

SIXTY-FIFTH SESSION

***In re* ELSEN-KASPERSKI**

Judgment 944

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Julia Elsen- Kasperski against the European Patent Organisation (EPO) on 23 February 1988 and corrected on 29 March, the EPO's reply of 22 June, the complainant's rejoinder of 3 August and the EPO's surrejoinder of 5 October 1988;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 68, 69, 70, 72, 83 and 108 of the Service Regulations 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 facts of the case and the pleadings may be summed up as follows:

A. Article 83(1) of the EPO Service Regulations provides that, "in accordance with the Implementing Rules", a permanent employee and his spouse, among others, shall be insured against expenditure incurred in case of sickness and accident.

Article 83(6) requires the claimant to "declare the amount of any other reimbursement to which he or any other person provided for in paragraph 1 is entitled for the same expenditure" and says that, where the total which he would receive by way of reimbursement exceeds 100 per cent of the expenditure incurred, the difference shall be deducted from the amount to be reimbursed.

Under a collective contract the EPO has concluded with several companies its insurance scheme is run by an international firm of brokers in Belgium, J. van Breda.

Both the complainant and her husband are employees of the EPO at The Hague. Mr. Elsen was refunded, under the insurance contract, 80 per cent of expenses he had incurred for medical treatment. On 13 November 1986 the complainant claimed the remaining 20 per cent from van Breda. In a letter addressed to Mr. Elsen on 14 November van Breda observed that, where husband and wife were both employees of the EPO, each had to pay the premiums in full and was therefore treated as separately insured; so neither might claim any supplementary refund of the other's expenses. On 5 December 1986 Mr. Elsen wrote to the EPO protesting against van Breda's decision and asking, should the claim to full refund be refused, that his letter be treated as an internal appeal under Article 108 of the Service Regulations. The case was referred to the Appeals Committee on 12 February 1987 and in its report of 17 September 1987 the Committee recommended allowing the main claim to 100 per cent refund. By a letter of 27 November 1987, the decision under challenge, the Principal Director of Personnel told Mr. Elsen that the President had rejected his appeal.

B. The complainant observes that according to Article 83(6) of the Service Regulations she may claim not 80 but 100 per cent refund of her own and her husband's medical expenses. Whereas the case of spouses both employed by the EPO is covered by Article 68(3), about household allowance, and Article 72(7), about expatriation allowance, there is no provision that expressly covers medical insurance. In support of her claims she submits a letter of 13 July 1987 from the Ministry of Justice of the Federal Republic of Germany commenting on the lawfulness of the collective insurance contract under German law. She asks for the full application of 83(6) and in particular the refund at 100 per cent of the medical expenses incurred by her husband and herself since 12 November 1982, plus interest.

C. In its reply the EPO observes that, whereas it was Mr. Elsen who lodged the internal appeal, the complaint is signed by his wife and submitted in her own name. The complaint is therefore irreceivable.

The Organisation's pleas on the merits are subsidiary. It argues that the rights of its staff derive solely from Article 83(1) of the Service Regulations, not from the collective insurance contract. Thus a staff member is not entitled to benefits beyond what the Regulations allow. Article 83(6) merely means that no-one may get more than 100 per cent refund of the expenses incurred, and a married official cannot plead that provision in support of a claim to 100 per cent refund of expenses incurred by a spouse also employed by the EPO. The views of the Ministry of Justice of the Federal Republic are irrelevant to the interpretation to be put on the Service Regulations. To accept the complainant's interpretation would give an unfair advantage to spouses both employed by the EPO.

D. In her rejoinder the complainant explains that she is claiming only her entitlements under the Service Regulations, not pleading the contract with van Breda or German law. She submits that if her claims are allowed she would not be getting preferential treatment. Although her husband and she are contributing twice over the benefits they derive are no greater than those granted to a married official whose spouse is not at the EPO.

E. In its surrejoinder the EPO develops its pleas and seeks to refute the complainant's, observing in particular that it is not right to say that the complainant and her husband are contributing twice over: each of them is paying contributions as an official.

CONSIDERATIONS:

Receivability

1. The complainant is impugning a final decision which the President of the Office took on 27 November 1987, on the Appeals Committee's recommendation of 17 September 1987, to reject an internal appeal that had been lodged on 5 December 1986. So there has been compliance with the requirement in Article VII(1) of the Tribunal's Statute that the internal means of redress should have been exhausted.

Moreover, the final decision having been notified on 9 December 1987, the complainant lodged her complaint on 23 February 1988, within the time limit in Article VII(2) of the Statute.

2. The EPO raises an objection to receivability in that the internal appeal was signed by Mr. D. Elsen, the Appeals Committee's report refers to "an appeal by Mr. D. Elsen" and the final decision is also addressed to Mr. Elsen, whereas this complaint is signed by Mr. Elsen's wife, who is suing in her own name, not her husband's.

There being no need for a ruling of general purport on the issue, the Tribunal holds that in the circumstances of the case the complaint may be deemed receivable. The internal appeal was made by the complainant's husband, who, like her, is an official of the EPO; that appeal and the complaint are not at odds; the two spouses are not legally separated; they concur on the material issue and the purpose of the suit relates to a matter of social security for spouses arising under Article 83(1) of the Service Regulations.

The Tribunal will therefore go into the merits.

The merits

3. The only issue which the Tribunal is competent to consider under Article II(5) of its Statute is whether the President's decision of 27 November 1987 was in breach of Article 83. The collective insurance contract the Organisation has concluded with van Breda is immaterial because the complainant is not privy to it: all she may do is challenge, on the grounds of breach of Article 83, the Administration's decision not to refund the amount of medical expenses she claims.

4. The President's decision to confirm the earlier decision on the complainant's and her husband's entitlements was in keeping with 83(1).

That provision reads:

"In accordance with the Implementing Rules, a permanent employee, his spouse, his children and other dependants within the meaning of Articles 69 and 70 shall be insured against expenditure incurred in case of sickness, accident, pregnancy and confinement. One third of the contribution, calculated by reference to the basic salary of the employee, which is required to meet such insurance shall be charged to the employee, but so that the amount

charged to him shall not exceed 2.4% of his basic salary."

The rule does not expressly cover the contingency in which the EPO employs both spouses and there is no provision that says that, where it does, expenses may be refunded in full. Article 83(6) does require the staff member to declare the amount of any other reimbursement to which he or any other person provided for in 83(1) is entitled for the same expenditure, and it may be taken as establishing special rules on reimbursement of expenses where both spouses are employees. But the rules in 68(3) and 72(7) may not be applied in construing 83(1) since they provide against other contingencies. Only if there is an express rule on the matter will special arrangements be made to apply 83(1) to the case where both spouses are on the staff. There being no such rule, no other provision of the Service Regulations may be applied, even by analogy, if intended to fit an essentially different set of circumstances.

5. The contract with van Breda is stated, in clause 1, to be governed by a German statute of 1908 and by the Civil Code of the Federal Republic of Germany. But such legislation cannot affect relations between the EPO and its staff, which are governed solely by its Service Regulations and the material rules of international administrative law. Although in a letter of 13 July 1987 the Ministry of Justice of the Federal Republic has commented on the lawfulness of the contract under German law as regards the refund of expenses to EPO officials who are spouses, the Ministry's opinion has no bearing on the lawfulness of the impugned decision under the EPO Service Regulations.

6. It is true that 83(1) refers to "Implementing Rules", and the absence of such rules is indeed a lacuna that ought to be made good, the Organisation being under a duty to adopt them. Be that as it may, the impugned decision may not be set aside unless shown to be in breach of 83(1). As was stated above there is no breach since 83(1) will not bear the construction the complainant wants to put on it. The decision must therefore stand.

7. Besides, the EPO's interpretation of 83(1) is in keeping with the spirit and the letter of its own rules on social security. Under those rules each staff member pays contributions that depend on the amount of salary, yet is entitled to the same benefits, whatever the degree of individual risk or family situation may be. Status as an official will always prevail over status as the member of an official's family, and the right to refund derives solely from the former, not from any marital connection there may be with another official.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
H. Gros Espiell
A.B. Gardner