SEVENTY-SIXTH SESSION

In re FRANKS (No. 2) and VOLLERING (No. 2)

Judgment 1333

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Nigel Malcolm Franks against the European Patent Organisation (EPO) on 2 April 1993, the EPO's reply of 14 June, the complainant's rejoinder of 15 September and the Organisation's letter of 29 September 1993 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering the second complaint filed by Mr. Johannes Petrus Geertruda Vollering against the EPO on 12 March 1993 and corrected on 1 April, the EPO's reply of 14 June, the complainant's rejoinder of 15 September and the Organisation's letter of 29 September 1993 informing the Registrar that it did not wish to enter a surrejoinder;

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

Considering the application of 23 September 1993 by Mr. Steven Derek Cook to intervene in Mr. Vollering's complaint and the EPO's comments thereon of 4 November 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 17, paragraph 2, of the Rules of Court and Articles 56(4), 64(2), 65, 67 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The EPO employs the complainants as patent examiners in Directorate-General 1 (DG1) at The Hague. They each have three dependent children and receive family allowances under Article 67 of the Service Regulations. On 11 December 1991 they took part in a strike of EPO staff. They learned from supplementary pay slips for February 1992 that on that account the Administration had deducted one-thirtieth of their total monthly pay, including not just basic salary but also their allowances.

In letters dated 3 March they asked the President of the Office to pay back the amounts deducted against their family allowances or else treat their letters as appeals under Article 108 of the Service Regulations. In a letter of 29 June 1992 the Director of Staff Policy informed Mr. Vollering that the President had referred his case and others - among them Mr. Franks' - to the Appeals Committee as a "collective appeal". In its report of 2 November the Committee unanimously recommended allowing the appeal, but by a letter of 5 January 1993, the impugned decision, the President rejected it.

B. The complainants submit that the deductions are in breach of the Service Regulations and general principles of law and amount to covert disciplinary action. They have the following main pleas.

Asserting the precedence of general principles of the international civil service over the Service Regulations, they cite first the Organisation's duty of care towards its employees and their dependants. Though the staff's right to strike is, they maintain, "balanced" by the Administration's right to deduct basic salary for each day of strike action, the balance is disturbed when allowances too are withheld.

They allege, secondly, breach of the "fundamental" right to social security, as embodied in the Universal Declaration of Human Rights and the International Labour Organisation's Social Security (Minimum Standards) Convention, 1952 (No. 102). In Article 67(2) of the Service Regulations, which precludes concurrent payment of allowances of like nature, the EPO acknowledges that allowances are not amounts paid in proportion to services

rendered. If they were there would be no need for such a rule. Allowances from the EPO being comparable to those that member States provide, the Organisation may not suspend payment whenever a staff member goes on strike: that would deprive his family of the social protection which the EPO owes its permanent employees much as a government owes protection to citizens.

Their third plea is breach of equal treatment. Since 1978 the EPO has been setting against family allowances any amounts officials and their spouses have received in child allowance from the Dutch Government (the kinderbijslag). But the complainants, whose wives do not receive Dutch child allowances, fare less well than any official whose spouse does get such an allowance, which a strike at the EPO does not affect. Among the other examples of discriminatory treatment they cite are cases where both parents are employed by the EPO: if the one who receives family allowance does not go on strike the EPO will pay it whether or not the other parent goes on strike too.

Their final plea turns on the construction to be put on Article 65(1) b) and c), which reads as follows:

"b) Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths ...

c) Where entitlement to any of the allowances provided for in Article 67 commences after the date of entering the service, the employee shall receive such allowance from the first day of the month in which such entitlement commences. On cessation of such entitlement the employee shall receive the sum due up to the last day of the month in which entitlement ceases."

In the absence of special provisions on strikes the material rule is 65(1) c), which means that allowances are to be paid for the full month in which entitlement begins or ends. Since Article 64(2) says that "remuneration shall comprise basic salary and, where appropriate, any allowances" the words "where appropriate" allow the EPO to exclude allowances from the scope of 65(1) b). So any deductions against the allowances are tantamount to covert disciplinary action.

