

In re FOGLIA

Judgment 1142

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alberto Foglia against the European Patent Organisation (EPO) on 23 April 1991 and corrected on 23 May, the EPO's reply of 14 August, the complainant's rejoinder of 18 September and the EPO's surrejoinder of 11 October 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 70 and Annex III of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Article 70 of the EPO Service Regulations says that "An allowance for dependants ... may be granted by the President of the Office on the basis of supporting evidence where a permanent employee or his spouse mainly and continuously supports a parent or other relative, by blood or marriage, by virtue of a legal or judicial obligation". 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 and 6 per cent of basic salary.

The complainant, an Italian citizen, joined the EPO in November 1986 as a search examiner in its General Directorate 1 at The Hague. By letter of 15 January 1987 he applied for payment of the dependant's allowance for each of his parents, who are also Italian.

By letter of 2 March 1988 the Head of the Personnel Department granted the complainant payment of the allowance for each of his parents as from 1 June 1987 and up to 31 May 1989. By letter of 19 January 1989 he informed the Administration that while in the Netherlands his parents lived rent-free in a flat he owned at Rijswijk. On 29 May 1989 he applied for the continuance of the allowances. By letter of 28 March 1990 the Head of Personnel informed him that, new facts having come to light about his parents' position, he would cease at 1 April 1990 to be paid the allowances. On 28 May he lodged an internal appeal against that decision. In its report of 23 November the Appeals Committee, finding fault with the Administration's method of reckoning his parents' income, unanimously recommended that the President of the Office allow his appeal. But by a letter of 29 January 1991, the decision he impugns, the Principal Director of Personnel informed him of the President's rejection of the Committee's recommendation.

B. The complainant objects on several counts to the discontinuance of the allowances. He submits that in assessing his parents' income the Administration went back on the procedure it had originally followed. Having wrongly assumed that they were resident at Rijswijk, it put up its reckoning of their income by an amount it regarded as the minimum rental value of a flat his mother owns in Rome. That amount was greater than the rental value which the Italian tax authorities put on it and which the Administration had earlier accepted. The EPO also began to treat as income a tax-free "social pension" his mother received from the Italian State even though when he first mentioned it to the EPO he was told that only income entered in his parents' tax returns mattered.

As the Appeals Committee acknowledged, his parents were unable to let the flat in Rome, their place of residence. It would therefore have been proper to begin by taking 20 per cent off "normal" income for housing expenses. By that method of reckoning his parents' pension income falls below half the amount of "normal" income as so reduced. Since the amount of financial support he gives them has never been questioned, each of them qualifies for the allowance.

He invites the Tribunal to set aside the decision of 29 January 1991.

C. In its reply the EPO contends that the decision to discontinue payment of the allowances for the complainant's parents was warranted because its assessment of their income was accurate. In the exercise of his discretion the President had to establish whether they could afford to meet their basic needs and in doing so he had to take account both of their real income - whether or not it was tax-free like the complainant's mother's "social pension" - and of notional income from any capital assets they had. Since they live in the Netherlands in a flat owned by the complainant they might properly be expected to realise the potential of unproductive assets such as the flat in Rome. It was reasonable to estimate its rental value at 20 per cent of the "normal" income, and adding that amount to their pension puts their total income above the admissible maximum of half the figure of "normal" income. The method the Appeals Committee suggested for calculating their income is flawed since it means applying a flat rate of 20 per cent to any residential property, be it cottage or castle, so that someone who, though on a low income, has valuable property may wrongly qualify as a dependant. It is fairer to count the rental value of property as notional income.

When the complainant first applied for the allowance the only income the Administration took into account was his father's pension. Since that amount was low it had no cause to look at his parents' notional income, which would have had to be very high to disqualify them for the allowance. Once his mother's pension came to light there was call for a review of their entitlement. It is their total income that counts, not just their taxable income.

D. In his rejoinder the complainant contends that his parents have never been resident in the Netherlands. Registering with the authorities of a town where they spend some time each year does not make them residents. Italy is their country of residence, and the Administration is wrong to suggest letting his mother's flat in Rome. That would yield taxable income that would cost his mother her State pension, and they would have to rent other housing in Rome. He presses his claim.

