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

THIRTY-FIRST ORDINARY SESSION

In re HAKIN (No. 1)

Judgment No. 216

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute (IPI) drawn up by Mr. Robert Hakin 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 1 April 1967. By decree of 28 May 1968 the Civil Court of Liège, in Belgium, declared the dissolution of his first marriage by mutual consent and gave his wife custody of their two children, who were aged 17 and 14 when the complaint was lodged. In July 1968 the complainant remarried. Before the divorce proceedings, on 29 March 1967, the complainant signed before a notary a document containing the agreements prior to the divorce by mutual consent. Under the agreements the complainant was to pay a monthly maintenance allowance of 3,750 Belgian francs for each of his two children. On 1 June 1970 he wrote to the Director-General of the Institute objecting to the Administration's decision to interpret the Staff Rules then in force to mean that the child allowance was not payable to a divorced father who did not have custody. By letter of 19 June 1970 the Director-General dismissed his claim. On 13 July 1970 he lodged with the Appeals Committee an initial appeal which was not receivable under the restrictive rules then in force. Later amendment of the rules enabled him to lodge a valid appeal, by letter to the Director-General of 22 April 1972. On 5 May 1972 the Director-General dismissed his claim and he appealed to the Appeals Committee. The majority of the Committee (one member dissenting) recommended dismissing the appeal and the Director-General endorsed that recommendation in a letter to the complainant of 26 June 1972.

B. The complainant is impugning the Director-General's decisions dismissing his claims on 19 June 1970 and 5 May and 26 June 1972 - the last decision having been taken on the Appeals Committee's recommendation.

C. In his claim for relief 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 Rules 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, 1 June 1970;

(d) declare that on account of the general prejudice suffered by his children he should receive a sum equivalent to 50,000 French francs provided he proves the payment or assignment of that sum for the exclusive benefit of his 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. On 28 May 1968 the Civil Court of Liège declared the complainant and his first wife divorced by mutual consent. According to the contract concluded between them before the notary the mother was to have custody of the two children of the marriage. It is she who is responsible for them, and the complainant contributes a maintenance allowance of 3,750 Belgian francs a month for each child, or 276 guilders, less the family allowances received for the children. He also pays alimony to his former wife. His monthly salary is 3,612 guilders. He remarried in July 1968. At present he is paying 9,000 Belgian francs a month for the two children, or 662 guilders, less 2,500 Belgian francs, or 184 guilders, the amount of the family allowances received by the mother, making a net total of 6,500 Belgian francs, or 478 guilders, a month. His first wife has not remarried, and is working as a shop assistant. The Institute therefore concludes that the complainant is not actually maintaining his children within the meaning of the Staff Rules, inasmuch as the maintenance allowance which he is paying is merely a contribution towards their maintenance.

E. The Institute accordingly asks the Tribunal to:

(a) dismiss the complainant's claim for the quashing of the decisions not to pay him the child and education allowances;

(b) dismiss his claim for damages amounting to 50,000 French francs for the prejudice suffered by his children; and

(c) dismiss his claim for payment of 10,000 French francs towards the costs of the complaint.

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 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 dependence, 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 for 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, it 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 contending 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 present ease the complainant had undertaken to pay a maintenance allowance amounting to a monthly total of 7,500 Belgian francs, later increased to 9,000 Belgian francs, on behalf of the children of his first marriage, less the amount of the state family allowances paid for the children, or about 2,500 Belgian francs, so that the complainant actually makes a monthly payment of about 6,500 Belgian francs on their behalf. His former wife, who has custody of the children, received a gross salary of 6,500 Belgian francs a month which has probably been increased since, under a contract of 24 January 1968, and an additional monthly pension of 3,600 Belgian francs due to her personally, as well as the state family allowances for the children, apart from the maintenance allowance she receives from the complainant on their behalf. In these circumstances the complainant not only does not have custody of the children, but he 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 according to the strict interpretation of the term adopted above. His claim for the payment of child allowances 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 educating 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". 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

Updated by PFR. Approved by CC. Last update: 7 July 2000.