

NINETY-NINTH SESSION

Judgment No. 2433

The Administrative Tribunal,

Considering the complaint filed by Mr M.S. against the European Patent Organisation (EPO) on 22 September 2004, the EPO's reply of 17 December 2004, the complainant's rejoinder of 21 January 2005 and the Organisation's surrejoinder of 5 April 2005;

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. At the material time Article 120a of the Service Regulations for Permanent Employees of the European Patent Office (the secretariat of the EPO) read as follows:

“Payment of school fees

Where an employee entitled to the expatriation allowance, who is not a national of the country in which he is serving, 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.

The Office shall pay the fees only in the case 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.

[...]

Where the Office pays the fees, the right to the education allowance under Articles 71 and 120 of the Services Regulations shall lapse.”

Article 71 of the Service Regulations provides in particular that:

“(1) Permanent employees entitled to the expatriation allowance – with the exception of those who are nationals of the country in which they are serving – and permanent employees who are excluded from receiving the expatriation allowance under Article 72(1)(b) 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.

[...]

(4) The education allowance shall not be awarded for a child attending a European School at the place of employment or where the education costs are covered under Article 120a.”

Article 1(3) of the Service Regulations stipulates that:

“These Service Regulations shall apply also to former permanent employees of the Office in all cases expressly provided for in these regulations.”

Article 28(1) of the Pension Scheme Regulations of the Office provides that:

“The family allowances comprising household allowance, child and dependant's allowance, handicapped child allowance and education allowance granted under the Service Regulations for permanent employees of the Office

shall be paid:

i) to the recipient of a retirement pension, at the age of entitlement, or later;

[...]"

Rule 28/2(i) of the Implementing Rules to the Pension Scheme Regulations specifies that:

“The education allowance shall be granted for children dependent on a former employee who is in receipt of a retirement or invalidity pension, or dependent on his or her spouse, where such spouse is in receipt of a survivor’s pension, by applying:

– to the recipients of the aforesaid pensions, the same criteria linked to national or non-national status in the country of service as would be applicable to the former employee were he or she still serving;

– to the dependent children, the same criteria as to education (level, country and type of establishment) and expenditure as would be applicable to the children of the former employee were he or she still serving.”

The complainant, a French national, was born in 1937. In 1971 he joined the International Patent Institute, which was integrated into the EPO on 1 January 1978, as examiner in The Hague, Netherlands. The school fees for his child, who did not attend a European school, were paid by the Organisation in accordance with Article 120a of its Service Regulations and, when he retired on 1 June 2002, his child was still attending school.

By a letter of 23 July 2002 the Pension Administration Department informed him that, on retirement, he had lost his entitlement to the payment of school fees but that he was still entitled to an education allowance under Article 71 of the Service Regulations. By a letter of 28 August to the same Department the complainant enquired about the legal basis for that decision and suggested that in his view according to Rule 28/2 he should “continue to be entitled” to the same benefits as under Article 120a.

In a letter of 28 October the Head of the Pension Administration Department replied that under Articles 1(3), 71 and 120a of the Service Regulations, Article 28 of the Pension Regulations and Rule 28/2, retired employees were entitled only to the payment of an education allowance and not to the payment of school fees.

On 6 November the complainant lodged an appeal with the President of the Office against the decision of 28 October. By a letter of 4 December 2002 the Employment Law Department informed the complainant that the President considered that the relevant provisions had been correctly applied and that his case was being referred to the Appeals Committee. In its opinion dated 16 February 2004 the Committee unanimously recommended that the appeal be allowed. Meanwhile, the Director of Personnel had recognised on 7 March 2003, following a request by the complainant and his spouse – a permanent employee of the Office in active service – that she had an individual right to the payment of school fees for their child on the basis of Article 120a of the Service Regulations. By a letter received on 3 August 2004 by the complainant, the Director of Conditions of Employment and Statutory Bodies informed him, on behalf of the President, that his appeal had been rejected. That is the impugned decision.

B. The complainant submits that Rule 28/2 guarantees that retired employees who have children still attending school will continue to benefit from the support of the Office. He interprets this Rule to mean that retired employees are entitled to the payment of school fees, particularly in order to maintain equality among staff, since there is a European school in Munich, Germany, but not in The Hague. Referring to the findings of the Appeals Committee which held that Rule 28/2 should cover the benefits under Article 120a, he argues that the President decided to dismiss his appeal without providing exhaustive reasons for his decision, which, he points out, was not even dated.

In the complainant’s view, if retired employees have no right to the benefits under Article 120a, they might no longer be able to afford the school fees for their children, which would consequently force the latter to leave their school.

He seeks the quashing of the impugned decision and a declaration that retired employees who fulfil the same conditions as their active colleagues can benefit from Article 120a. He also claims legal costs.

C. In its reply the EPO states that the impugned decision, which is dated 28 July 2004, was properly

substantiated and based on legitimate grounds. The Organisation considers that the wording of the applicable provisions is unambiguous and shows that the Pension Regulations do not provide for payment of school fees. Article 120a of the Service Regulations was inserted after the enactment of the Pension Regulations, while the Implementing Rules came into force after the insertion of the former. Accordingly, the EPO concludes that the Organisation's legislator deliberately decided not to grant the benefit of the payment of school fees to retired employees. According to the EPO, the choice between the payment of school fees or the education allowance is open only to staff in active employment, in accordance with Article 1(3) of the Service Regulations.

The Organisation further contends that, when granting benefits, it must follow objective criteria and avoid making arbitrary distinctions. It submits that Article 71 is intended to provide an education allowance, irrespective of where the active or former employees reside, whereas retired employees leaving the "immediate district of a branch of the Office" forfeit the financial support provided for in Article 120a.

The EPO also argues that the complainant appears to misunderstand Rule 28/2. It concludes that the distinction between Article 71 and Article 120a is intentional and that, in line with a literal interpretation of the applicable rules, retired employees are only entitled to the education allowance.

D. In his rejoinder the complainant reiterates that the impugned decision was undated. He submits that the literal interpretation made by the EPO is overly restrictive and was not accepted by the Appeals Committee. He argues that the fact that Rule 28/2 does not contain any reference to Article 120a "does not necessarily mean that the omission is deliberate". Moreover, there is no evidence in the preparatory work for the drafting of Article 120a of any intention to exclude former employees from its application. In his view, the interpretation most favourable to staff should prevail.

According to the complainant, Article 1(3) of the Service Regulations does not stipulate that the Service Regulations shall not apply to retired employees unless expressly provided for. He notes discrepancies between different provisions and suggests that a broader interpretation of the term "employee", which would include retired employees, should not a priori be excluded.

He submits that, as he still resides in The Hague, the issue of the immediate district raised by the Office is irrelevant. Lastly, he considers that Rule 28/2 should be construed as allowing retired employees to benefit from the education allowance or from the payment of school fees, provided that the recipient continues to fulfil the necessary criteria.

E. In its surrejoinder the EPO states that the President of the Office decided to extend the application of Article 120a to those retired staff members who were, at the time of their retirement, entitled to the payment of school fees and that the complainant was informed accordingly by a letter of 15 March 2005. Since the complainant's spouse received the school fees for their child for the school year 2002-03 pursuant to Article 120a, the EPO stopped payment to the complainant, pursuant to Article 67(2) of the Service Regulations, which provides that a permanent employee in receipt of family allowances shall declare allowances of like nature paid to him, to his spouse or to his dependants from other sources and that these allowances shall be deducted from those paid under the Service Regulations.

The EPO asserts that in view of these new facts the complaint has become groundless: since the complainant has received satisfaction, the impugned decision no longer causes him injury.

CONSIDERATIONS

1. The complainant is a former permanent employee of the European Patent Office who retired on 1 June 2002.
2. In a letter of 23 July 2002 the Pension Administration Department informed him that since his retirement he was entitled, for his child, to the education allowance provided for under Article 71 of the Service Regulations, and no longer to the school fees previously paid in accordance with Article 120a of those Regulations.

The relevant extracts of those provisions as they stood at the material time are given under A above.

3. The position as stated on 23 July 2002 was confirmed by a decision of 28 October 2002. The complainant

lodged an appeal against that decision on 6 November 2002, in which he complained of a misinterpretation of Rule 28/2 of the Implementing Rules to the Pension Scheme Regulations, of which the relevant extracts are also reproduced under A above.

4. On 7 March 2003, in response to a request by the complainant and his spouse, a permanent employee of the Office in active service, the Director of Personnel formally recognised the latter's individual right to the payment of school fees for the couple's child on the basis of Article 120a of the Service Regulations.

On 16 February 2004 the Appeals Committee nevertheless unanimously recommended that the appeal be allowed. It also expressed the view that the complainant maintained a legitimate interest in the appeal despite the new decision benefiting his spouse.

In a letter received by the complainant on 3 August 2004 but bearing no date, the latter was informed that the President of the Office had decided not to follow the recommendation of the Committee and to reject his appeal, on the grounds that Article 120a of the Service Regulations applied only to active staff. With its reply to the complaint the defendant produces a copy of this letter bearing the date 28 July 2004.

The complainant asks the Tribunal to quash that decision and to declare that retired employees who fulfil the same conditions as their active colleagues should benefit from Article 120a of the Service Regulations. He also claims costs.

5. In its surrejoinder the EPO contends that the complaint has become groundless. It produces the following letter which the Pension Administration Department sent to the complainant on 15 March 2005:

“Your complaint before the Tribunal

[...]

The President [...] has decided to continue the application of [Article] 120a [of the Staff Regulations] to those retired staff members who were at the time of their retirement entitled to the payment of school fees.

Your further claims concerning the payment of costs will be subject to your pending complaint.

[...]”

This means that the President of the Office altered his decision of 28 July 2004. He now considers that the complainant is entitled to the benefits that were allocated to him in respect of his child under Article 120a at the time he was still working. Consequently, the complainant's claim to be allowed these benefits has become redundant. Furthermore, he has no present and legitimate interest in obtaining a ruling to the effect that, beyond that which is conceded in the letter of 15 March 2005, retired employees should be paid school fees for children still attending school.

6. The decision of 28 July 2004 not to allow the complainant the benefit of Article 120a of the Service Regulations did not cause him any real injury since, by virtue either of the decision of 7 March 2003 or of that of 15 March 2005, his child's school fees must be paid by the Office as from the date of his retirement. It would therefore not be justified to grant him compensation.

7. The reversal of the EPO's position notified in the letter of 15 March 2005 is equivalent, from the substantive point of view, to allowing his claim. The complainant should therefore be granted costs, which the Tribunal sets at 1,500 euros.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The EPO shall pay the complainant the sum of 1,500 euros in costs.

In witness of this judgment, adopted on 28 April 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 14 July 2005.