SEVENTY-EIGHTH SESSION

In re FOGLIA (No. 2)

Judgment 1397

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Alberto Foglia against the European Patent Organisation (EPO) on 19 April 1994, the EPO's reply of 6 July, the complainant's rejoinder of 6 September and the Organisation's surrejoinder of 21 October 1994;

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. As the Tribunal stated under A in Judgment 1142 on Mr. Foglia's first complaint, EPO officials may in certain circumstances be granted a dependant's allowance for a parent or other relative under Article 70 of the Service Regulations of the European Patent Office, the secretariat of the Organisation. The practice is to grant the allowance where the relative's income is less than half the amount recognised as "normal" income in the relative's country of residence and where the employee makes over at least half the "normal" income, a sum that must be not less than the total amount of the allowance plus 6 per cent of basic salary.

The complainant, an Italian citizen who joined the EPO in 1986, drew the allowance for both his parents between 1987 and 1990. The Organisation later stopped paying it after taking into consideration his mother's notional income from a residential property she owned. That formed the subject of his first complaint. In Judgment 1142 the Tribunal ordered the President of the Office to take a new decision on his allowance stating "what its current practice is in handling claims to payment of dependant's allowance".

By a letter of 27 April 1992, which the complainant got on 8 May, the Director of Staff Policy said that "the policy review concerning Article 70 of the Service Regulations", which the EPO launched following Judgment 1142, was not yet completed. But, he said, its established practice did not allow the EPO to pay him the allowance.

By a letter of 6 August 1992 to the President the complainant appealed against the decision of 27 April. On 25 August he learned that the appeal had been referred to the Appeals Committee.

During the internal hearings the Administration produced a "note for the record" of 4 March 1993 setting out the policy on dependant's allowance as from 1 January 1993. In its report of 24 November 1993 the Committee recommended that the President of the Office should grant the complainant the allowance from 1 April 1990 to 31 December 1992 and treat his claim as from 1 January 1993 according to the terms of the note of 4 March.

In a letter of 25 January 1994, the impugned decision, the Director of Staff Policy informed the complainant that the President had rejected his appeal.

B. The complainant submits that the Tribunal's order in Judgment 1142 of a new decision, and no more, allowed the EPO to follow any method it cared to suit the circumstances of his case.

He challenges the EPO's treating the notional rental value of a property as 20 per cent of a married couple's "normal" income. That has never been its practice and the effect was to make an artificial increase in his parents' income above the critical figure of 50 per cent of "normal" income and so allow the withholding of the allowance.

He maintains that the reckoning of notional rents in Italy should be left to an Italian institution that knows about rent control.

He seeks "cancellation of the formula of 20% of normal income for calculating the notional rental value of a real estate" and "adoption of a calculation formula furnished by national organization encharged to fiscalize the real

rent". He claims backpayment of the two allowances from 1 April 1990 to 31 December 1992, plus interest; and an award of 25,000 guilders in costs and material and moral damages.

C. In its reply the EPO submits that since it properly executed Judgment 1142 the complaint is devoid of merit insofar as it seeks execution of the judgment. The President of the Office took a new decision in which he unambiguously set out the Organisation's policy on the grant of Article 70 allowances. The EPO has since 1989 been setting notional rental values at 20 per cent of normal income so as to refine estimates of dependants' actual disposable income. The applicable rules, which are now "set down objectively", are based on the practice and case law in EPO member States.

Insofar as the complainant is seeking the review of Judgment 1142 his complaint is irreceivable. Following the method of reckoning that a national body adopts for tax purposes would not produce reliable results. There having been no substantive changes since the EPO issued the note for the record on 4 March 1993, the Appeals Committee was wrong to treat that as a cut-off date.

The Organisation concludes that it has caused the complainant neither material nor moral injury.

D. In his rejoinder he presses all his earlier pleas. He accuses the EPO of misuse of authority: it treated his claim superficially and in breach of good faith.

E. In its surrejoinder the Organisation says that his pleas on the reckoning contain nothing new and afford no admissible grounds for the review of Judgment 1142.

CONSIDERATIONS:

1. Under Article 70 of the Service Regulations of the European Patent Office the complainant was granted dependants' allowances for his parents from 1 June 1987 to 31 March 1990. The Organisation stopped the allowances on 1 April 1990. On his first complaint, which was an appeal against that decision, the Tribunal held in Judgment 1142, under 4, 5, 9 and 10, that for the purposes of Article 70 the "normal" income of a couple residing in Italy was the equivalent of 3,031 guilders a month; that the dependants' allowances were payable if their income was less than half that amount; and that the income of the complainant's parents included not only his father's retirement pension, equivalent to 681 guilders a month, but also his mother's social pension, equivalent to 385 guilders a month.

2. The Tribunal did not, however, then decide the questions now at issue: whether and, if so, how the rental value of the flat in Rome owned by the complainant's mother, in which both parents live, should be taken into account in computing their income. On that matter the Tribunal ruled in 11:

"... the President should state what its current practice is in handling claims to payment of dependant's allowance, especially where the employee's parents have continued to live in the family home, which may have appreciated in value over the years. In particular he should confirm that the rental value of such property is notional, as the Organisation contended in its submissions to the Appeals Committee. He should state what formula it adopts for reckoning such notional value and whether or not the amount is added in its entirety to actual income."

The Tribunal remitted the case for a new decision.

3. In a letter dated 27 April 1992 the Organisation accordingly informed the complainant:

"In reckoning the dependant's income the rental value of the premises in which he lives is taken into account if he is the owner. For that purpose the Organisation takes the rental value, which is purely notional, to be 20% of the 'normal' income in the case of a married couple and 25% in the case of someone who is single."

4. The complainant went to the Appeals Committee. While his appeal was pending the Organisation submitted to the Committee a "note for the record" setting out its policy on the grant of the dependant's allowance from 1 January 1993. Although that document has not been produced it seems to have used the formula in the letter of 27 April 1992.

5. The Committee held:

(a) The grant of the dependant's allowance to all employees, including the complainant, should as from 1 January 1993 be in accordance with the policy set out in the "note for the record", but the Organisation was not justified in applying that policy retroactively from 1 April 1990.

(b) Although the decision of 27 April 1992 did comply with the Tribunal's ruling, it was doubtful whether the Organisation could state its "current practice" on the basis of a single instance, the complainant's case being the only relevant one.

(c) The Organisation had changed its mind more than once. In its original decision of 2 March 1988 granting the complainant the allowances it had taken the notional rental value of the flat to be 109 guilders a month, which was the value the Italian authorities put on it for tax purposes. When it decided on 28 March 1990 to stop the allowances it took a notional value of "at least 449.50 guilders" a month, based on the rental value of the property. Finally, in its decision of 27 April 1992, it took the figure of 20 per cent of "normal" income. The Committee put the notional value at 449.50 guilders, considering that such had been the Organisation's practice immediately before the start of the relevant period.

6. With the addition of the notional value of 449.50 guilders the income of the complainant's parents rose to 1,515.50 guilders, i.e. exactly half the "normal" income of the 3,031 guilders which was the figure accepted in Judgment 1142. The practice is to grant the allowance where the relative's income is less than half the amount recognised as "normal" income in the relative's country of residence. As long as the income of the complainant's parents was not "less than half" the "normal" income the allowances would not have been payable.

7. But the Committee took "normal" income as at 1 April 1990 to be 3,212.17 guilders a month, a new figure supplied by the Organisation during the appeal proceedings. On that basis it held that the complainant was entitled to the allowances from 1 April to 30 June 1990 and that, though the calculation for the period up to 31 December 1992 should be made anew, it too would doubtless be in his favour. Accordingly the Committee recommended paying him the allowances for the entire period from 1 April 1990 to 31 December 1992. The President of the Office rejected the recommendation and appeal, and that is the decision now impugned.

8. The complainant asks for action on the Committee's recommendation and for "cancellation of the formula of 20% of normal income".

9. It is not clear whether he accepts the Committee's recommendation as to how the allowances should be paid for the period that started on 1 January 1993. His appeal to the Committee did not refer to that period, and, as was said in 4 above, the "note for the record" has not been produced. The Tribunal will decide the matter without reference to that note and will neither make any ruling covering that period nor retroactively apply the policy stated in the note to any earlier period.

10. The purpose of the dependant's allowance is to make sure that the dependant has sufficient resources to meet basic needs for such things as food, clothing and shelter. Accordingly, in determining whether the dependant's "income" is not above a certain figure, account must be taken not only of receipts in cash but also of the value of benefits in kind whose effect is to reduce expenses. So if the dependant owns property its rental value must in some way be taken into account in determining his income. When the Organisation first granted the complainant the allowances it began a "practice" - although his was the only instance of it - that consisted in taking into account the notional rental value of real property.

11. At that time the Organisation treated the value for tax purposes as the notional rental value. In March 1990, when looking into the complainant's request for continuance of the allowances, it decided to change the way of determining the notional rental value and it was entitled to do so. The Committee was mistaken in thinking that by that change the Organisation had fixed the notional rental value of the flat at 449.50 guilders: what it really did was to assess the notional rental value to be "at least" 449.50 guilders, at which point the dependants' income would exceed the stipulated maximum. It is clear from its pleadings in its reply to the first complaint - see Judgment 1142 under C - that the Organisation had arrived at that conclusion, not arbitrarily, but by applying the formula of 20 per cent of "normal" income. That, then, was the practice of the Organisation immediately before the period relevant to the present complaint, and the complainant has failed to establish any grounds which would justify the quashing of the decision to adopt that practice.

12. After the notional rental value as so determined was added to the actual income of the complainant's parents the

total figure exceeded one half of "normal" income - be it 3,031 or 3,212.17 guilders - and the Organisation was entitled to stop paying the allowances.

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. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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