

WIPO Coordination Committee

Seventy-Third (47th Ordinary) Session
Geneva, October 3 to 11, 2016

LEGAL OPINION ON THE ISSUE OF ACQUIRED RIGHTS TO EDUCATION
GRANT FOR STAFF MEMBERS RESIDING, BUT NOT SERVING, IN THEIR
HOME COUNTRY

AND

ASSESSMENT OF THE FINANCIAL IMPACT OF THE POTENTIAL INTRODUCTION
OF A LIMITED TRANSITIONAL MEASURE

Information document prepared by the Office of the Legal Counsel

I. INTRODUCTION

1. During its seventy-first session held in October 2015, the WIPO Coordination Committee was requested to approve two amendments to Regulation 3.14 of the WIPO Staff Regulations and Rules, which concerns the education grant. At that time, Regulation 3.14(a) specified that a “staff member [...] whose duty station is not in his or her home country shall be entitled [...] to an education grant”.

2. It was proposed to amend Regulation 3.14(a) by specifying that only staff members who were not “residing or serving” in their home country would be eligible to receive the education grant. The rationale behind the proposed amendment was two-fold: (i) to ensure consistency with the purpose of the education grant, which, according to the International Civil Service Commission (ICSC), is “to cover part of the additional cost of educating a staff member’s children arising from the staff member’s *expatriation*”; and (ii) to align WIPO’s statutory framework with the rules and practices in other organizations of the UN common system.

As a consequence of this amendment, staff members whose duty station was not in their home country but who nevertheless resided in their home country would no longer be entitled to an education grant. In practical terms, the staff members who would be affected by the proposed amendment were the French staff members residing in France.

3. It was further proposed to add a new paragraph (f) to preserve the rights of staff members who had entered the service of WIPO before the amendment to paragraph (a) would be introduced.¹ The proposed wording of this new paragraph (f) was as follows:

“Notwithstanding paragraph (a) above, staff members holding fixed-term, continuing or permanent appointments with the International Bureau before January 1, 2016, and residing but not serving, at the time, in their home country shall retain the entitlement to an education grant”.

4. The WIPO Coordination Committee approved the two amendments to Regulation 3.14, noting that:

“the Office of the Legal Counsel will present at the 2016 session of the Coordination Committee an analysis on the issue of staff members’ acquired rights to education grant, together with the relevant information on the financial impact, for its decision on whether to maintain or delete new Staff Regulation 3.14(f) on education grant”.²

Executive Summary

5. This document comprises the above-mentioned analysis requested by the Coordination Committee. In short, while an entitlement to an education grant has been recognized as falling within the category of acquired rights (see Section II), those French staff members residing in France who had submitted a claim for an education grant received it pursuant to a long-standing practice, rather than an entitlement stipulated in the WIPO Staff Regulations and Rules (see Section III). This practice did not obtain legal force, let alone give rise to an acquired right. As such, it may be lawfully discontinued, provided it is done prospectively, and with sufficient notice (see Section IV). It is therefore recommended that Regulation 3.14(f) be deleted, and that it be replaced by a limited transitional measure, to encapsulate the requirement of notice (see Section V). The financial implications of the proposed transitional measure are limited (see Section VI).

II. DOCTRINE OF ACQUIRED RIGHTS

Power to Amend Service Conditions is subject to Doctrine of Acquired Rights

6. While it is recognized that international organizations are endowed with the inherent regulatory authority to amend the terms and conditions of employment offered to their staff, such power is not unlimited. Generally speaking, the conditions of service may be amended, but only with prospective, and not retroactive, effect. In addition, the entitlement(s) in question must not form part of a staff member’s set of “acquired rights”, which are considered to be inviolable, and therefore cannot be taken away without his or her consent. In a case involving WIPO as the defendant organization, the International Labour Organization Administrative Tribunal (“ILOAT”) expressly held that “[t]hrough an organisation must observe acquired rights and keep binding promises, it has broad discretion to amend its staff regulations [...]”.³

¹ See WO/CC/71/4 Rev., paragraphs 5 and 6.

² See WO/CC/71/7, paragraph 95(i)(b).

³ See Judgment No. 1641 (1997), at consideration 7(c).

7. WIPO's authority to amend its Staff Regulations and Rules is also expressly reflected in Regulation 12.1(a) (dealing with amendments to the Regulations) and Regulation 12.2(a) (dealing with amendments to the Rules). Since the right to receive an education grant is contained in a Regulation and not a Rule, paragraph (b) of Regulation 12.1 is the applicable provision, which states as follows:

"Amendments shall be without prejudice to the acquired rights of staff members and to any condition of service specified in the letter of appointment or contract of a staff member. No amendment shall affect the application to a staff member of the provisions of the Staff Regulations in force up to the effective date of the amendment; amendments shall not have retroactive effect unless the terms of appointment of staff members would thereby be improved".

8. The above-cited stipulation makes it clear that the provisions of the Staff Regulations may be amended, but only prospectively, unless the staff members were to benefit from the amendment (in which case it may also be amended retroactively). Furthermore, amendments cannot have the effect of infringing the "acquired rights" of staff members, or of altering their conditions of service, as stipulated in their contract of employment.⁴

9. Since WIPO is subject to the jurisdiction of the ILOAT, an analysis was undertaken of its jurisprudence in order to ascertain whether the abolition of an education grant would amount to a breach of the doctrine of acquired rights.

Meaning of Acquired Right

10. Pursuant to the ILOAT's consistent case law, "a right is 'acquired' when someone who has it may, because of its fundamental importance to the balance of rights and duties that define the relationship of employment, demand that it be respected notwithstanding any amendment to the rules".⁵ An acquired right may be a right that is specified in a staff member's contract of appointment, and which both parties intended to be inviolable. More relevantly in this case, an acquired right may also be a right that is stipulated in a provision of the organization's staff regulations or staff rules, and which is of decisive importance to accept the appointment, or to remain in service. In other words, in order for there to be a breach of an acquired right, the amendment to the conditions of service must relate to a fundamental or essential term of employment.⁶

⁴ The doctrine of acquired rights and the rule against retroactivity are general principles of law (see, for example, Judgment No. 429 (1980), at consideration 9 and Judgment No. 51 (1960), at consideration 5). These principles are therefore applicable, even in the absence of an express mention in the WIPO Staff Regulations and Rules.

⁵ See Judgment No. 1446 (1995), at consideration 13, referring, *inter alia*, to the classical pronouncements of the doctrine in Judgment No. 61 (1962) and Judgment No. 832 (1987).

⁶ See Judgment Nos. 365 and 366 (1978), at considerations 7 and 6 respectively. See also, for example, Judgment No. 368 (1979), at consideration 7; Judgment No. 371 (1979), at consideration 4; Judgment No. 666 (1985), at consideration 5; Judgment No. 832 (1987), at consideration 13 (quoted with approval in Judgment No. 2089 (2002), at consideration 12); and Judgment No. 3074 (2012), at consideration 16. At first sight, the distinction between contractual and statutory conditions of service may be considered superficial, as a staff member's letter of appointment or contract usually (if not always) incorporates, by reference, the provisions of the Staff Regulations and Rules. It is clear however from the ILOAT's jurisprudence that only those provisions specifically spelled out in an individual staff member's contract are, generally speaking, inviolable. The fact that an organization incorporates, by reference, its staff regulations and staff rules into the terms of appointment does not *per se* mean that these may not be amended. It all depends on whether those provisions constitute acquired rights.

Reduction v. Abolition of Allowance

11. In its jurisprudence, the ILOAT makes a distinction between, on the one hand, the reduction in a statutory allowance or entitlement, and the outright abolition thereof on the other. Generally speaking, reductions in benefits are permissible, whereas the same cannot be said of a discontinuance of a particular benefit altogether, for failure to respect the doctrine of acquired rights.⁷ This is how the ILOAT put the matter:

“It is quite clear that expatriation, education and leave expense allowances are matters of importance to someone who joins the staff of an organisation. The question therefore arises whether the outright abolition of such allowances would not violate an acquired right. There is, however, no acquired right to the amount and the conditions of payment of such allowances. Indeed the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty”.⁸

Acquired Right to Receive Certain Allowances, including Education Grant

12. The entitlement to “well-established allowances, such as those for dependants”⁹ and the right to a pension¹⁰ have been recognized by the ILOAT as fundamental and essential terms of the conditions of employment, hence qualifying as an acquired right. Furthermore, the ILOAT has expressly held that the discontinuance of an entitlement to the repayment of travelling expenses on home leave constituted a breach of an acquired right.¹¹ Similarly, and more importantly for present purposes, the entitlement of staff members to an education grant has been qualified as an acquired right,¹² the removal of which would be considered in breach of the doctrine of acquired rights, and hence unlawful.

III. SITUATION OF FRENCH STAFF MEMBERS RESIDING IN FRANCE

13. Some French staff members residing in France, and who had been recruited prior to January 1, 2016, submitted a claim for, and received, an education grant. Payment was made on the basis that Regulation 3.14(a) did not, at that time, require that the staff member reside outside his or her home country as a pre-condition to receiving an education grant. This is how the statutory provision was formulated at the relevant time:

“Any staff member recruited internationally [...] whose duty station is not in his home country shall be entitled [...] to an education grant for each child who is dependent on the staff member for main and continuing support and who regularly attends a school, university or similar institution [...]”.

14. It should be noted however that the term “duty station” in the above-mentioned provision was given a specific definition in WIPO’s statutory framework. Up to the end of 2012, the Staff Regulations and Rules contained the following provision:

⁷ See also the advice given by the Office of Legal Affairs (New York) to the International Civil Service Commission, as reflected in paragraph 144 of its Report for the year 2015: “As a general rule, while an amendment to a statutory element of employment might lawfully reduce a benefit, the change should not result in the total evisceration of the benefit”.

⁸ See Judgment Nos. 365 and 366 (1978), at considerations 11. See also, for example, Judgment No. 368 (1979), at consideration 7; Judgment No. 371 (1979), at consideration 8; and Judgment No. 666 (1985), at consideration 5.

⁹ See Judgment No. 426 (1980), at consideration 7.

¹⁰ See Judgment No. 2632 (2007), at consideration 13.

¹¹ See Judgment No. 441 (1980), at consideration 7. The home leave of the complainant in question was from the Netherlands to Suriname.

¹² See Judgment No. 666 (1985), at consideration 5.

“When the place of assignment is Geneva, the term ‘duty station’ shall mean the area within a radius of 25 kilometers from Geneva”.

As of January 1, 2013, the reference to the phrase “a radius of 25 kilometers from Geneva” was changed to “a reasonable commuting distance from Geneva”.

15. Given the proximity of France to Geneva, the above-cited definitions of the Geneva duty station had the effect of making it fall within the borders of the neighboring territory of France. Since the area of the duty station crossed over the border into France, the WIPO Staff Regulations and Rules did not accord a right to an education grant to French staff members residing in their home country. Payment of the education grant was however made to this category of staff members pursuant to a consistent and long-standing practice.

16. The next issue to be addressed is whether the well-established practice of paying an education grant to French staff members residing in France has created any legal obligation on the part of WIPO to continue that practice. As will be demonstrated below, the short answer to that question is “no”.

IV. LEGAL EFFECTS OF LONG-STANDING PRACTICE

17. In certain circumstances, an administrative practice can be considered a source of law, provided that the practice (i) is consistent, (ii) was followed by the organization in the conviction that it reflected a legal obligation (*opinio juris*), and (iii) does not offend a written law. Furthermore, the ILOAT has not excluded the possibility that in some limited instances, a practice may even become the source of an acquired right.¹³

18. In the case under consideration, condition (iii) above is not met, as the long-standing practice to pay an education grant to French staff members residing in France was not authorized by the provisions of the WIPO Staff Regulations and Rules, by reason of the definition given to the term “duty station” in Geneva, as explained above. The ILOAT has made it clear in a wealth of jurisprudence that a practice that is inconsistent with the staff regulations and/or staff rules cannot obtain legal force,¹⁴ or give rise to an acquired right,¹⁵ and that an organization is entitled to bring the situation back into conformity with the statutory framework.¹⁶

19. It follows from the above that no legal obligation exists on the part of WIPO to continue the practice of paying an education grant to French staff members residing in France. This particular category of staff members never acquired a right to the preservation of the education grant. This is not because an education grant does not fall within the type of allowance that would ordinarily give rise to an acquired right, but because they did not have a statutory entitlement to an education grant in the first place, the payment of which was based merely on a long-standing practice.

20. In these circumstances, it is considered appropriate to delete Regulation 3.14(f) of the WIPO Staff Regulations and Rules, effective January 1, 2017.

¹³ See Judgment No. 2089 (2002), at consideration 14.

¹⁴ See, for example, Judgment No. 3071 (2012), at consideration 28.

¹⁵ See Judgment No. 3523 (2015), at consideration 10.

¹⁶ See Judgment No. 3358 (2014), at consideration 2.

Lawful Discontinuation of Practice

21. While the practice may be lawfully discontinued, the ILOAT has made it clear that the change should not be applied retroactively, and should be brought to the attention of staff members.¹⁷ These pre-conditions for the lawful abandonment of a practice stem from the principles of good faith and fair dealing, ensuring that staff members' choices and decisions are fully-informed when made.¹⁸

22. As for the requirement of notice, reference should be made to a relatively recent judgment, in which the ILOAT had the occasion to rule on the validity of the decision by an organization to discontinue the payment of an education allowance to dual nationals, on the basis that it had previously been wrongly awarded to them. The organization had notified the complainant that he would no longer be entitled to receive an education allowance for the next school year, as it had been paid in error. The complainant filed an internal appeal, in relation to which a new decision was taken to award the allowance until the end of his dependent child's educational stage.¹⁹ In confirming the lawfulness of the decision to discontinue the payment of the education allowance, the ILOAT held that there had been no violation of an acquired right or a legitimate expectation that the previous situation would be maintained. In addition, the ILOAT noted, with approval, that the organization in question had not immediately stopped payment of the allowance,²⁰ but only did so upon the completion of the child's educational stage.

V. TRANSITIONAL MEASURES

23. It is submitted that the approach taken by the organization in question in the preceding paragraph is beyond reproach (as confirmed by the ILOAT), given that, generally speaking, the decision to enroll a child in a particular educational institution represents a long(er)-term commitment (i.e., beyond a single school year), with the expectation that he or she would finish the educational stage at that institution (whether it be primary, secondary or post-secondary). If staff members had known that the payment of an education grant would be ceased before their child had completed a particular educational stage, then they might have made different choices at the time of enrolling their child.

24. It is therefore considered appropriate to introduce the following transitional measure into the WIPO Staff Regulations and Rules effective January 1, 2017 (and, in particular, in Regulation 12.5, which is the section dealing with transitional measures):

“Notwithstanding Regulation 3.14(a), staff members holding fixed-term, continuing or permanent appointments with the International Bureau before January 1, 2016, and residing but not serving, at the time, in their home country, and who are in receipt of an education grant in relation to expenses incurred up to and including December 31, 2016, shall continue to receive the education grant until the dependent child completes the educational stage of the educational institution in which he or she was enrolled as at December 31, 2016, provided all other eligibility requirements are met. For the purpose of this provision, ‘educational stage’ shall mean primary, secondary or post-secondary level of education”.

25. This transitional measure is limited in time. Primary and secondary education is generally of 6 years' duration. Furthermore, the education grant may only be paid until the fourth year of post-secondary education. Therefore, the maximum period the transitional measure would

¹⁷ See Judgment No. 767 (1986), at consideration 9 and Judgment No. 792 (1986), at consideration 8. See also Judgment No. 1053 (1990), at consideration 7, and Judgment No. 3358 (2014), at consideration 6.

¹⁸ See Judgment No. 1053 (1990), at considerations 5 to 7, and Judgment No. 767 (1986), at consideration 6.

¹⁹ See Judgment No. 3358 (2014), at part B and consideration 2.

²⁰ See Judgment No. 3358 (2014), at consideration 6.

remain in place would be approximately five years for a child in primary or secondary education (assuming normal progression of the child through the education system), and not more than three years for a child in post-secondary education. This is because staff members should already have committed to the educational institution in question, in order to fall within the transitional measure. It is purely designed to take into account the principles of good faith and fair dealing espoused by the ILOAT.

VI. FINANCIAL IMPLICATIONS

26. In order to determine the financial impact of the proposed transitional measure, the Office of the Legal Counsel (“OLC”) obtained relevant information and data from the Human Resources Management Department (“HRMD”) in relation to the target population of French staff members residing in France. OLC then requested HRMD and the Finance Division to perform a calculation of the financial cost of the proposed transitional measure, based on a set of criteria provided by OLC.

27. The starting point for the financial analysis is the 2017/2018 school year, which typically commences in September 2017. This is because any amendments to the Staff Regulations and Rules would only enter into force after the seventy-third session of the Coordination Committee in October 2016, which would be too late to have an impact on the 2016/2017 school year, as commitments would already have been made by the French staff members concerned.

28. As of the end of June 2016, the number of French staff members residing in France who have made claims pursuant to the education grant scheme is thirty-one (31). These 31 staff members were already residing in France before January 1, 2016, and hence are captured by the safeguarding provision of Regulation 3.14(f).

29. The calculation of the financial cost of the proposed transitional measure is necessarily based on a number of assumptions, including that the pool of 31 French staff members would not change. However, it is possible that the number could increase, if a French staff member who was residing in France before January 1, 2016, makes a claim for the first time pursuant to the education grant scheme in relation to the school year commencing in September 2016. For the purpose of the financial impact study, it is further assumed that the 31 French staff members continue:

- (a) to be employed at WIPO;
- (b) to reside in France, and not move to Switzerland, in which case they would be entitled to the education grant pursuant to Regulation 3.14(a), and not by reason of any transitional measure;
- (c) to incur admissible expenses pursuant to the education grant scheme for the school year commencing in September 2016;
- (d) to enroll their children at the same educational institution they are currently attending;
- (e) to be charged the same fees by the educational institutions in question, in relation to the same type(s) of expenses.

30. In addition, it is necessary to factor in the changes to the calculation of the education grant scheme as a result of the implementation of the compensation package reform of the UN common system, which is scheduled to take effect as of the school year in progress on January 1, 2018 (i.e., the 2017/2018 school year for schools located in the northern hemisphere). Generally speaking, the major change for staff serving in category “H” duty stations (like Geneva) is that boarding-related expenses and education grant travel no longer form part of the admissible expenses pursuant to the revised scheme. The same holds true in relation to certain other expenses, such as the cost of meals, transportation, books and school supplies.

31. This financial analysis does not take into account any WIPO-specific transitional measures that may be proposed in relation to the implementation of the new education grant scheme. Any such transitional measures would, if accepted, be applicable to staff in general, and not merely to French staff members residing in France.

32. In light of the foregoing, it is considered that out of the pool of 31 French staff members, only 24 would fall under the proposed transitional measure. This is because the children of seven staff members would either be completing their educational stage by September 2017, or the expenses claimed in respect of their education would no longer be covered by the new education grant scheme.

33. Based on the above assumptions, and taking into account the changes to the education grant scheme as of the 2017/2018 school year, it is estimated that the total, maximum, financial cost to WIPO of adopting the proposed transitional measure with respect to the 24 French staff members is 327,680 Swiss francs, over a five-year period (see Annex).

34. This is significantly less costly than if Regulation 3.14(f) were to remain in place. If no limited transitional measure were to be adopted, it is anticipated that WIPO would be faced with litigation from the staff members concerned, the associated costs of which is likely to outweigh the estimated total, maximum, cost of adopting the transitional measure.

[Annex follows]

French staff member residing in France	Dependent child	Admissible expenses claimed in original currency ¹	Admissible expenses converted into USD ²	Reimbursement rate 86% ³	Reimbursement rate 81% ³	Reimbursement rate 76% ³	Estimated cost per year in USD	Number of years remaining in educational stage (estimate) ⁴	Total cost projection in USD	Total cost projection in CHF
1	A	CHF 15,330	15,854	9,976	3,445	-	13,421	5	67,105	64,891
2	A	CHF 19,500	20,166	9,976	4,697	2,101	16,775	2	33,549	32,443
	B	CHF 2,500	2,586	2,224	-	-	2,224	1	2,224	2,151
3	A	CHF 1,000	1,035	890	-	-	890	1	890	861
	B	CHF 19,000	19,649	9,976	4,697	1,708	16,382	2	32,763	31,683
4	A	CHF 15,500	16,029	9,976	3,587	-	13,563	2	27,125	26,231
	B	CHF 18,900	19,545	9,976	4,697	1,629	16,303	1	16,303	15,765
5	A	CHF 1,000	1,035	890	-	-	890	1	890	861
6	A	CHF 14,300	14,789	9,976	2,582	-	12,558	2	25,117	24,288
7	A	EUR 1,015	1,145	985	-	-	985	2	1,969	1,905
	B	EUR 1,015	1,145	985	-	-	985	2	1,969	1,905
8	A	EUR 3,540	3,991	3,432	-	-	3,432	3	10,297	9,957
	B	EUR 1,840	2,075	1,785	-	-	1,785	1	1,785	1,726
9	A	EUR 560	632	544	-	-	544	2	1,087	1,052
10	A	EUR 135	153	132	-	-	132	1	132	128
11	A	EUR 6,250	7,047	6,060	-	-	6,060	1	6,060	5,861
12	A	EUR 525	592	509	-	-	509	5	2,546	2,462
	B	EUR 1,450	1,635	1,406	-	-	1,406	3	4,218	4,080
13	A	EUR 3,300	3,721	3,200	-	-	3,200	1	3,200	3,095
14	A	EUR 1,550	1,748	1,503	-	-	1,503	1	1,503	1,454
15	A	EUR 3,750	4,228	3,636	-	-	3,636	2	7,272	7,033
	B	EUR 4,150	4,679	4,024	-	-	4,024	1	4,024	3,892
16	A	EUR 600	677	582	-	-	582	3	1,747	1,690
	B	EUR 600	677	582	-	-	582	4	2,329	2,253
17	A	EUR 1,045	1,179	1,014	-	-	1,014	4	4,056	3,922

French staff member residing in France	Dependent child	Admissible expenses claimed in original currency ¹	Admissible expenses converted into USD ²	Reimbursement rate 86% ³	Reimbursement rate 81% ³	Reimbursement rate 76% ³	Estimated cost per year in USD	Number of years remaining in educational stage (estimate) ⁴	Total cost projection in USD	Total cost projection in CHF
18	A	EUR 1,900	2,143	1,843	-	-	1,843	3	5,529	5,347
	B	EUR 1,900	2,143	1,843	-	-	1,843	3	5,529	5,347
19	A	EUR 1,400	1,579	1,358	-	-	1,358	2	2,716	2,627
	B	EUR 1,530	1,725	1,484	-	-	1,484	2	2,967	2,870
20	A	EUR 3,200	3,608	3,103	-	-	3,103	1	3,103	3,001
	B	EUR 4,150	4,679	4,024	-	-	4,024	1	4,024	3,892
21	A	EUR 2,900	3,270	2,812	-	-	2,812	1	2,812	2,720
22	A	EUR 748	844	726	-	-	726	3	2,178	2,106
	B	EUR 748	844	726	-	-	726	2	1,452	1,404
23	A	GBP 9,400	13,429	9,976	1,481	-	11,457	2	22,913	22,158
24	A	USD 15,000	15,000	9,976	2,753	-	12,729	2	25,458	24,619
							179,776		338,840	327,680

Global sliding scale

Claim amount in USD	Reimbursement rate
0 - 11,600	86%
11,601 - 17,400	81%
17,401 - 23,200	76%
23,201 - 29,000	71%
29,001 - 34,800	66%
34,801 - 40,600	61%
> 40,601	0%

Explanatory Notes

¹ As obtained from the staff member's closure claim for the year 2014/2015, or the advance claim (if any) for the year 2015/2016.

² Pursuant to the new education grant scheme.

³ As per the global sliding scale adopted under the new education grant scheme.

⁴ Calculated as of the 2017/2018 school year.