

EIGHTY-FIFTH SESSION

In re Goettgens (No. 4)

Judgment 1755

The Administrative Tribunal,

Considering the fourth complaint filed by Mr. Johannes Karl Wilhelm Goettgens against the European Patent Organisation (EPO) on 19 June 1997 and corrected on 1 July, the EPO's reply of 18 September, the complainant's rejoinder of 9 October and the Organisation's letter of 4 November 1997 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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. The complainant, a German who was born in 1928, served on the staff of the European Patent Office, the EPO's secretariat, until he retired. Information on his career is given under A in Judgment 1517 of 11 July 1996 on his second complaint.

The salient facts are set out in Judgment 1518 of even date on his third one. The subject of that case was and of this one is the EPO's decision to reduce his household allowance by an amount equal to the spouse's share (*Ehegattenbestandteil*) of the local weighting allowance (*Ortszuschlag*) he was entitled to as a former official of the German civil service. Having found breach of due process, the Tribunal sent the case back to the President of the Office for a new decision after resubmission to the Appeals Committee.

The EPO put his case to the Committee on 8 October 1996. In a report dated 3 February 1997 the Committee recommended allowing his appeal and paying him back sums it held to have been wrongfully withheld from his pension.

By a letter of 3 April 1997 the President told him of the rejection of his appeal. That is the decision under challenge.

B. The complainant puts forward three main pleas.

First, he points out that, according to Article 28/1 of the Rules implementing the Office's Pension Scheme Regulations, the household allowance payable to a pensioner shall be "calculated on the basis of his pension", but not "less than the minimum laid down in the scales in force", save where the allowance is "reduced on the basis of the income of the spouse". He submits that that provision does not allow EPO to reduce the household allowance on account of sums collected from other sources. Although Article 67(2) of the Service Regulations requires serving officials to declare any family allowances they or their spouse or dependants may have received from other sources and allows the EPO to make corresponding deductions, pensioners do not come under the rule. Pensioners are in a different position in fact because they often draw pensions from more than one source, whereas staff members draw salary from the Organisation alone. Besides, the amount due by way of household allowance varies with that of the pension, unlike the child allowance, which is fixed.

The complainant's second plea is that in only one case do the rules allow the EPO to reduce the minimum amount of the allowance: where such reduction is based on the spouse's income. Since his wife is not gainfully employed and it is the minimum amount he is entitled to, the EPO is wrong to reduce it.

Thirdly, he contends that his local weighting allowance and the household allowance were not comparable. The EPO relied on the first part of the German Government's statement that he had got the spouse's component of that allowance solely because he was married, but it overlooked the second part of its statement, according to which he would have got the same amount if he had never married or were a widower.

He asks the Tribunal to set aside the impugned decision and order the EPO to pay him no less than the minimum amount of the household allowance, refund the amounts wrongfully deducted and pay him interest, to be reckoned at an "appropriate" rate. He claims costs.

C. The EPO replies that the complaint is groundless. According to the German Government, the complainant's marital status alone entitled him to payment of the spouse's share of the local weighting allowance. Although he may have got the same amount because he reached the age of 40 before 1 January 1976, the "main reason" for awarding a similar amount to unmarried people who were born before 1 January 1936 was that most of them were women who were unable to marry "as a result of war". So the household allowance and the spouse's share of the local weighting allowance are indeed of like nature. The Tribunal has declared concurrent payment of like benefits unlawful. For want of any special provision that adapts the rules on household allowance to the circumstances of pensioners, all provisions in the Service Regulations apply. There is no "apparent reason" why the rule against payment of concurrent benefits of like nature should apply only to serving officials. The other "co-ordinated organisations" treat serving officials and pensioners alike. By docking from the complainant's household allowance the amount due to him by way of the spouse's share the EPO has not deprived him of the minimum amount of his allowance: it has merely taken account of the fact that a part of the minimum amount comes from another source.

D. In his rejoinder the complainant contends that the reply says nothing that the defendant has not already argued in answer to his third complaint. He submits that, if the intent had been what the EPO makes out, the draftsman would have expressly extended the scope of the material rules to pensioners.

CONSIDERATIONS

1. This complaint is a sequel to Mr. Goettgens' third complaint, on which the Tribunal ruled in Judgment 1518. The facts are set out in that judgment.

2. Article 28 of the EPO's Pension Scheme Regulations reads:

"(1) The family allowances comprising household allowance, child and dependant's allowance, handicapped child allowance and education allowance granted under the Service Regulations for permanent employees of the Office shall be paid:

- i) to the recipient of a retirement pension, at the age of entitlement, or later;
- ii) to the recipient of an invalidity pension;
- iii) to the recipient of a survivor's pension.

The household allowance shall be calculated by reference to the pension of the recipient.

(2) The amount of the allowance for a child or other dependant payable to the person entitled to the survivor's pension shall be twice the normal amount.

(3) If the recipient of a retirement, invalidity or survivor's pension receives other family benefits in respect of the same children, the amount of the latter benefits shall be deducted from the allowances provided for in this Article.

(4) Entitlement to the allowances provided for in this Article shall cease at the end of the month in which the child or other dependant ceases to satisfy the conditions for entitlement to those allowances under the Service Regulations and Rules applicable to employees of the Office."

and Article 67 of the Service Regulations reads:

(1) Under the conditions laid down in this Section, a permanent employee shall be entitled to:

- a) family allowances:
 - household allowance,
 - dependants' allowance,
 - education allowance;

- b) expatriation allowance;
- c) installation allowance;
- d) rent allowance;
- e) language allowance.

(2) 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.

(3) In cases where a husband and wife employed by the Office are both entitled to family allowances, these shall be payable only to the person whose basic salary is the higher."

3. The complainant has been receiving since March 1992 under Article 28 a retirement pension from the EPO together with a household allowance and since January 1993 a civil service pension from the German Patent Office, which employed him until he joined the EPO. The German pension is supplemented by a local weighting allowance known as the *Ortszuschlag*.

4. On the grounds that the *Ortszuschlag* which the complainant was receiving included a married person's component, or *Ehegattenbestandteil*, which amounted to about 80 German marks a month, the EPO treated that component as being "of like nature" to his household allowance and deducted it from the amount of his pension.

5. The complainant objected to that deduction on the grounds that Article 28 authorised only the deduction of allowances "in respect of the same children" and that in any event the *Ortszuschlag* was not like a household allowance in his case, being paid because he was born before 1 January 1936, not because he was married.

6. The President of the Office rejected the complainant's appeal against the deduction. Judgment 1518 set aside the President's decision for breach of due process, on the grounds that he had acted on two letters which had not been brought to the notice of the complainant and the Appeals Committee. The Tribunal sent the case back for a new decision after resubmission to the Appeals Committee.

7. Although the Committee recommended allowing the complainant's appeal, the President rejected it in a letter to him dated 3 April 1997. That is the decision he is now impugning.

8. The first issue is whether Article 28 allows the deduction only of benefits in respect of children or, as the EPO contends, of all allowances similar to the household allowance.

9. The EPO relies on the general principle the Tribunal recognised in Judgment 1296 (*in re Cook*):

"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 ..."

The EPO sees no reason why the general principle that no-one should accumulate allowances of like nature should apply only to serving staff and not to pensioners. It further contends that since according to Article 28(1) the family allowances granted under the Service Regulations to permanent employees must be paid to pensioners without making any special provision to adapt the household allowance to their situation, all the provisions of the Service Regulations relating to the allowance must be applied. Lastly, the EPO submits that 28(3) is not "a special provision which excludes the application of Article 67(2) ... and consequently also the general principle of the deductibility of allowances of like nature" but is "necessary in order to adapt the provision of Article 67(2) to the specific situation of the pension recipient". It points out that 67(2) bars granting a permanent employee a second household allowance from another source but makes no corresponding provision for a pensioner; and that 67(3) disentitles husband and wife employed by the EPO to more than one household allowance, but does not prohibit the accumulation of allowances upon the death of one spouse: "[the] widowed staff member ... is entitled to both a salary and a survivor's pension paid by the EPO and would therefore be entitled to twice the family benefits in respect of his dependent children. Article 67(3) ... does not cover this kind of cumulation". The EPO submits that 28(3) provides against those omissions by using broader wording - "other family benefits" - and extends to

pensioners the general rule against the accumulation of allowances.

10. Article 28(3) does not help the EPO. It does not deal at all with household allowances but is restricted to benefits "in respect of the same children".

11. As for the rule against concurrent payment of family allowances of like nature, it is intended, as Judgment 1296 made plain, to prevent the inequitable grant of double benefit to an employee. The complainant submits, and the EPO does not deny, that the household allowance is a variable one which increases with the amount of the pension, and that the pension itself increases with length of service. Thus a pensioner who has served only one employer will receive one pension, including the household allowance, while another who, during the same period, has served two employers will receive two pensions, each including the household allowance. If, as the EPO argues, one household allowance is to be deducted from the pension of the latter the result will be that he will receive a much smaller household allowance, although his period of service was the same. The deduction of household allowance will in those circumstances not prevent double benefit but create serious inequality. Household allowances are different from fixed ones, such as child allowances, the accumulation of which would result in an inequitable double benefit. The Tribunal holds that there are good reasons why Article 28 does not prohibit the accumulation of household allowances and will not read that principle into the article.

12. The reference in 28(1) to the allowances "granted under the Service Regulations" is no more than a description of the allowances: the family allowances to be paid to pensioners shall be the same as those paid to serving staff. If the EPO had further intended to make those allowances subject to the same restrictions and deductions as those stated in the Service Regulations, express provision to that effect could quite easily have been made. The omission to make it in the case of household allowances seems deliberate, express provision being made in respect of child allowances. At all events any ambiguity in the Regulations the EPO has issued should be construed *contra proferentem* and in favour of the staff.

13. The conclusion is that the EPO was not entitled to deduct the *Ehegattenbestandteil* from the family allowances payable to the complainant and that the decision of 3 April 1997 cannot stand. That conclusion makes it unnecessary to decide whether the complainant was entitled to the payment of the spouse's share (*Ehegattenbestandteil*) of the local weighting allowance (*Ortszuschlag*) because - whether he was married or not - he was born before 1 January 1936.

DECISION

For the above reasons,

1. The impugned decision of 3 April 1997 is quashed.
2. The EPO shall pay the complainant the household allowance without making any deduction on account of the *Ortszuschlag* received by him and shall repay to him the amounts wrongfully deducted, plus simple interest thereon, to be reckoned at the rate of 10 per cent a year as from the due dates and up to the date of payment.
3. The EPO shall pay the complainant 1,500 German marks in costs.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner