

SEVENTY-FIFTH SESSION

In re COOK

Judgment 1296

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Steven Derek Cook against the European Patent Organisation (EPO) on 24 September 1992, the EPO's reply of 14 December 1992, the complainant's rejoinder of 17 March 1993 and the Organisation's surrejoinder of 21 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38, 64, 65, 67 and 69 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and EPO Circular No. 82 of 19 February 1981 entitled "Guidelines for Article 67, paragraph 2, and Article 69, paragraph 3 a), of the Service Regulations for permanent employees";

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 67(2) of the Service Regulations of the European Patent Office requires an employee who is being paid EPO family allowances to declare allowances "of like nature" paid to him, his spouse or dependants from other sources and says that they are to be docked from any allowances paid under the Regulations. A circular, No. 82 of 19 February 1981, that set out guidelines for applying Articles 67(2) and 69(3)(a) of the Service Regulations, stipulates that any payments made by a third party by way of allowance for an employee's dependant shall be docked from the amount the EPO would otherwise pay the employee for that dependant.

The complainant, who is British, and his wife, who is French, have three children. One of them is handicapped. The complainant joined the EPO in 1985 as a patent examiner in Directorate-General 1 (DG1) at The Hague. He is entitled to family allowances under Article 67(1) of the Service Regulations and receives three Article 69 dependant's allowances for his children, including one for his handicapped child. His wife is unemployed. In a notice of 8 January 1987 the Head of Personnel informed the staff that "an amount equal to the minimum amount of the [Dutch child allowance] for one child will be deducted from the EPO dependant's allowance".

On 10 November 1989 the Head of Personnel issued a notice about the application of Dutch social security provisions to EPO employees' spouses and cohabitating partners who were resident in the Netherlands and were not themselves international civil servants. It set out the terms of their entitlement to Dutch child allowance in the light of changes brought in by a Dutch royal decree of 3 May 1989 and explained that to safeguard their entitlement those concerned should apply to the Dutch authorities.

In a letter of 20 March 1991 the complainant informed the Remuneration Section of the EPO that his wife had applied for and obtained from the Dutch State back-payments of 12,074 guilders in allowances for their three children for 1988, 1989 and 1990.

Replying on 25 March 1991, the Section told him how much it intended to dock, in keeping with the notice of 8 January 1987, from his EPO child allowances to offset those payments. His pay slip for April 1991 showed a deduction of 271 guilders for that month and an "additional pay slip" of April 1991 said that the total amount to be withheld from his EPO child allowances for the period from January 1988 to March 1991 came to 9,000.03 guilders.

By a letter of 2 May 1991 the complainant appealed to the President of the Office against the deductions from his EPO child allowances on the grounds that the Dutch allowance was not a payment "of like nature" within the meaning of Article 67(2). In its report of 16 June 1992 the Appeals Committee unanimously recommended rejecting his appeal. In its view the Dutch child allowance was indeed "of like nature" and it cited in support rulings by the Court of Justice of the European Communities on a similar provision in force in the Communities.

In a letter of 30 June 1992, the decision impugned, the Director of Staff Policy conveyed to the complainant the

President's decision to endorse the Committee's recommendation.

B. The complainant submits that since the EPO dependant's allowance and the Dutch child allowance are not "of like nature" the EPO was wrong to make deductions from his pay on account of the Dutch child allowances.

For such deduction to be lawful both entitlements must have the same basis in law. In this instance they do not: the EPO allowance is an item of pay in return for services rendered. Judgment 1041 (in re Lammineur) shows that to qualify for items of pay other than basic salary an employee must meet several conditions. Once the conditions for payment of dependant's allowance are met it becomes a part of the employee's remuneration under Article 64(2), which provides that "Remuneration shall comprise basic salary and, where appropriate, any allowances". That is borne out by the EPO's practice of making deductions from all items of pay, including allowances for dependent or handicapped children, whenever an employee withholds his services for such purposes as strike action.

The Dutch child allowance is a basic social security benefit intended to help parents to meet their obligations towards their children. If the EPO allowance were of the same legal nature as the Dutch child allowance any deductions from it for strike action would be tantamount to covert disciplinary action. He cites international labour standards and the case law of the Court of Justice of the European Communities in support of his case. In any event the ban on concurrent payment of benefits is unlawful because the EPO has concluded no agreement with the Dutch Government setting out the purpose and basis in law of child allowance.

He seeks the quashing of the President's decision of 30 June 1992, repayment of the sums docked from his pay, interest thereon at the rate of 8 per cent a year as from the date of withholding and 3,000 guilders in costs.

C. In its reply the EPO relies on its rule precluding concurrent payment of allowances that serve the same purpose and submits that the only material criterion for determining the "nature" of an allowance is its purpose. The complainant is wrong to assume that the EPO pays the dependant's allowance in return for services rendered. The common purpose of the Dutch child allowance and the EPO child allowance is to help parents to meet the cost of bringing up children.

The case law of the Court of Justice of the European Communities is not binding on the EPO or on the Tribunal, and in any event the Court's rulings confirm that the two allowances are "of like nature" within the meaning of Article 67(2).

D. In his rejoinder the complainant enlarges on his earlier pleas. The EPO argued in the proceedings on the case that Judgment 1041 ruled on that the payment of allowances was for services rendered; it now takes another tack.

The EPO has seriously infringed his family's right to legal certainty: by applying its own rule on the deductibility of allowances paid for the same purpose it is telling the Dutch and other national authorities that the allowances it pays are a form of social protection.

In any event the deduction is tainted with a procedural flaw. The EPO failed to consult the General Advisory Committee and Local Advisory Committee, as it must under Article 38(3) and (4) of the Service Regulations, before adopting the policy of making deductions against the Dutch child allowance.

E. In its surrejoinder the Organisation answers the complainant's arguments and develops its own, rejecting in particular his allegations of a procedural flaw.

CONSIDERATIONS:

1. The complainant is a patent examiner at grade A3 and is employed by the EPO at The Hague. He and his wife, who is not in paid employment, have three children, the eldest of them born in May 1983. Under the terms of Article 67(1) of the EPO Service Regulations he is entitled to payment of dependant's allowances for his three children.

2. By a notice dated 10 November 1989 the Head of Personnel announced that, since all residents of the Netherlands were covered by the Dutch state social security scheme, the EPO was asking the spouses or cohabiting partners of its employees to apply for Dutch child allowances and other national benefits. On 20 March 1991 the complainant wrote to the Administration stating that his wife's application to the Dutch State for child allowances had been granted and that she had been paid such allowances for their three children with retroactive effect from

1988.

3. In April 1991 the EPO, acting under the authority conferred in Article 67(2), sent the complainant pay slips docking 271 guilders from his pay for that month and informing him of the withholding of another 9,000.03 guilders by way of repayments for the period from January 1989 to March 1991. On 2 May 1991 he filed an internal appeal, but the President rejected it by a letter to him of 30 June 1992, the decision he is now impugning.

4. The Dutch state social security scheme provides a child allowance known as the Kinderbijslag. Payment is not subject to any means test and is made to one or other of the parents lawfully resident in the Netherlands.

5. Article 67(2) of the Service Regulations reads:

"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; these allowances shall be deducted from those paid under these Service Regulations."

That text is identical to Article 67(2) of the Staff Regulations of the European Communities, barring of course the reference to the applicable regulations. As under the Communities' Regulations the family allowances referred to in 67(2) are the household allowance, dependant's allowance and education allowance.

6. The fundamental issue in this case is whether the child allowance received by the complainant's wife from the Dutch State - the Kinderbijslag - is "of like nature" to the EPO dependant's allowance.

The complainant contends that it is not. He argues that it is a form of basic social security intended to safeguard the welfare of any child living in the Netherlands, whereas the EPO allowance is a component of the remuneration an EPO employee is paid for services rendered. He cites the International Labour Organisation's Social Security (Minimum Standards) Convention, 1952 (No. 102), which says that periodic allowances for dependent children shall be provided during the entire period of entitlement; and he points out that the Dutch allowance is inalienable whereas the EPO one is subject to deduction, for example, in the event of strike action by the employee.

The EPO replies that the Dutch allowance and its own one are both intended to afford support for the parent in meeting the costs of child maintenance.

7. As both the complainant and the EPO submit, the Tribunal is not bound by the rulings of the Court of Justice of the European Communities, but inasmuch as Article 67(2) is derived from the article bearing the same number in the Staff Regulations of the Communities the Court's decisions do carry persuasive authority.

In one case (*Emer v. Commission of the European Communities*, 14/77) the issue turned on whether a Belgian family holiday allowance and a Belgian special family allowance were of the same nature as the Communities' dependent child allowance, and the Court held that they were not.

The complainant himself cites other decisions by the Court, but none of them is exactly in point.

8. At all events Article 67(2) of the EPO's Service Regulations must be construed in the context, not of the law of the Communities, but of the Organisation's own rules. As the Tribunal held in Judgment 1041 (in *re Lammineur*), Article 64(2), which is headed "Determination of remuneration" and states that "remuneration shall comprise basic salary and, where appropriate, any allowances", must be read together with the reference to "remuneration" in Article 65(1)(b) and that term is used in the EPO's Service Regulations to denote both basic salary and allowances.

9. Both the EPO dependant's allowance and the Dutch child allowance are paid on account of the dependency of the child and the social obligations of the parent. Their purpose is the same, to contribute to the costs of child maintenance. Neither the fact that the Dutch child allowance is paid to the complainant's wife nor the fact that it is inalienable - a normal provision of social security legislation - changes its essential purpose or makes it any different in nature from the EPO dependant's allowance.

10. Article 67(2) embodies the rule against concurrent payment of benefits and is based on the principle that no-one should simultaneously receive a family allowance of like nature from more than one source. It also seeks to prevent discrimination as between EPO employees living in different countries inasmuch as the law in some EPO member States, as the Appeals Committee pointed out, disqualifies EPO employees for national family allowances.

11. The complainant further contends in his rejoinder that the policy of deduction of the Dutch child allowance from the EPO dependant's allowance was not based on any decision by the EPO's Administrative Council; had not been first submitted to the General Advisory Committee in accordance with Article 38(3) of the Service Regulations; and did not comply with the terms of circular 82 of 19 February 1981 about the reckoning of deductions.

As to the first argument, since authority for deducting allowances "of like nature" is provided in Article 67(2) of the Service Regulations, no further decision by the Administrative Council was required: the determination of the portion of the national allowance that is "of like nature" to the EPO's own allowance is a matter for administrative decision by the European Patent Office.

Secondly, the answer to the plea about failure to consult the General Advisory Committee is that circular 82 was issued after consultation with the Committee at its 14th meeting, in November 1980.

The complainant's third plea is also unsound. The paragraph of the circular which he cites relates to "regular payments from third parties", that is, payments from private sources, for example for the maintenance of children of divorced parents. The paragraph does not apply to allowances paid by the State.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner