SEVENTY-FIFTH SESSION

In re HOFMANN (No. 3)

Judgment 1291

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Dieter Gerhard Hofmann against the European Patent Organisation (EPO) on 14 April 1992, the EPO's reply of 6 July, the complainant's rejoinder of 21 September and the Organisation's surrejoinder of 21 December 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 38, 84 and 107 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and EPO circular 184 of 6 August 1989;

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. As is recounted under A in Judgment 1062 of 29 January 1991, in which the Tribunal ruled on Mr. Hofmann's second complaint, the EPO has concluded with Van Breda and Company International, who are brokers for several insurance companies, a "collective insurance contract" for the protection of staff. Title II of the contract covers "Death and total permanent invalidity insurance" and applies to staff who qualify under the EPO Service Regulations.

In an explanatory memorandum of 7 June 1989 to the Administrative Council of the EPO the President of the Office proposed that the provisions of Article 84 of the Service Regulations, which exclude payment in case of "senescence" and limit amounts payable after the age of 55, should not apply to anyone on the staff at 10 June 1983. The memorandum explained that the wider coverage, which had been provided before and which it was thereby restoring, would mean putting up insurance premiums to meet the cost. The premium for invalidity insurance would go up from 0.0638 to 0.21 per cent of basic salary. Together with the 0.374 per cent payable for insurance against death that would bring the total to 0.584 per cent of basic salary.

The Administrative Council decided on 7 July 1989 that "Permanent employees recruited by the European Patent Office prior to 10 June 1983 shall continue to benefit from the provisions contained in the text of Article 84 in force before that date". The decision was to go into effect at 7 July 1989 and to apply as from 10 June 1983.

By circular 184 of 6 August 1989 the Principal Director of Personnel informed the staff that the premiums were put up as from 7 July 1989 because of the Administrative Council's decision of even date. For any permanent employee who had joined the EPO before 10 June 1983 death insurance was thenceforth to cost 0.3740 per cent and invalidity insurance 0.2112 per cent of basic salary, making a total of 0.5852 as against 0.4378 per cent of basic salary.

The complainant, who was born in 1949, has been a permanent employee of the EPO since before 10 June 1983. On 24 October 1989 he lodged an internal appeal under Article 107 of the Service Regulations against the increase on the grounds that the EPO had failed to consult the General Advisory Committee (GAC), a body comprising representatives of both staff and management, as Article 38(3) of the Regulations required. That provision says that the Committee shall "be responsible for giving a reasoned opinion on" any proposed amendment to the Regulations or implementing rules "and, in general, ... any proposal which concerns the whole or part of the staff ...". Some 200 other staff members lodged similar appeals at about the same time.

On 6 August 1991 the Appeals Committee recommended that the President of the Office allow the appeal. It held that the Administration had had enough information at its disposal to consult the GAC as early as 7 June 1989, the date of its explanatory memorandum. In any case it had had ample opportunity to do so before actually amending the insurance contract on 6 October 1989. The failure to bring in the Committee flawed the decision announced in circular 184 to increase as from 7 July 1989 the insurance premiums for permanent invalidity, and the difference between the old and new premiums for those recruited before 10 June 1983 should therefore be paid back to them. Since, however, the complainant had been fully covered by insurance against death and total permanent invalidity, the Committee did not recommend allowing his claim to payment of interest.

By a letter of 27 January 1992 the Principal Director of Personnel told the complainant that the President had rejected his appeal, and that is the decision he is now impugning.

B. The complainant submits that the material circumstances are the same as those he pleaded in his second complaint.

He argues that the Administration neither gave the GAC proper information nor sought its opinion, as Article 38 of the Service Regulations required. It may not justify its omission to consult by pleading that there was not enough information to allow of a reasoned opinion: it had the relevant documents at its disposal. Its memorandum of 7 June 1989, a fax message of 3 July 1989 from Van Breda and the Administration's statement to the GAC at its 73rd meeting on 30 November and 1 December 1989 all show that it had the detailed figures of the new premiums by 7 July 1989, when the Administrative Council amended Article 84 of the Service Regulations. Not until the appeal proceedings had started did it disclose material about negotiations with Van Breda.

The complainant founds his claim to payment of interest on the contention that he is "entitled to damages under basic principles of law and equity common to all contracting States of the EPO" and that "the EPO benefited from the amounts deducted from [his] salary without a legal basis".

He asks the Tribunal to set aside the decision to increase his contributions, order that they be reduced to 0.4378 per cent of basic salary and that he be paid the amounts wrongfully deducted since 7 July 1989 and interest at the rate of 10 per cent a year thereon, and award him 2,000 Deutschmarks in costs.

C. In its reply the EPO submits that the complaint is devoid of merit: it did consult and inform the GAC, which in turn gave an opinion, in accordance with Article 38 of the Service Regulations.

The GAC did discuss the matter of the rise in insurance premiums that restoration of the original text of Article 84 would require. The Organisation concludes from the Staff Committee's report on the GAC's 69th meeting of 20 and 21 April 1989 that it is "unlikely that the GAC had not considered the question of an increase in premiums/contributions". The GAC further discussed the proposed amendment at its 70th meeting on 1 and 2 June 1989.

The Administration also kept the GAC abreast of the negotiations with Van Breda and told it of the amounts needed to meet the costs of wider coverage. The memorandum of 7 June 1989 gave the information provided by Van Breda on increases in insurance premiums and the rates of staff contribution and how they had been reckoned. In any case the GAC had at its disposal in those documents and earlier circulars full material for drawing comparisons and checking the level of premiums. And if that did not suffice why did the staff representatives not protest against the rates of contribution at the Administrative Council's 33rd meeting, held from 4 to 7 July 1989, or ask for an explanation of Van Breda's reckoning?

The Appeals Committee's finding that the Administration did not let the GAC have enough material on which to base an informed opinion until the matter had gone to appeal "is not convincing". For one thing, the Committee disregarded the Principal Director of Personnel's statement to the GAC at its 70th meeting. The GAC gave three times the opinion required by Article 38 of the Service Regulations: on 11 July and 22 December 1989 and on 3 February 1992. It undoubtedly wanted its opinion of 22 December 1989 to put an end to the matter with a mere recommendation for another approach in future. For another thing, though the GAC gave its opinion on 3 February 1992 its earlier opinions still met the requirements of Article 38 because in the one of 3 February 1992 the staff representatives merely restated the views expressed in the opinion of 22 December 1989, which by implication had accepted the rates of contribution set in circular 184.

Since the requirements of Article 38 were met by 22 December 1989 at the latest, the decision published in circular 184 on 6 August 1989 was lawful.

If the Tribunal allowed the complaint the EPO would like it to order a stay of reimbursement of the difference between contributions paid for invalidity insurance before 7 July 1989 and after that date to give it time in which to work out the new rates. Were the Tribunal to find in his favour, the complainant would not be entitled to recover the full difference between the two rates since in any event the old ones would not have held good. Nor may he claim reimbursement beyond 22 December 1989, the latest date by which the GAC may be deemed to have given the opinion required in Article 38.

D. In his rejoinder the complainant enlarges on his pleas.

In his submission the consultation required in Article 38 will serve its purpose only if the EPO asks the GAC for an opinion on a clearly defined proposal which - to cite paragraph (3) - "concerns the whole or part of the staff". The Organisation's plea that the staff representatives knew about the memorandum of 7 June 1989 is irrelevant because they are not the only members of the GAC. To allow that plea would mean that merely issuing circular 184 dispensed with the need for consultation because everyone, including the members of the GAC, must have known the exact amounts of the new rates. Since the GAC may give only a "reasoned opinion", later implied endorsement of the new rates - even supposing it were proven here - does not make good the lack of consultation. The flaw endures until the Organisation meets the prior conditions for properly informed discussion by the GAC. All that matters is what it did before issuing and applying the circular. The GAC's discussions and opinions are irrelevant because they were about the lawfulness of the decision, not about the new rates.

The EPO should have passed on to the GAC all the information which it had and on which it intended to base its decision, especially since it had been negotiating with Van Breda in secret. Its duty was not conditional upon a formal request by the staff representatives on the GAC. Neither the disclosure of that information to the Appeals Committee nor its belated submission to the GAC in October 1991 sufficed. After all, the setting of the rates is not a purely mathematical exercise and, even if it were, the GAC did not know at the material time the facts that the reckoning had been based on.

E. In its surrejoinder the Organisation submits that the case is not on all fours with the one the Tribunal ruled on in Judgment 1062. Here the GAC held discussions and gave an opinion before the Administrative Council took its decision.

Members of the GAC and of the Staff Committee are sent Council papers, and so they got the memorandum of 7 June 1989 setting out Van Breda's offer.

There was no attempt to give retroactive effect to the GAC's opinions. That its opinion of December 1989 did not address the "contribution rates as such" was its own choice: the opinion still complied with Article 38.

CONSIDERATIONS:

1. In Judgment 1062 the Tribunal allowed a challenge by the complainant to an increase in his premiums for death and invalidity insurance on the grounds that the General Advisory Committee (GAC) had not been consulted in advance in accordance with Article 38(3) of the EPO's Service Regulations, which reads:

"The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

- any question of a general nature submitted to it by the President of the Office".

In that judgment the Tribunal held that a decision to increase rates of staff contribution to the costs of death and invalidity insurance was a "proposal" within the meaning of 38(3) and that consultation under Article 38 meant giving the GAC enough information to enable it to come to "a reasoned opinion".

2. The present complaint too arises out of a decision by the EPO to increase insurance premiums, and that decision came about in the following circumstances. Before 10 June 1983 Article 84 of the Service Regulations provided for the payment of a lump sum to any permanent employees, whatever their age, whom permanent invalidity prevented from performing duties appropriate to the level of their employment in the Office. As from that date, however, the Administrative Council amended Article 84 to limit such coverage. Again, at a meeting held from 4 to 7 July 1989, it restored the original purport of Article 84 for permanent employees who had been recruited before 10 June 1983, and the increased coverage thus provided made an increase in rates of staff contribution necessary. What the complainant contests is not that some increase has to be made but the way in which the EPO sought to impose it.

3. Before the Council's meeting of July 1989 Van Breda, the firm of insurance brokers who managed the collective insurance contract with a consortium of six insurance companies, sent the EPO a fax message dated 30 May 1989 giving provisional figures for the increased premiums to meet the cost of coverage of the permanent employees concerned. As the President explained in a note to the Council of 7 June 1989, the premium increase reflected a 438,000 Deutschmark rise in the costs of coverage, of which two-thirds were to come from the Organisation. Van Breda gave a firm quotation of the applicable rates in a fax message of 3 July 1989.

4. The EPO notified the increases to the staff by circular 184 of 6 August 1989. The Staff Committee queried the lack of consultation in a letter of 28 August and in his letter of 26 September in reply the Principal Director of Personnel set out the President's position: although he was satisfied that the requirements of Article 38 had been met he had decided to ask the GAC to give a reasoned opinion on the subject. The insurance contract with Van Breda was amended on 6 October 1989.

5. At the GAC's 73rd meeting, held on 30 November and 1 December 1989, the Principal Director of Personnel attended and gave explanations on the Administration's behalf of the restoration of Article 84, including the fact that the GAC had asked that the text be applied to all permanent employees. There had, he said, been long and difficult discussions with Van Breda, who had quoted figures for the premiums only a few days before the Council's meeting of July 1989; for want of time no other insurance companies had been involved, and Van Breda had all the necessary data at their disposal.

6. The Chairwoman of the GAC wrote the President a letter on 22 December 1989 in reply to his request for an opinion under Article 38(3): having reviewed the matter, she said, the GAC regarded the information available as insufficient to allow it to give a reasoned opinion.

7. The Tribunal is satisfied that the GAC was not asked for a "reasoned opinion" within the meaning of 38(3) before circular 184 went out on 6 August 1989. Although the GAC already knew about the need for higher premiums and had discussed the subject, not until the President decided, in September 1989, to put the matter on the agenda of the Committee's next meeting was it actually asked for a reasoned opinion on the increase. The issue therefore arises whether it had sufficient information to enable it to give a reasoned opinion when its Chairwoman wrote the letter of 22 December 1989 to the President. The complainant objects that the fax messages from Van Breda were disclosed only in the internal appeal proceedings and he submits that until those documents, or at least the information they contained, were passed on to the GAC, no proper consultation within the meaning of Article 38(3) was possible. For its part the Appeals Committee took the view that the Administration had had sufficient information when preparing material for submission to the Administrative Council - document AC/28/29 of 9 June 1989 - to ask then for a reasoned opinion.

8. The relevant information in Van Breda's fax messages was made known to the GAC before or at its meeting in November-December 1989. Those messages did contain other information relevant to the cost of extending the wider coverage of Article 84 to all members of the staff rather than just restoring it to those recruited before 10 June 1983, even though that was not relevant to the issue on which the GAC was asked to give a reasoned opinion. It was not necessary that the actual documents should be produced provided that the relevant information in them was transmitted.

9. The Tribunal is therefore satisfied that the relevant available information on the higher premiums required to meet the cost of restoring the wider coverage of Article 84 to the permanent employees appointed before 10 June 1983 was in the possession of the GAC when it gave its reply of 22 December 1989 and that the requirements of Article 38(3) were fulfilled at that date. But the original decision, which was made in breach of Article 38(3), cannot stand. The new rates of contribution did not become properly payable until 22 December 1989, the date of the GAC's opinion.

10. What relief, then, is to be granted to the complainant? The permanent employees who have benefited from the wider coverage must pay their due share of the costs, and the fact that the original decision fixing the monthly premiums was made in breach of Article 38(3) cannot relieve the individual beneficiary of ultimate liability for payment: staff cannot expect to get wider coverage without having to pay for it. Indeed, as was said at the end of 2 above, the complainant himself acknowledges that an increased premium has to be paid for the increased coverage. Since the contributions were wrongfully deducted new calculations will have to be made. But the Tribunal allows the Organisation's application for a stay of repayment of the difference between the premiums wrongfully deducted and the new rates of contribution to be calculated. It would indeed be administratively wasteful to impose on the

Organisation the trouble and expense of repaying the amounts wrongfully deducted, only to deduct similar amounts once the new rates had been worked out. There would be no real benefit to the complainant in that.

DECISION:

For the above reasons,

1. The decision to increase the complainant's insurance contributions to meet the costs of restoring the wider coverage provided for in Article 84 is quashed as from 6 August 1989.

2. It is upheld as from 22 December 1989.

3. The Organisation shall arrange for recalculation of the notional increase in premiums as if payment of the costs of the wider coverage had been postponed until 22 December 1989.

4. If the net cost to the complainant is less the Organisation shall repay him the difference between the two figures plus interest at the rate of 10 per cent a year.

5. It shall pay him 2,000 Deutschmarks in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
Mella Carroll
Mark Fernando
A.B. Gardner

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