having been disallowed by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant was appointed to the staff of the IPI on 16 April 1967. By decree of 2 March 1962 the High Court of Draguignan in France had granted him a divorce from his wife. On 21 February 1968 he claimed payment of child and education allowances for the two infant children of his marriage, of whom his former wife had been granted custody and for whose maintenance he was required by the above-mentioned decree to pay his former wife a contribution of 125 French francs a month for each child. By letter of 22 October 1968 the Director-General confirmed a letter of 1 March 1968 from the Chief of Personnel and told the complainant that his claim could not be granted since the Institute did not consider that a staff member was actually maintaining his children when the divorce court had not given him custody of the children. By letter of 20 May 1970 the complainant informed the Director-General that he intended to appeal to the Appeals Committee but first wished to know whether the Director-General abided by his decision of 22 October 1968. On 19 June 1970 the Director-General replied that he did. On 8 June the complainant had addressed a complaint to the Chairman of the Appeals Committee claiming "the grant of the child and education allowances prescribed in Appendix II of the Staff Rules and compensation for the prejudice suffered". By letter of 24 April 1972 the complainant repeated his original claim and in accordance with new Staff Regulations 82 and 83 asked the Director-General to withdraw the decisions of 1 March and 22 October 1968 refusing him the child and education allowances prescribed in Appendix II of the former Staff Rules and the similar allowances prescribed in the new Staff Regulations. By letter of 15 May 1972 the Director- General told the complainant that he could not agree to withdraw the decisions of 1 March and 22 October 1968 and that the Appeals Committee would therefore examine the case. In a majority report (one member dissenting) the Appeals Committee held that the complainant did not qualify for the child allowances and education or schooling allowances for the children in the custody of his former wife and that his claim for such allowances was not valid. By letter of 23 June 1972 the Director-General told the complainant that he endorsed the Appeals Committee's recommendation.

B. The complainant is impugning the decision of 1 March 1968 transmitted to him by the Chief of Personnel and refusing his claim for the allowances, the Director- General's confirmation of that decision on 22 October 1968, the further dismissal of his claim under the new Staff Regulations notified to him on 15 May 1972 and the Director-General's final decision of 23 June 1972 on the Appeals Committee's recommendation.

C. The complainant asks the Tribunal to:

(a) quash these decisions;

(b) declare that from the date of judgment the IPI shall, in accordance with Articles 36, 42, 43 and 47 of the Staff Regulations adopted on 20, 21 and 22 December 1971, pay him the child and education allowances prescribed in the current scales;

(c) order the payment of the sums which should previously have been paid to him as child allowance, plus interest, at the date of his original claim, 21 February 1968;

(d) declare that on account of the general prejudice suffered by his children and the special prejudice suffered by one of them he should receive a sum equivalent to 100,000 French francs provided he proves the payment or assignment of that sum for the exclusive benefit of the children; and

(e) award him 10,000 French francs towards the costs of the complaint.

D. The Institute argues that, according to the relevant Rules, to qualify for the child allowance and education or schooling allowance a staff member must actually maintain the child for whom he may be entitled to such allowances. There can be no actual maintenance, however, unless the staff member assumes permanent responsibility for the maintenance of the child. Hence a distinction must be drawn between maintenance of the child and a mere contribution towards such maintenance. According to the divorce decree of 2 March 1962 custody of the children was granted to the mother and the father was ordered to pay a maintenance allowance of 300 French francs a month, consisting of 50 francs for the mother and 250 francs for part maintenance of the two children, i.e. 125 francs for each of them. The sum was later voluntarily increased from 300 to 500 francs. Mr. Hérouan's former wife has remarried and has a child by her second marriage. She is employed as a secretary and receives family allowances for her two children by the complainant. The complainant's monthly salary is 3,612 guilders. He has married again, has no child by his second marriage, and his second wife is working, The Institute therefore concludes that he is not actually maintaining his children within the meaning of the Staff Regulations, inasmuch as the maintenance allowance which he is paying is merely a contribution towards their maintenance.

E. As regards the complainant's claim for payment of 100,000 French francs as "special compensation for the child who has been unable to continue his studies", the Institute contends that the complainant has established neither the existence of any fault on the Institute's part nor any causal link between the alleged fault and the alleged prejudice, and that since the complaint is ill-founded he should bear the costs. The Institute therefore prays that the Tribunal dismiss these two claims and the complainant's claim for withdrawal of the decisions not to grant him the child and education allowances.

CONSIDERATIONS:

1. As to receivability

Article 87 of the Staff Regulations at present in force, adopted by the Administrative Council of the Institute at its meeting from 20 to 22 December 1971, gives staff members, former staff members and their beneficiaries the right to submit complaints to the Administrative Tribunal in accordance with the Statute of the Tribunal. On 2 March 1972 the Governing Body of the International Labour Office assented to this extension of the Tribunal's competence. The present complaint is therefore addressed to a competent tribunal

Article 83 of the present Staff Regulations lays down the procedure for internal appeals; the first step is a request to the Director-General or to the Administrative Council, followed by reference to an Appeals Committee if the request is rejected, and finally a decision taken after consideration of the findings of the Appeals Committee, The internal procedure and the procedure before the Administrative Tribunal are connected, the former being a necessary prelude to the latter. Subject to any provisions to the contrary in its own Statute, therefore, the Administrative Tribunal is competent to hear any cases which are referable to the internal appeals body. Under Article 98, paragraph 4, of the present Staff Regulations the Appeals Committees are competent to deal with disputes arising out of the application of the former Staff Rules. It follows that the same is true of the Administrative Tribunal since its Statute contains no provisions to the contrary. Article 98, paragraph 4, cannot however apply to disputes on which a final decision has been taken and which therefore cannot be re-opened failing a specific provision to that effect.

2. As to the right to child allowances

The remuneration of staff members is laid down in Appendix II of the old Staff Rules, which state in Comment B that such remuneration does not include

"2. Child allowance amounting to 800 guilders a year for each dependent child, i.e. any child under the age of 21

who has no occupation and is actually maintained by the staff member." (Registry translation)

The provision of the present Staff Regulations dealing with child allowances is as follows:

"Article 42: A staff member who has one or more dependent children is entitled, subject to the conditions set out in Articles 43 and 44 below, to the annual child allowance referred to in Appendix II B for each dependent child ..."

"Article 43: A dependent child is any legitimate, natural or adopted child of the staff member or his spouse who is actually maintained by the staff member ..." (Registry translation)

It is common ground between the two parties that the definition of a dependent child is the same in the old Rules and in the present Regulations. Both texts specify that a child is the dependant of the person who actually maintains him. In the case at issue the word "actually", which means "really", as opposed to "theoretically", "apparently" or "illusorily", is not in question. The parties do not agree, however, as to the interpretation of the word "maintain. The complainant interprets it broadly, considering that a parent maintains his child if he makes a financial contribution to the expense of housing, feeding, clothing and educating the child. The Institute, on the other hand, supports a narrower definition: only the parent who provides for all the child's material and moral needs can claim to maintain it, and it follows that a child of divorced parents is considered to be maintained by the parent who has custody, unless that parent fails to fulfil his or her financial obligations and the latter are then wholly assumed by the other parent.

Both these interpretations are compatible with the letter of the applicable Regulations. Maintenance, like dependance, can be defined in different ways. While it can be argued that a contribution to maintenance is a form of maintenance, it can also be claimed that only complete maintenance can truly be called maintenance. By changing the definition of a "dependent child" from one whose "maintenance is actually provided"(*), to one who is "actually maintained"(*) the new Regulations have merely substituted one set of words £or another without really defining their meaning.

(*) Registry translations of the French texts: "l'entretien effectif est assuré" (former Staff Rules) and "est effectivement entretenu" (present Staff Regulations).

If the purpose of child allowances is considered the complainant's view is not more convincing than the Institute's. As a general rule the purpose of child allowances is to improve the circumstances in which children grow up In the intergovernmental organisations they also aim at putting all staff members of the same grade on a similar financial footing, whether or not they have children. Even if, following the Institute's arguments, such allowances are in principle payable only to the parent who has custody of the children, i.e. the parent who is presumed to bear the heaviest responsibilities, lt cannot be said that they do not fulfil their purpose.

Of greater significance is the conclusion drawn by the Institute from Articles 40 and 41 of the present Regulations. Under Article 40, a staff member regarded as head of the family receives an allowance of 6 per cent of his basic salary. Under subparagraph (b) of Article 41, the head of the family is defined as "a widowed, legally separated, divorced or unmarried staff member, of either sex, who has one or more dependent children within the terms of Articles 43 and 44 below" (Registry translation). Article 41 thus refers to the definition of a dependent child laid down in Article 43; in other words the term "dependent child" has the same meaning in both these provisions. It would clearly be unreasonable to describe a divorced staff member as the head of the family for the sole reason that he paid an allowance for his children to the parent who had custody of them, it is rather the latter parent who should be described as the head of the family. The complainant accepts this view inasmuch as he recognises that he is not entitled to an allowance as head of the family on account of the payments he makes on behalf of the children of his first marriage, who are in their mother's custody. It follows that he cannot claim the child allowance either, since the grant of both allowances depends on the fulfilment of the same condition.

This interpretation may be regarded as conforming to the intentions of the authors of the former Rules and of the present Regulations. The maintenance allowance payable by a divorced person on behalf of children in the custody of the other spouse may vary in amount; in many cases it is only a fraction of the total cost of the children's maintenance. In some circumstances it may be scarcely more, and perhaps even less, than the total amount of the allowance payable to the head of the family and the child allowance, and it would then be contrary to the spirit of the Regulations for the person paying the maintenance allowance to receive the whole amount of these allowances. Hence, if it had been intended that the applicable provisions should have the effect of making child allowances

payable to a divorced staff member responsible for paying a mere maintenance allowance, special provisions would presumably have been included in the Regulations to deal with such cases, either by giving the Director-General discretionary power to determine the amount of the allowance in each case on its merits, or by making the amount of the child allowance dependent on the amount of the maintenance allowance; at the very least provision would have been made for the payment of the child allowance to the parent having custody. The fact that both the former Rules and the present Regulations are silent on these points suggests that the Institute is right in eon- tending that child allowances are in principle payable only to the staff member who has custody of the children. The only possible exception would be the case of a parent having custody being wholly unable to maintain the children, with the result that full responsibility for their maintenance is assumed by the other parent.

In the case at issue the judgment granting the divorce included an order requiring the complainant to pay a monthly maintenance allowance of 300 French francs, comprising 250 francs as a contribution to the maintenance of both children and 50 francs for their mother; this sum was later voluntarily increased by the complainant to 500 French francs monthly. His divorced wife, who has custody of the children, has remarried and has a child by her second husband; she is employed as a secretary at a salary that has not been specified and receives state family allowances for the children of her first marriage. In these circumstances it is clear that the complainant not only does not have custody of his children but makes a financial contribution to their maintenance which is probably smaller than that made by their mother, and therefore does not actually maintain his children in the strict interpretation of the term adopted above. His claim to receive child allowance therefore fails.

3. As to the right to an education allowance

Appendix II of the former Staff Rules made provision, under Comment B, paragraph 3/I, for the granting of an education allowance on behalf of each dependent child "in regular attendance at an educational establishment in a country other than that of the staff member's duty station" (Registry translation). Article 47 of the present Staff Regulations lays down the right to an education allowance in the following terms:

"A staff member is entitled to an education allowance equivalent to the actual costs of schooling incurred by him up to the annual maximum set out in Appendix II B for each dependent child within the meaning of Article 43 above who is in regular and full-time attendance at an educational institution." (Registry translation)

It is clear from the wording of this provision that it is applicable only to a staff member who has dependent children within the meaning defined above. It follows that the complainant is not entitled to an education allowance since he has no dependent children within the terms of the Regulations. The fact that he has not himself incurred the educational expenses of his children is a further reason why Article 47 of the present Regulations is inapplicable to his case,

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr, André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 22 October 1973.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet