

EIGHTY-SECOND SESSION

In re Vollering (No. 8)

Judgment 1567

The Administrative Tribunal,

Considering the eighth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 1 November 1995, the EPO's reply of 22 January 1996, the complainant's rejoinder of 26 April and the Organisation's surrejoinder of 5 July 1996;

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, who is Dutch, is employed by the European Patent Office, the EPO's secretariat, as a patent examiner in its Search Directorate (DG1) at The Hague. Facts with a bearing on his case are recounted in Judgments 1296 (*in re Cook*), 1297 (*in re Theuns No. 3*) and 1333 (*in re Franks No. 2 and Vollering No. 2*).

By a letter of 22 April 1993 he told the Administration that his wife was receiving child allowances (*kinderbijslag*) from the Dutch State for their three children as from October 1989. An "additional pay slip" he got for June 1993 showed that on that account the EPO had withheld 7,778.31 guilders from his pay.

By a letter of 22 September 1993 he appealed to the President of the Office. The Appeals Committee, to which the President referred his appeal, recommended rejection in its report of 30 June 1995. By a letter of 11 August 1995 the Director of Staff Policy told him that the President had decided to endorse the Committee's recommendation. That is the challenged decision.

B. The complainant submits that the EPO was wrong to rely on Article 67(2) of the Service Regulations, which requires it to deduct from any dependant's allowance paid to an employee the amount of any allowance "of like nature" paid to the employee or the employee's spouse. He insists that the Dutch child allowance and the EPO dependant's allowance are not of like nature. He also pleads discriminatory treatment and breach of the rules governing payments and the recovery of sums overpaid.

He wants the Tribunal:

"A) to quash the decision of the President of the EPO dated 11.08.1995 which rejects the internal appeal of the complainant

B) to order the EPO to pay back the deducted amounts from the complainant's remuneration because of the receipt of "Kinderbijslag" by the complainant's wife with retroactive effect over the period of 89/10 - 92/12...

C) to order the EPO to pay back the deducted amounts from the complainant's remuneration because of the receipt of "Kinderbijslag" by the complainant's wife on a regular basis since 93/1

D) to order the EPO to stop the deduction of any amounts from the complainant's remuneration because of the receipt of "Kinderbijslag" by the complainant's wife

E) to order the EPO to pay the complainant a 10% interest per annum on all sums of money wrongly deducted from the complainant's remuneration

F) to order the EPO to pay a moral damage of NLG 10,000 to the complainant because the EPO upholds the illusion that the dependants' allowance is of like nature as the "Kinderbijslag" while in judgement 1333 (*re Franks and Vollering*) it is judged to be a simple pro rata payment, and for the implicit refusal of the EPO to solve the problems of its employees concerning their social security by means of for instance an agreement with the Dutch Government

G) to order compensation to the complainant of NLG 10,000 for costs incurred."

C. In its reply the EPO contends that the complaint is devoid of merit. The Tribunal has already declared it lawful for the Organisation to deduct sums from the dependant's allowance when an employee or an employee's spouse receives an allowance of like nature, such as the Dutch child allowance, from another source. The EPO rebuts his other pleas.

D. In his rejoinder the complainant says that his original arguments already answer "most" of the points in the Organisation's reply.

E. In its surrejoinder the EPO maintains its earlier submissions.

CONSIDERATIONS

1. The complainant and Mr. Steven Cook have both applied for joinder of this complaint with Mr. Cook's fourth one. The application is disallowed because the other complaint is about deductions from pay on account of participation in a strike and therefore raises different issues of law.

2. The complainant informed the Organisation on 22 April 1993 that his wife had recently applied for and been granted the *kinderbijslag*, the child's allowance paid by the Government of the Netherlands. She was accordingly paid that allowance for three children with retroactive effect for the last three months of 1989 and for 1990, 1991 and 1992. The total came to 10,284 guilders. In June 1993 the Organisation deducted from the complainant's pay the sum of 7,778.31 guilders, the total of the amounts it had paid him in dependant's allowances for the same period. He appealed on 22 September 1993. In its report of 30 June 1995 the Appeals Committee recommended rejection and the President rejected the appeal in a letter of 11 August 1995 to the complainant, the decision he is impugning.

3. 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."

Whether the *kinderbijslag* and the dependant's allowance of the EPO are "of like nature" is an issue that the Tribunal has already ruled on, in Judgments 1296 (*in re Cook*) and 1297 (*in re Theuns No. 3*). It held therein that the essential purpose of the two allowances was the same and that none of the differences between them changed that purpose.

4. The complainant submits that the two allowances are not "of like nature" and that the Tribunal overruled Judgments 1296 and 1297 in Judgment 1333 (*in re Franks No. 2* and *Vollering No. 2*) confirming 1041 (*in re Lammineur*). He is mistaken. Judgments 1041 and 1333 were about the application -- in those cases in the event of strikes -- of Article 65(1)b) of the Service Regulations, which says that where remuneration is not payable for a complete month the monthly amount is to be divided into thirtieths. Those judgments declared it lawful to reduce the dependant's allowance under 65(1)b) on the grounds that it was a component of remuneration under 64(2). Judgments 1296 and 1297 were about different issues: the nature of the *kinderbijslag* and the legal basis of the deduction under Article 67(2). So there is no merit in any of the complainant's arguments in support of his view that Judgment 1333 was at variance with Judgments 1296 and 1297. The rulings in 1296 and 1297 on the nature of the *kinderbijslag* hold good: it and the dependant's allowance are "of like nature".

5. Circular 82 of 19 February 1981, which the complainant cites, sets guidelines for construing Articles 67(2), on the rule of non-accumulation, and 69(3)a), on the definition of a dependant child. It provides:

"Article 67, paragraph 2

General provisions

(1)Article 67, paragraph 2, will be interpreted as meaning that allowances of like nature paid in respect of dependants are also deductible.

(2)Permanent employees must notify the Office without delay of any deductible amounts or changes in such amounts, of which they are aware.

(3)If the requirements of Article 69, paragraph 3 a), are met and the household allowance is accordingly claimed, the allowance will be paid only up to the amount by which the maintenance being paid by the employee exceeds the amount of the dependants' allowance.

Article 69 paragraph 3 a)

Dependants' allowance

(1) It will be assumed that any child resident with the permanent employee or his spouse is being mainly supported by the employee or his spouse.

(2) Any child not resident with the permanent employee or his spouse will be considered as being "mainly" supported by them if they are paying, by way of maintenance, an amount (minimum maintenance) which exceeds the dependant's allowance paid by the Office by the following amounts (personal contribution):

- Grades C to B4:DEM [German marks] 50

- Grades B5 to A2:DEM 100

- the other grades:DEM 150

(3) The amount by which any regular payments from third parties for the benefit of the dependant, and any regular income earned by the dependant, exceeds the amount of a dependants' allowance will be deducted from that allowance. Point 2 of the Guidelines for Article 67, paragraph 2, will apply mutatis mutandis."

6. The complainant quotes the above phrase "allowances of like nature paid in respect of dependants are also deductible" (see under "General provisions" in (1)). He takes it to mean that Article 67(2) has been changed so as to replace the words "shall be deducted" with "can be deducted". He is mistaken. Not only can a circular not amend the wording of the Service Regulations but this one does not bear the meaning he gives it. It says that allowances of like nature "are also deductible"; that is to say, they are included in the category of allowances which, according to Article 67(2), shall be deducted.

7. On the strength of that misinterpretation the complainant argues that -

"this adaptation of the meaning of article 67 made article 67 applicable in practice: it opened the way to further specify the deductions which can be deducted and how they are deducted as is specified further on in the same circular 82."

He then cites point (3) of the circular about Article 69(3)a, "Dependants' allowance". But his reference to that point of the circular is irrelevant. Point (3) is about the reckoning of the allowance for a dependent child, a matter that is not at issue in the present case.

8. The complainant further observes that point (3) speaks of "regular payments from third parties for the benefit of the dependant". He contends that the lump-sum payments of *kinderbijslag* for the period from October 1989 to December 1992 were not "regular payments" and the EPO was therefore not free to deduct them from the sums it paid to him in dependant's allowance. His plea is again immaterial: the deduction made on account of the *kinderbijslag* came under Article 67(2), whereas the deductions referred to in that point of the circular are not the ones made under that provision.

9. It is likewise immaterial whether the amount paid in *kinderbijslag* is greater or smaller than that of the dependant's allowance. The deduction is made on the grounds that no EPO employee should at any time receive family allowances of like nature from more than one source. The purpose is to avert any risk of discrimination between members of staff, who may be stationed in any one of the countries where the EPO has offices.

10. The complainant pleads that it is unlawful to deduct the *kinderbijslag* on the grounds that it is paid not to him but to his wife. Yet Article 67(2) is quite clear on that score. His wife is his "spouse" within the meaning of the Service Regulations, and 67(2) says that where the spouse is paid a family allowance "of like nature" the amount shall be deducted from that of the allowance paid under the Service Regulations.

11. The complainant argues that the recovery of the *kinderbijslag* is not authorised under Article 88 of the Service Regulations, which reads:

"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

He observes that his wife "was not aware that the sum now recovered by the EPO (because of the retroactive payment of *kinderbijslag*) was overpaid". But Article 88 is irrelevant to the instant case. The EPO made the deduction after the complainant had declared to it the receipt by his wife of the *kinderbijslag*. The Organisation was thereupon entitled under Article 67(2) to make deductions from the amounts paid to him in dependant's allowance and it did so. This is not the sort of case envisaged by Article 88, which applies where the Organisation has overpaid an official who was or ought to have been aware that "there was no due reason for the payment". It is a case, not of overpayment by the Organisation, but of lawful deduction by it from the family allowance on account of payment of an allowance "of like nature" from another source.

12. The complainant pleads discrimination on the grounds that the Organisation has treated him differently from another staff member who is divorced. But since he is not in the same legal and factual situation as that other staff member there can be no breach of the principle of equal treatment.

13. Lastly, the complainant submits that the *kinderbijslag* is inviolable, a point that is not in dispute. But he is under the mistaken impression that it is deducted by the Organisation. It is not: the Organisation leaves intact the *kinderbijslag* as such, but reduces the amounts of its own

dependant's allowance instead. It is thereby not committing any abuse of authority or breach of due process but simply applying Article 67(2).

DECISION

For the above reasons:

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner

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