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

FORTY-NINTH ORDINARY SESSION

In re DELHOMME

Judgment No. 518

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Henri Antoine Delhomme and dated 12 November 1981, the EPO's reply of I February 1982, the complainant's rejoinder of 11 March and the EPO's surrejoinder of 17 April 1982;

Considering the applications to intervene filed by

Mr. Jean-Pierre Boutruche

Mr. Daniel David

Mrs. Marie-Christine Drouot

Mr. Xavier Jaunez

Mr. Guy Rempp,

the EPO's observations of 5 April on Mr. Rempp's application and Mr. Rempp's communication of 8 June 1982;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Article 17(2) of the Rules of Court and Articles 71, 120 and 120(a) of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. On 6 June 1980 the Administrative Council of the EPO adopted a proposal by the President of the European Patent Office to introduce the following new article, 120(a), in the Service Regulations:

"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 educational allowance under Articles 71 and 120 of the Service Regulations shall lapse."

The Council's decision was notified to the staff on 16 July 1980, and they were also informed that the French School at The Hague came within the scope of the second paragraph of the new article. On 12 and 24 October the complainant, a French citizen employed by the EPO at The Hague, applied for repayment of fees for attendance by his son and his daughter at the kindergarten of the French School at The Hague. The President of the Office

refused. In its report of 21 July 1981 the Appeals Committee, to which the complainant had appealed, held that the rules did not provide for repayment of pre-primary school fees, but unanimously recommended that the President allow the application. On 28 October 1981 the President wrote the complainant a letter refusing repayment, and that is the decision impugned.

B. The complainant argues that, although the President's proposal to the Council did not expressly cover kindergarten fees, an appended paper did refer to such fees at international schools in Munich. This implied that they would be paid to EPO staff at The Hague since the avowed purpose of the new rule was to put all staff on a par. If repayment were denied there would be a breach of the principle of equality for EPO staff. The complainant invites the Tribunal to order the EPO to repay him the fees in accordance with Article 120(a), interest on the sums due from 28 October 1981, and costs.

C. The EPO considers the complaint to be devoid of merit. Article 71 limits the amount of education allowance payable and does not always allow full repayment of the actual cost of education. Article 120(a) is designed to operate instead in such cases, and its scope is therefore identical. Article 71(4) states that the right to the allowance starts when "the child begins to attend a primary school". Article 120(a) cannot therefore cover pre-primary schooling. The limitation is, besides, in keeping with the general rules on repayment. Article 120, which applies to staff in Munich, allows only primary and secondary education expenses. The text submitted to the Council and relied on by the complainant affords no grounds for any different interpretation. The principle of equal treatment merely requires equivalent terms of repayment to EPO staff at different duty stations, for example repayment of expenses from the start of compulsory schooling. Under Dutch law schooling is compulsory only from the primary stage. At other duty stations staff can send their children to kindergarten free of charge, but the EPO is not obliged to provide similar benefits for staff at The Hague.

D. In his rejoinder the complainant seeks to refute the EPO'S arguments. He points out, in particular, that according to the staff bulletin of 16 July 1981 it is the staff member who alone decides which article to claim under, and so it cannot be said that Article 120(a) replaces Article 71. He maintains that there has been a breach of the principle of equality. The principle is acknowledged in the text of the President's proposal to the Council, which said that staff members who could not send their children to a European school free of charge should be put on a par with other staff and suffer no financial disadvantage. Article 120(a) was introduced precisely in order to attain that result.

E. In its surrejoinder the EPO presses the arguments in its reply and comments on several points in the rejoinder. It observes that the purpose and wording of Article 120(a) make it clear that there may not be payment under both articles: when the official claims under Article 120(a), that article is applied instead of Article 71. Moreover, repayment under Article 120, which prescribes education allowance for the children of staff not attending the European School in Munich, does not cover kindergarten expenses. The allegation of breach of equality between duty stations is therefore groundless.

CONSIDERATIONS:

The applications to intervene

Article 17(2) of the Rules of Court of the Tribunal reads: "Any person to whom the Tribunal is open under article II of its Statute may apply to intervene in a case on the ground that he has a right which may be affected by the judgment to be given."

All that the rule requires is that the applicant should be someone who has access to the Tribunal under Article II and who asserts a right which may be affected by the judgment to be given. There is no reference in Article 17 to Article VII of the Statute and, for the application to be receivable, there is no need to comply with the requirements of that article.

That an intervener in a case before the Tribunal may have already filed an internal appeal and had it rejected and that he has not himself filed a complaint with the Tribunal, does not prevent him from applying to intervene in such a complaint provided he complies with the requirements of Article 17 of the Rules of Court and Article II of the Statute and provided the judgment to be given by the Tribunal may affect his rights.

The Tribunal therefore considers all the applications to intervene to be receivable.

The correctness of the impugned decision

(a) In considering the impugned decision of 28 October 1981 the Tribunal will begin by determining whether it was in breach of Article 120(a) of the EPO Service Regulations. The article reads:

"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.

...

Where the Office pay the fees, the right to the education allowance under Articles 71 and 120 of the Service Regulations shall lapse."

Thus Article 120(a), which applies instead of Articles 71 and 120 where the Office pays the fees, has the same scope as those articles. Moreover, by virtue of the reference to Article 71, it applies to primary schools (Article 71 first and third paragraphs, as approved on 11 November 1980), but not to kindergartens or nursery schools.

The meaning of Article 120(a), on a literal construction and in the context of the Service Regulations, cannot be altered by reliance on material which does not embody rules, such as document CEA/18/80, the sole purpose of which is to submit to the competent authorities of the Office information on the availability of schools at the various duty stations of EPO staff.

(b) EPO staff in Munich have at their disposal facilities for educating their children which in practice those stationed at The Hague and in Berlin do not. In the circumstances of the present case, however, that does not constitute any breach of the principle of equality.

What the principle of equality requires is that all those in the same position should receive equivalent and non-discriminatory treatment, provided that, with due regard to the different factual situations which may exist, the Organisation may adopt rules prescribing or allowing reasonable distinctions.

The EPO school in Munich was put at the EPO's disposal by the Government of the Federal Republic of Germany, and the EPO bears only the running costs. The Government of the Netherlands has not made any such offer to the EPO. Herein lies a difference of fact which it was open to the EPO to take into account without being in breach of the principle of equal treatment. In other words, it is under no duty to make a school available at The Hague, nor to refund the cost of attendance at such a school, so as to provide for EPO staff at The Hague the same benefits as those enjoyed by EPO staff in Munich. All that the principle requires is non-discriminatory application of Articles 71, 120 and 120(a) of the Service Regulations.

(c) The Tribunal's finding that there is no breach of the principle of equality does not make it any less desirable that there should be similar educational facilities available for the children of all EPO officials, whatever their duty station. This is an objective which the EPO has considered on different occasions, as is clear from the evidence in the file.

The applications to intervene

Since the complaint is dismissed, so too are the applications to intervene.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

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