

NINETY-SEVENTH SESSION

Judgment No. 2357

The Administrative Tribunal,

Considering the complaint filed by Mr P. A. S. against the European Patent Organisation (EPO) on 21 May 2003 and corrected on 3 July, the Organisation's reply of 13 October, the complainant's rejoinder of 3 November 2003 and the EPO's surrejoinder of 20 February 2004;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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 was born in 1948 and has German nationality. He joined the European Patent Office – the EPO's secretariat – in 1984 as a programmer at grade B5, based in The Hague. In 1987 he was transferred to headquarters in Munich, where since 1 January 1999 he has held the post of Supervisor/Head of Section at grade B6.

Article 71 of the Service Regulations for Permanent Employees of the EPO provides for the award of an education allowance in respect of dependent children “attending an educational establishment on a full-time basis”. The allowance is intended primarily for employees serving away from their country of origin. However, as an exception to that general rule, pursuant to Article 71(2)(a) and (b) permanent employees who are nationals of the country in which they are serving may claim the education allowance provided that their “place of employment is not less than 80 km distant from any school or university corresponding to the child's educational stage”, and that their “place of employment is not less than 80 km distant from the place of domicile at the time of recruitment”.

Relying on that exception, the complainant applied on 31 August 2001 for an education allowance in respect of his son, who had enrolled on a course in media information technology at a technical college in Giessen-Friedberg, beginning in the winter semester 2001/2002. The college in question is located approximately 360 km from Munich. By a letter of 7 May 2002 the Head of the Personnel Administration Department informed the complainant that his application had been rejected. He pointed out that the course chosen by the complainant's son was also offered at a college located in Augsburg within 80 km of Munich, which meant that the condition stipulated in Article 71(2)(a) was not fulfilled.

On 23 July 2002 the complainant wrote to the President of the Office, initiating an appeal against the decision of 7 May 2002. He contended that several of the admission criteria for Augsburg prevented his son's admission to that course. In particular, the college required “vocational training in technology or design or 6 weeks of preliminary training”, as well as a portfolio of practical work. Applicants also had to sit an aptitude test. On completing his secondary education his son had been obliged to attend national service from 1 September 2000 to 31 July 2001, with the result that he could not do any internship, or sit the aptitude test for Augsburg, which took place in June and July 2001. To secure a place at Augsburg, he would have had to delay the start of his course by approximately two years. After an initial examination of the case, the President of the Office concluded that the complainant's request could not be granted and referred the matter to the Appeals Committee. The complainant's submissions to the Committee included a document comparing his present application for an education allowance with a successful application he had made previously for his elder son, who had likewise enrolled on a course which was not available at any college within 80 km of Munich.

In a report dated 12 February 2003, the Committee unanimously recommended that the complainant's appeal be dismissed. Referring to the Tribunal's case law, it considered that in deciding that the college in Augsburg offered

a course which, though different in some respects to the media IT course offered at Giessen-Friedberg, covered the same basic discipline as the latter course and corresponded to the educational stage of the complainant's son, the Office had exercised its discretion correctly. In particular, the Committee rejected the complainant's argument that the admission requirements for the course in Augsburg precluded a successful application by his son.

By a letter of 24 February 2003 the Acting Director of Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to reject his appeal in accordance with the conclusions of the Appeals Committee. That is the impugned decision.

B. The complainant submits that he should be granted the education allowance under Article 71(2)(a) of the Service Regulations. Relying on Judgments 1835, 1836 and 1837, he states that the EPO has overlooked the fact that the college in Augsburg did not offer the same studies as the one in Giessen-Friedberg and that the course at Augsburg did not lead to the same degree. His son wanted to take a course leading to a degree in media information technology (*Diplom-Ingenieur Medieninformatik*), but the course offered in Augsburg led to a degree in multimedia studies (*Diplom-Informatiker Multimedia*). None of the nine colleges offering media information technology for the winter semester 2001/2002 was located within 80 km of Munich.

The complainant asks the Tribunal to order that he be paid an education allowance in accordance with Article 71(2)(a) of the Service Regulations.

C. In its reply the EPO points out that Article 71(2)(a) of the Service Regulations applies only "by way of exception" and that it has consistently given it a narrow interpretation. It explains that the terms "school or university corresponding to the child's educational stage" simply mean that the level of education – school or university level – and the basic discipline are available within 80 km of the place of employment. Subjective criteria representing the child's personal wishes, such as the preferred language, the length of a course or its specific content, are not taken into account. Referring to the case law, it also emphasises that the decision to award an education allowance under Article 71(2) is discretionary and, as such, subject to only limited review by the Tribunal.

The Organisation submits that despite differences in content and in the names of the degrees to which they lead, the courses offered at Giessen-Friedberg and at Augsburg, respectively, are comparable for the purposes of Article 71(2) insofar as they cover the same basic discipline at the same educational level.

It rejects the view that the admission requirements for Augsburg rendered it impossible for the complainant's son to obtain a place there. The college had confirmed that the six-week internship did not necessarily have to be completed before the start of the course. The EPO acknowledges that the portfolio of practical work required by Augsburg would be more easily produced by an applicant whose previous education had focused on technology and design, but contends that it was not impossible for the complainant's son, whose background was in social sciences, to meet this requirement. Nor was it impossible for him to attend the aptitude test held in June and July 2001, since he could have been released from national service on special leave for that purpose.

D. In his rejoinder the complainant presses his pleas and points out that the defendant has ignored the chronology of the events, wrongly assuming that the relevant information was available to his son in sufficient time to comply with the admission requirements.

E. In its surrejoinder the EPO maintains its position on all issues.

CONSIDERATIONS

1. The complainant claims entitlement to payment of the education allowance for his son, for which he applied on 31 August 2001 under Article 71(2) of the Service Regulations. During the internal appeal proceedings, he alleged that the refusal to pay him the allowance was discriminatory as an allowance was paid in similar circumstances in respect of his elder son.

2. It is not disputed by the EPO that the complaint is receivable. The only matter in issue is whether the decision to reject the complainant's application and, later, his appeal is attended by reviewable error.

3. Article 71 of the Service Regulations provides for payment of an education allowance to permanent

employees, except “those who are nationals of the country in which they are serving”, in respect of dependent children “regularly attending an educational establishment on a full-time basis”. Article 71(2) provides:

“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.”

It is accepted that the complainant meets the second of those requirements.

4. It was said in Judgments 1835, 1836 and 1837 that the application of Article 71(2), as it stood at the time of those decisions, “is at the discretion of the President of the Office”. It is not strictly accurate to describe a decision as to the application of Article 71(2) as discretionary. The question whether a particular school or university corresponds to a “child’s educational stage” is essentially a question of fact, albeit one that may, in some circumstances, permit of a value judgment. However, because of the nature of that question, a decision under Article 71(2) is subject to limited review on the same grounds as a discretionary decision properly so called. Thus, it will be reviewed only for procedural error, mistake of fact or law, the drawing of a clearly mistaken conclusion or misuse of authority. In particular, this Tribunal will not substitute its view of the facts for that reached by the President.

5. The complainant’s application for payment of an education allowance was based on his son’s attendance at a college in Giessen-Friedberg at which he was accepted as a candidate for a course in media information technology. That college is more than 80 km distant from Munich.

6. The President’s decision to reject the complainant’s application was based on the fact, which is not disputed, that there is a college at Augsburg, which is within 80 km of Munich, offering the same basic subjects as does Giessen-Friedberg. However, at Augsburg those subjects lead to a degree in multimedia studies, whereas at Giessen-Friedberg they lead to a degree in media information technology.

7. Article 71(2) is not concerned with whether a permanent employee’s child can undertake the course of his or her choice within the specified distance from his or her parent’s place of employment. Rather, it is concerned solely with the question whether there is a school or university that “correspond[s] to the child’s educational stage” within that distance. Thus, the fact that Augsburg does not offer precisely the same degree as Giessen-Friedberg does not bring the complainant within Article 71(2).

8. Of more relevance is the fact that there are differences between the entry requirements of the two colleges in question. Giessen-Friedberg accepts students purely on the basis of scholastic qualifications. On the other hand, Augsburg requires, in addition to the same scholastic qualifications, a six week internship before entry or during the first vacation after the course is commenced, the submission of a portfolio of work and the passing of an aptitude test. In his internal appeal the complainant contended that his son did not know that the internship could be undertaken after entry to the course at Augsburg and could not have satisfied the other two requirements. In this last regard, he submitted that his son could not have prepared a portfolio and could not have sat the aptitude test because he was then doing his national service. Further, he claimed that the aptitude test favours students who have studied technology or design rather than social sciences, which his son had studied.

9. Slightly different considerations apply to formal scholastic qualifications and additional qualifications of the kind required by the college at Augsburg. If a child does not possess the necessary scholastic qualifications, that is easily proved and, *ipso facto*, the school or university in question does not correspond to his or her “educational stage”. Similarly, if a child cannot satisfy additional qualifications of the kind required at Augsburg, the school or university does not correspond to his or her “educational stage”. But it is much more difficult to establish that a child cannot satisfy those requirements.

10. In its report, the Appeals Committee made particular reference to the exceptional nature of the allowance for which the complainant applied. It was right to do so. Where a person seeks to bring himself or herself within an exception to a general rule – here, the rule that an education allowance is not payable to persons serving in their

own country – it is for that person to establish that he or she falls within the exception.

11. In the present case, the President of the Office and, subsequently, the Appeals Committee were not persuaded that the complainant's son would not have been accepted at the Augsburg college if he had taken the necessary steps. In particular, they were not satisfied that, consistently with his national service duties, the complainant's son was not able to prepare a portfolio of work or to sit the aptitude test. That being so, the impugned decision does not involve reviewable error.

12. The complainant's case is not advanced by reference to the situation pertaining to his elder son. In that instance, he must have satisfied the decision-maker that he fell within the exception provided for in Article 71(2); in the present case, he did not.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet