

SEVENTY-FIFTH SESSION

In re THEUNS

Judgment 1297

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Hubertus Gerardus Theuns against the European Patent Organisation on 6 October 1992 and corrected on 20 October 1992, the EPO's reply of 8 January 1993, the complainant's rejoinder of 9 April and the Organisation's surrejoinder of 18 May 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 64, 65, 67 and 69 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and EPO Circular No. 82 of 19 February 1981 entitled "Guidelines for Article 67, paragraph 2, and Article 69, paragraph 3 a), of the Service Regulations for permanent employees";

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. Article 67(2) of the Service Regulations of the European Patent Office requires an employee who is being paid EPO family allowances to declare allowances "of like nature" paid to him, to his spouse or dependants from other sources and says that they are to be docked from any allowances paid under the Regulations. A circular, No. 82 of 19 February 1981, that set out guidelines for applying Articles 67(2) and 69(3)(a) of the Service Regulations, stipulates that any payments made by a third party by way of allowance for an employee's dependant shall be docked from the amount the EPO would otherwise pay the employee for that dependant.

The complainant, who is Dutch, joined the staff of the EPO in 1985 as a patent examiner in Directorate-General 1 (DG1) at The Hague. He and his wife have two children. He is entitled to family allowances under Article 67(1) of the Service Regulations and receives two allowances for his dependent children under Article 69. His wife is unemployed.

In a notice of 8 January 1987 the Head of Personnel informed the staff that "an amount equal to the minimum amount of the [Dutch child allowance] for one child will be deducted from the EPO dependant's allowance".

In a note of 26 November 1990 the complainant informed the Administration in keeping with the provisions of Circular 82 that his wife had applied for and obtained from the Dutch State back-payments of 12,534 guilders in child allowances for their two children for the period April 1987 to June 1990.

A pay slip of December 1990 said that the arrears to be withheld for those payments came to 5,781.03 guilders.

By a letter of 19 February 1991 the complainant appealed to the President of the Office against the deduction from his EPO child allowances on the grounds that the Dutch child allowance was not apayment "of like nature" within the meaning of Article 67(2). In its report of 16 June 1992 the Appeals Committee unanimously recommended rejecting his appeal. In its view the Dutch child allowance was indeed "of like nature" and it cited in support rulings by the Court of Justice of the European Communities on a similar provision in force in the Communities.

In a letter of 30 June 1992, the decision impugned, the Director of Staff Policy conveyed to the complainant the President's decision to endorse the Committee's recommendation.

B. The complainant submits that since the EPO dependant's allowance and the Dutch child allowance are not "of like nature" the EPO was wrong to make deductions from his pay on account of the Dutch child allowances.

The EPO allowance is an item of pay in return for services rendered. That is borne out by the EPO's practice of making deductions from all items of pay, including allowances for dependent children, whenever an employee withholds his services for such purposes as strike action.

The Dutch child allowance, which has nothing to do with employment, is a basic social security benefit intended to help parents to meet their obligations towards their children. He cites international labour standards and the case law of the Court of Justice of the European Communities in support of his case. In any event the ban on concurrent payment of benefits is unlawful because the EPO has not concluded an agreement with the Dutch Government setting out the purpose and basis in law of child allowance.

He seeks the quashing of the President's decision of 30 June 1992, repayment of the sums docked from his pay, interest thereon at the rate of 8 per cent a year as from the date of withholding and 3,000 guilders in costs.

C. In its reply the EPO relies on its rule precluding concurrent payment of allowances that serve the same purpose and submits that the only material criterion for determining the "nature" of an allowance is its purpose. The complainant is wrong to assume that the EPO pays the dependant's allowance in return for services rendered. The common purpose of the Dutch child allowance and the EPO child allowance is to help parents to meet the cost of bringing up children.

The case law of the Court of Justice of the European Communities is not binding on the EPO or on the Tribunal, and in any event, the Court's rulings confirm that the two allowances are "of like nature" within the meaning of Article 67(2).

D. In his rejoinder the complainant enlarges on his earlier pleas. The EPO argued in the proceedings that Judgment 1041 (in re Lammineur) ruled on that the payment of allowances was for services rendered; it now takes another tack.

Relying on Dutch tax laws concerning allowances and on national insurance legislation, he insists that the material allowances are not of like nature and describes the impugned deductions as "an unacceptable interference with [his wife's] inalienable rights".

He again cites rulings by the Court of Justice of the European Communities which he submits bear out his case.

He sets his costs at 7,500 guilders and further claims the full amount due to him - "or to his spouse" - in child allowance up to April 1987 and for which his wife failed to make timely application because of "misleading information" from the EPO.

E. In its surrejoinder the EPO presses its arguments and contends that his new claim, for which he has not exhausted the available internal remedies, is irreceivable.

CONSIDERATIONS:

1. The complainant is a patent examiner at grade A3 and is employed by the EPO at The Hague. He and his wife, who is not in paid employment, have two children for whom he is entitled under the terms of Article 67(1) of the EPO Service Regulations to payment of dependant's allowances.

2. On 26 November 1990 the complainant filed with the EPO a form reporting the repayment of the *kinderbijslag*, or the child allowance which his wife had received since April 1987 under the Dutch state social security scheme. He learned from his pay slip for December 1990 that the Organisation had docked the sum of 5,781.03 guilders from his pay on account of the payment to his wife of the Dutch child allowance.

3. On 19 February he filed an internal appeal against that deduction. The Appeals Committee recommended rejecting it on 30 June 1992 the President of the Office did so and that is the decision he is now impugning.

4. The Dutch state social security scheme provides a child allowance known as *kinderbijslag*. Payment is not subject to any means test and is made to one or other of the parents lawfully resident in the Netherlands.

5. Article 67(2) of the Service Regulations provides:

"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."

That text is identical to Article 67(2) of the Staff Regulations of the European Communities, barring of course the reference to the applicable regulations. As under the Communities' Regulations the family allowances referred to in 67(2) are the household allowance, dependant's allowance and education allowance.

6. The fundamental issue in this case is whether the child allowance received by the complainant's wife from the Dutch State - the *kinderbijslag* - is "of like nature" to the EPO dependant's allowance.

The complainant contends that it is not. He argues that it is a form of basic social security intended to safeguard the welfare of any child living in the Netherlands, whereas the EPO allowance is a component of the remuneration an EPO employee is paid for services rendered. He cites the International Labour Organisation's Social Security (Minimum Standards) Convention, 1952 (No. 102), which says that periodic allowances for dependent children shall be provided during the entire period of entitlement and he points out that the Dutch allowance is inalienable whereas the EPO one is subject to deduction, for example, in the case of strike action by the employee. He further argues that the Dutch allowance is not subject to tax whereas the EPO one is taken into account by the Dutch inland revenue for the purpose of applying the tax progression clause in the assessment of income from other sources. Citing passages from the Dutch General Child Allowance Insurance Act of 26 April 1962, he submits that the Act excludes from the national scheme anyone employed by the EPO, of whatever nationality, whom the Organisation's own social insurance scheme covers.

The EPO replies that the Dutch allowance and its own are both intended to afford support for the parent in meeting the costs of child maintenance.

7. The Tribunal is not bound by the rulings of the Court of Justice of the European Communities, but inasmuch as Article 67(2) is derived from the article bearing the same number in the Staff Regulations of the Communities, the Court's decisions do carry persuasive authority.

In one case (*Emer v. Commission*, 14/77) the issue turned on whether a Belgian family holiday allowance and a Belgian special family allowance were of the same nature as the Communities' dependent child allowance, and the Court held that they were not.

The complainant himself cites other decisions by the Court but none of them is exactly in point.

8. At all events Article 67(2) of the EPO's Service Regulations must be construed in the context, not of the law of the Communities, but of the Organisation's own rules. As the Tribunal held in Judgment 1041 (*in re Lammineur*), Article 64(2), which is headed "Determination of remuneration" and states that "remuneration shall comprise basic salary and, where appropriate, any allowances", must be read together with the reference to "remuneration" in Article 65(1)(b) and that term is used in the EPO's Service Regulations to denote both basic salary and allowances.

9. Both the EPO dependant's allowance and the Dutch child allowance are paid in respect of the dependency of the child and the social obligations of the parent. Their purpose is the same, to contribute to the costs of child maintenance. Neither the fact that the Dutch child allowance is paid to the complainant's wife nor the fact that it is inalienable - a normal provision of social security legislation - changes its essential purpose or makes it any different in nature from the EPO dependant's allowance.

10. 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 inasmuch as the law in some EPO member States, as the Appeals Committee pointed out, disqualifies EPO employees for national family allowances.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-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 14 July 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner

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