E. In its surrejoinder the EPO presses the pleas in its reply. Wherever their residence may be, the complainant's parents have two dwellings at their disposal, and the Organisation should not have to pay allowances and the free health insurance to which dependants are entitled when income from their property would put them over the admissible maximum. Besides, they could sell the flat in Rome reserving a right of occupancy.

CONSIDERATIONS:

1. The complainant is employed by the European Patent Organisation at The Hague as an examiner. On 15 January 1987 he applied for payment of dependants' allowances for his father, who was born in 1913, and his mother, who was born in 1912. Payment was granted for the period from 1 June 1987 to 31 May 1989 subject to his providing the Office regularly with proof of financial support. On 29 May 1989 he applied for continuance of payment but on 28 March 1990 the EPO decided that as from 1 April 1990 dependants' allowances would cease to be paid to him because the conditions for payment were no longer fulfilled.

2. The complainant filed an internal appeal on 28 May 1990. The Appeals Committee recommended that the President of the Office should allow the appeal and that the complainant should continue to receive a dependant's allowance for each of his parents. By letter of 29 January 1991 the President rejected the Committee's recommendation and that is the decision impugned in this case.

3. Article 70 of the Service Regulations provides:

"An allowance for dependants as set out in Annex III may be granted by the President of the Office on the basis of supporting evidence when a permanent employee or his spouse mainly and continuously supports a parent or other relative, by blood or marriage, by virtue of a legal or judicial obligation."

Annex III sets out the rates of allowance payable for a dependent child, handicapped child or other dependant.

4. The practice adopted by the EPO in applying this provision is that the employee must establish: (i) that his dependant's income is less than one-half of "normal" income in the dependant's country of residence; and (ii) that he makes contributions towards the support of the dependant that are equivalent to at least half such "normal" income, a sum that must be not less than the total of the allowance and 6 per cent of the employee's own basic salary.

5. It is not in dispute between the parties that the complainant's father receives a retirement pension which is taken for the purposes of this case to be equivalent to 681 guilders a month and his mother a social pension equivalent to

385 guilders a month from the Italian State; that "normal" income in Italy is equivalent to 3,031 guilders for a couple; that the complainant's mother owns a flat in Rome; and that he supports his parents to the extent required by EPO practice as stated under point (ii) in 4 above.

6. The matters in dispute are whether the complainant's parents reside in the Netherlands or in Rome; whether, if they reside in the Netherlands, his mother's flat in Rome is free for letting; and whether her social pension should count in reckoning his parents' income.

7. The complainant maintains that his parents reside, not in the Netherlands, but in Rome and that his mother's flat is not free for letting because if it were let they would have to find somewhere else to live in Rome. He says that when they visit him in the Netherlands they live in a flat belonging to him. As to his mother's social pension, he submits that because it is free of tax it should not count towards the joint income.

8. The Organisation argues that his parents are resident in the Netherlands. Even if they were not, it contends, the rental value of the flat in Rome must be taken into account, as must his mother's social pension.

9. His mother's social pension, a benefit which the Italian State grants to those who have no income or are otherwise in need, is undoubtedly income in the hands of the grantee. That it is free of income tax is immaterial and it must therefore count in the reckoning.

10. As the Appeals Committee's report makes plain, however, the complainant's parents are resident, not in the Netherlands, but in Rome. The fact that when visiting the Netherlands, and for whatever length of time, they live in the flat belonging to him is immaterial and affords no grounds for letting his mother's flat in Rome. Since the Organisation's mistake on that score appears to have been a main factor in the President's decision, the impugned decision must be quashed and the case sent back to him for a new decision that is based on the fact that the complainant's parents reside, not in the Netherlands, but in Rome.

11. The Organisation appears to have argued its case ad hoc rather than by reference to current practice. In taking his new decision 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.

12. The Tribunal awards no costs because the complainant does not claim them.

DECISION:

For the above reasons,

1. The President's decision of 29 January 1991 is quashed.
2. The case is remitted to the President for a new decision, to be based on the above considerations.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner