

EIGHTY-SEVENTH SESSION

In re Verveer

Judgment 1866

The Administrative Tribunal,

Considering the complaint filed by Mr Daniël Verveer against the European Patent Organisation (EPO) on 5 June 1998, the EPO's reply of 10 September, the complainant's rejoinder of 21 October, and the Organisation's surrejoinder of 3 December 1998;

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, a Dutchman who was born in 1961, joined the European Patent Office, the EPO's secretariat, on 1 January 1988 as a patent examiner at grade A1. He is currently assigned to Directorate-General 1 (DG1) in Rijswijk/The Hague in the Netherlands, as a patent examiner at grade A3. The complainant, his wife and daughter live in Roelofarendsveen, a village thirty kilometres away from the Office. His wife works in Amsterdam, and their daughter attends a crèche (day nursery) in Roelofarendsveen.

On 7 February 1996, the complainant requested from the EPO either financial contribution towards the cost of his daughter's crèche placement, or a subsidised placement for his daughter in the crèche in his place of residence in Roelofarendsveen similar to the practice enjoyed by his colleagues whose children attend crèches near the Office.

By a letter of 14 November 1996, the complainant repeated his request and asked the Organisation to reply in writing. In a letter dated 4 December 1996, the President of the EPO told him that his request could not be met as it "exceed[ed] the possibilities of the Office" and continued that an individual placement would be "justifiable as an exception only if it had been foreseen by the Service Regulations, which is not the case". The complainant filed an internal appeal on 7 January 1997. The Appeals Committee concluded that an "entitlement to crèche facilities of the employee's own choice ... cannot be inferred from the Service Regulations", and unanimously recommended that the appeal be rejected as unfounded.

In a letter dated 12 March 1998, he was informed by the Director of Personnel Development that the President had endorsed the recommendation of the Appeals Committee and thereby rejected his appeal. This is the impugned decision.

B. The complainant requests that the Organisation subsidise the costs of his daughter's crèche as it does for other EPO employees. He states that the provision of crèches for the children of EPO employees is governed by a working paper submitted by the President of the Office to the Budget and Finance Committee entitled "Subsidies with a view to setting up crèches in Munich and The Hague for the children of EPO employees" and that his right to a crèche place for his child in his place of residence can be found in this document. Under Articles 33(2)(b) and 50 of the European Patent Convention, the Administrative Council is competent to adopt rules for the grant of supplementary benefits to the permanent employees of the EPO, and through its Financial Regulations it has created the Budget and Finance Committee to which it delegates financial matters. He submits that because the Committee took note of the working paper, it effectively agreed with its principles.

The working paper did not place a geographical limit on the location of a crèche. He argues that paragraph 2.2 of the paper applies not only to Rijswijk, but to The Hague as well as other cities in the Netherlands. Further, in the selection procedure to be employed by the Office there is no legal framework governing the location of crèches. Article 23 of the Service Regulations provides that:

"A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the

proper performance of his duties."

The complainant states that since the Service Regulations do not limit the place of residence to Rijswijk or The Hague, the same must apply to the location of a crèche.

Paragraph 2.6 of the same working paper refers to serious difficulties in adopting in The Hague the same solution as in Munich. Therefore, the paper presented an alternative. The Budget and Finance Committee proposed and adopted the concept of a yearly subsidy to be allocated to each child. The complainant says that it is clear from paragraph 2.6 that the Office does not subsidise one crèche, but a number of crèche places. He notes that the Organisation did not implement the full extent of the working paper. However, the Organisation had subsidised a place in a crèche for the child of one of his colleagues, in the place of residence.

The complainant seeks an award of compensation for the non-provision of a crèche place in Roelofarendsveen "as of 07.02.1996, until the day they provide for such a place"; and, the provision of a place in the crèche in Roelofarendsveen under the same financial arrangements as applied to presently contracted crèches in Rijswijk, (to enable the place presently occupied by his child to be converted into a "company place" and so that no-waiting list would be applicable). As a subsidiary claim, he seeks compensation for the Office's non-provision of a subsidised day nursery place for his child (that is, the difference in cost to him between an EPO-provided crèche place and what he has paid/is paying now).

C. The Organisation argues that the complaint is unfounded.

It states first that there are no specific provisions in the Service Regulations for Permanent Employees governing the payment of the costs of day-care and education for children of pre-school age, and they do not consider the matter of the provision of crèches. There is no obligation on the part of the Office to provide crèche places, so an employee is not entitled to claim a place in a crèche or request that the Office bear the costs of day-care in a crèche of his own choice. In 1985, the Office made a discretionary policy decision to subsidise a crèche in Munich and crèche places in the Rijswijk/The Hague area. This policy, where all subsidised crèches are located near the employee's place of employment, received the tacit approval of the Administrative Council.

The complainant's references to Articles 33(2)(b) and 50 of the European Patent Convention relating to the competence of the Administrative Council and the Budget and Finance Committee are irrelevant. Only the President of the Office is responsible for the application of the Service Regulations, therefore, it is incorrect for the complainant to maintain that the working paper supports his arguments.

He is also incorrect to argue that the paper placed no geographical limit on the location of a crèche; the foreword to the paper is clear that one of the aims of the document is to "examine the proposals to reserve a certain number of places in the crèches in Munich or The Hague ...". Contrary to the complainant's suggestion, the possibility of subsidising crèche places in an employee's place of residence has not even been considered.

According to Article 23 of the Service Regulations, a permanent employee "... shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties", however, the Organisation is not obligated to compensate the complainant for the disadvantages that may result from his choice of location of residence.