The complainants' claims are that the Tribunal quash the impugned decisions, order repayment to them of any deductions made against the allowances on account of strike action, plus payment of interest thereon at the rate of 10 per cent a year, and award each of them moral damages in the amount of 7,000 guilders plus 303 for each of their children. Mr. Vollering also seeks an award of 20,000 guilders in costs.

C. In its replies to the complaints the EPO submits that the answer to the complainants' pleas is already to be found in the case law. In Judgment 566 (in re Berte and Beslier) the Tribunal held that Article 65 applied "whatever the reason for the official's absence", since it does not provide for any exception. Judgment 1041 (in re Lammineur), which was about deductions against allowances for strike action, held that "remuneration" in 65(1) b) denotes "both basic salary and allowances" and ruled that there was "nothing to suggest that allowances are not subject to the thirtieths rule that applies under 65(1) b) to all forms of 'remuneration'" since the only purpose of 65(1) c) was to "determine entitlement to allowances when such entitlement is to cease ... and when such entitlement 'commences after the date of entering the service'".

In the absence of any special provision governing strikes it is the general rule on deductions in the event of absence that applies. Since that rule applies to basic salary and allowances alike there is no question of disciplinary action, nor is the deduction so "serious" as to destroy the balance between the EPO's and its officials' rights and duties. To assume that the Tribunal overlooked general principles of law when it delivered Judgment 1041 is to plead a mistake of law.

The Tribunal presumably took account of any fundamental rights, such as equal treatment, that are embodied in the human rights instruments that the complainants rely on. In any event the EPO is not bound by such instruments.

Those who get the Dutch child allowance and officials eligible for EPO family allowance are not in the same position in fact and in law. Since the complainants' wives are not permanent employees of the EPO their arguments raise "theoretical" questions beyond the scope of the complaints.

The EPO's interpretation of Article 65(1) b) and c) is the one endorsed in Judgment 1041: 65(1) c) covers the special case and may not override the general rule in 65(1) b). There is no ambiguity in 64(2), which defines "remuneration" to include allowances whenever an official is entitled to any, "where appropriate".

D. In their rejoinders the complainants press their earlier pleas. In their submission Judgment 1041 was flawed because the Tribunal did not have all the material evidence before it. That the deductions are discriminatory is especially plain in the event of a long strike: should a strike last for a whole month families who depend on the EPO for social protection would get no benefits - or for that matter salary - whatsoever. The complainants also allege breach of the principle by which the level of salary and allowances should be such as to attract the most highly qualified officials, since the EPO's practice offers less favourable conditions than those on offer in the Organisation's member States. Is not the protection of fundamental rights in human rights instruments part of the general principles of law that govern the international civil service?

CONSIDERATIONS:

1. On 11 December 1991 the complainants took part in a one-day strike of EPO staff at The Hague. Supplementary pay slips for February 1992 showed that the EPO had made deductions from their pay for that day at the rate of one-thirtieth of the monthly rates and that it had applied the deductions to all items of their pay, including the allowances they were entitled to under the Service Regulations. They thereupon appealed on the grounds that the EPO should have made the deductions only against their basic salary, not total pay including those allowances.

2. Their collective appeal was referred to the internal Appeals Committee, which reported on 2 November 1992. The Committee declared itself not competent to entertain their first claim, which was that it should "ignore the ILO Judgment 1041" on the grounds of "an error of law". As to their second claim, which was that it should "pronounce on the nature of the allowances", it unanimously recommended allowing the appeal and repaying the amounts deducted. The grounds it gave were that for the EPO to stop payment of the allowances as well would upset the balance between the staff's right to go on strike and the employer's right to deduct salary on that account and "would amount to an unjustified sanction in case of a legal exercise of a fundamental right". But in a letter dated 5 January 1993 to Mr. Vollering the President of EPO Office said that he was rejecting the appeal "in view of the clear case law on the subject". That is the decision the complainants are impugning.

3. The sole substantive issue in this case is whether the Organisation acted properly in deducting amounts from the complainants' pay in respect of their allowances because they had taken part in the strike of 11 December 1991. But that is the very issue that the Tribunal ruled upon in Judgment 1041 (in re Lammineur) of 26 June 1990. In that judgment the Tribunal made, under 3, a detailed analysis of the material provisions of the Service Regulations - Articles 56(4) and 65(1) b) and c) - rejected the complainant's interpretation of them and accordingly dismissed his case as devoid of merit, for the reasons set out in 4. The pleas that the present complainants are putting forward are in essence the same and must fail for the same reasons, which there is no need to repeat here.

4. The complainants further plead breach of basic rights and of general principles of law which, in their submission, amounts to covert disciplinary action in that "the administration is not allowed to take special measures which are not provided for in the Service Regulations".

5. That plea too is unsound. First, for the reasons already stated in Judgment 1041, the deduction of sums against the complainants' allowances is lawful under the Service Regulations, and the taking by the Organisation of a decision that the Regulations allowed cannot in the circumstances of the case constitute an unlawful act. Secondly, the complainants are mistaken in seeing deduction of their allowances as a breach of basic rights and general principles of law. The law that the Tribunal applies in entertaining claims that are put to it includes not just the written rules of the defendant organisation but the general principles of law and basic human rights. The ruling in Judgment 1041 that the EPO acted lawfully in making deductions against the allowances in the event of strike therefore implied that in doing so it was not offending against any general principle of law or basic human right. Again the complainants' plea fails.

6. One of the principles that the complainants allege that the EPO acted in breach of is that of equal treatment. Although what is said in 5 above holds good for that as for any other general principle of law, they dwell on the issue of equality at some length and the Tribunal therefore deals with it in rather greater detail below.

7. The complainants plead four breaches of the principle. The first arises out of the payment of the Dutch State child allowance known as the kinderbijslag to certain EPO staff members or their spouses. They point out that the EPO considers the Dutch child allowance to be "of like nature" to the EPO family allowance, and that is why it applies the rule against accumulation of the two benefits in Article 67(2) of the Service Regulations. They

themselves and their spouses do not receive the Dutch child allowance. So in the event of a strike they fare less well than EPO staff and their spouses who do receive it since the complainants suffer the deduction against the EPO allowance whereas the others preserve full entitlement to the Dutch child allowance. They conclude that families of EPO staff members are therefore being differently treated.

8. The Organisation's answer is that, though the Dutch child allowance and the family allowance paid by EPO are indeed "of like nature", that is "immaterial" to the question at issue. In its submission the Dutch allowance is "an integral part of national legislation in the Netherlands", whereas the "issue in the present case is the application of the special provisions governing permanent employees of the European Patent Office as set out in the Service Regulations".

9. The EPO's position is correct. Its employees whose families do receive the Dutch child allowance are not in the same position in law as those who receive the EPO family allowance, the source of the benefit not being the same. Since the principle of equal treatment applies only where staff members are in the same position in law, there is no breach of it in the present instance.

10. Secondly, the complainants plead "the case of unequal treatment which arises in the situation where both husband and wife are employed by EPO". Since their wives are not employed in the Organisation no analogy may be drawn between their own position and the situation on which they rely, and therefore the principle of equality does not apply.

11. Thirdly, the complainants contend that there is further discrimination in the event of strike between full- time EPO employees like themselves and part-time employees in that the latter will continue to receive in full any allowance they may be entitled to. As the Organisation points out in its replies, however, if any part-time employee "chooses to go on strike he is of course treated in the same way as his colleagues working full time and one-thirtieth of all his allowances is deducted for each day on strike". The conclusion is that there is no breach of the principle of equality between full-time and part-time employees.

12. Fourthly, and lastly, the complainants allege breach of equality in the payment of education allowance. But the EPO made no deductions from their pay on account of that allowance. The plea fails because they have no cause of action.

13. Mr. Cook has applied to intervene in Mr. Vollering's complaint in accordance with Article 17(2) of the Rules of Court on the grounds that his rights will be affected by the Tribunal's judgment. Insofar as he is seeking the "annulment" of Judgment 1041 and the resumption of proceedings on an internal appeal his claims go beyond the scope of Mr. Vollering's and are therefore irreceivable. Insofar as his claims concur with Mr. Vollering's his intervention is receivable but is rejected on the grounds set out above.

DECISION:

For the above reasons,

The complaints and the application to intervene in Mr. Vollering's complaint are dismissed.

In witness of this judgment Mr. José Maria Ruda, 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 31 January 1994.

José Maria Ruda
E. Razafindralambo
Michel Gentot
A.B. Gardner

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