He cannot claim a breach of the principle of equal treatment. The Organisation contends that, at present, no employee receives a subsidy for the costs of day-care in a crèche other than those subsidised by the Office close to the place of employment. The fact that the EPO has made exceptions in two cases cannot be questioned, as it is within its discretion to do so.

D. The complainant enlarges on his pleas. He states that every crèche place "contracted" by the Office is located in Rijswijk, not in The Hague. Therefore, employees living in this area have a crèche in their place of residence. In the case of Munich, the crèche is located in the very same building as the EPO offices.

He argues that although the President is responsible for the application of the Service Regulations, in the absence of relevant provisions in these Regulations, such a decision is beyond the discretion of the President, and is therefore governed by the Administrative Council and the Budget and Finance Committee. Under Articles 33(2)(b) and 50 of the European Patent Convention the decision to subsidise crèches must, the complainant says, have the approval of the Committee.

The discretion of the President must be exercised consistent with the principles of duty of care and equal treatment. The Office's decision to subsidise crèche places in Rijswijk only, discriminates against the vast majority of employees who do not reside there.

There would be almost "no financial difference" to the Organisation between the provision of a place in one of the present crèches in Rijswijk contracted by the Office and a subsidised crèche place in his place of residence, indeed it would be effectively cheaper. In cases like his, the EPO should allow for a crèche placement in the place of residence, and leave the decision as to the location of the crèche placement to the employee.

E. The Organisation states that the President responded to the needs of a growing number of staff members, and thereby fulfilled his duty of care towards them by submitting a paper to the Budget and Finance Committee regarding the setting up of crèches in The Hague and Munich. The Administrative Council "merely ... noted" the President's proposal, hence giving it their tacit approval without considering an amendment to the Service Regulations.

By approving the President's proposal, the Administrative Council also recognised the extent to which the President can exercise his discretion, particularly in his interpretation of "duty of care". As stated by the Appeals Committee, the Office fulfils its general duty of care by providing an in-house crèche or by subsidising crèche places near the place of employment. As was the case for his colleagues, the complainant was offered a place for his child in one of the crèches near his place of employment.

The argument that the provision of a crèche place in the complainant's place of residence is less expensive than in The Hague is irrelevant. Rather, the question is whether the complainant's rights have been violated, which they have not.

CONSIDERATIONS

1. The complainant, a Dutchman, joined the EPO on 1 January 1988 as a patent examiner at grade A1. His current grade is A3. He is assigned to DG 1 (Rijswijk/The Hague) and lives in Roelofarendsveen with his spouse and their little daughter.

2. The written submissions show that the complainant requested in February 1996 that the EPO pay a special contribution to resolve his family situation. He lives thirty kilometres away from his office and his spouse works in Amsterdam. The EPO does not have a subsidised crèche in Roelofarendsveen to which they can send their child during the daytime. He considers that he has been discriminated against in comparison with his colleagues who live in Munich or The Hague, where the EPO provides an in-house crèche, or subsidises crèche places.

According to the submissions, the complainant asked the EPO to subsidise the cost of a place in the crèche in his village, or to pay the difference between the total cost of a place in the crèche in his place of residence and the part of the cost that he would have had to pay himself if his child had a place in a crèche in Rijswijk.

On 12 March 1998, the Director-General definitively dismissed the appeal that the complainant had lodged with the Appeals Committee on 7 January 1997. It is against that decision that the complainant has filed this complaint with the Tribunal.

3. The complainant submits, in the first place, that the Service Regulations do not contain any provisions regarding crèches. This statement is correct.

Indeed, it was the Office which decided, starting in 1985, without any obligation under the applicable rules, to make subsidised places in crèches available to the children of staff members. The Office already subsidises crèches in Munich and The Hague, where a considerable number of its staff members live.

The EPO explains that its policy is designed to avoid absenteeism by young staff members due to their young children. It has found that this solution contributes to the sound functioning of the Office. It added that this practice does not involve any amendment to the Service Regulations with a view to creating a right of staff members to places in crèches. It is a simple measure designed to facilitate the functioning of the Office.

The complainant cannot therefore substantiate his plea by citing the silence of the Service Regulations on this issue,

nor the practice followed by the Office with regard to subsidised crèches.

4. The complainant also bases his claims on the report of the Budget and Finance Committee, submitted to the 23rd Session of the Administrative Council of the EPO, held in Munich from 14 to 17 January 1986. This plea must fail. The Administrative Council took no decision on the report, but merely noted it.

5. The complainant also cites Article 23 of the Service Regulations, which gives staff members the freedom to reside where they wish, with the sole condition that their place of residence is at no greater distance from their workplace than is compatible with the proper performance of their duties. The complainant contends that, as a counterpart to this freedom, the Office is bound to guarantee the rights of its staff members to social benefits at their place of residence. He concludes that the Office is under the obligation to provide his daughter with a place in a crèche in Roelofarendsveen. This plea presupposes that the Office is obliged to subsidise the cost of placing his child in a crèche. But this obligation has not been demonstrated.

6. The complainant alleges that the impugned decision violates the principle of equality of treatment. He says that staff members who are resident in Rijswijk or Munich benefit from better treatment than he does. The complainant's argument is mistaken. The principle of equality of treatment only applies between staff members in a similar situation. In the material case, staff members whose place of residence is Munich or The Hague, where there are subsidised crèches, benefit from the same treatment. But staff members, such as the complainant, who decide to reside in another location and do not wish to place their child in these subsidised crèches, are not in a similar situation. The plea must therefore fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Julio Barberis
Seydou Ba

Catherine Comtet