

EIGHTY-NINTH SESSION

In re Benze (No. 8)

Judgment No. 1993

The Administrative Tribunal,

Considering the eighth complaint filed by Mr Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 4 June 1999 and corrected on 15 June, the EPO's reply of 6 September, the complainant's rejoinder of 28 September, and the Organisation's surrejoinder of 14 December 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a German national born in 1938, is a permanent employee at grade A4 with the European Patent Office, the secretariat of the EPO. His duty station is Munich. He is divorced and has one daughter who lives with her mother in Bolivia. Pursuant to a German court order the complainant contributes to the maintenance of his daughter. While she was living in Germany that amount was set by the court at 860 German marks per month. He is currently waiting for a new court order to be finalised, setting his monthly contribution at 400 marks to take into account the lower cost of living in Bolivia.

According to Article 69 of the EPO Service Regulations, a dependants' allowance shall be payable to a permanent employee having a dependent child who is "mainly and continuously supported" by that official. Circular No. 82 of 19 February 1981 set out guidelines for implementing Article 69 and defined what constituted "mainly supported" with regard to a dependent child not in the custody of the permanent employee. Under those guidelines the permanent employee had to pay a minimum amount in maintenance for the child in order to qualify for the allowance. This consisted in a sum equal to the allowance, plus a "personal contribution", which was a fixed amount, determined by the employee's grade. In the complainant's case it amounted to 150 marks.

In 1996 new guidelines for determining whether a child was dependent within the meaning of Article 69 were adopted by the President of the Office and communicated to the staff in Communiqué No. 6 of 20 March 1996. They announced changes to the way the personal contribution would be calculated. In order to qualify for the dependants' allowance for one child, a permanent employee was now required to contribute an amount equal to "6% of the employee's basic salary plus the amount of the dependants' allowance, or 25% of the basic salary of grade C1/1 if this amount is lower".

In a letter of 30 May 1996 the Remuneration Department informed the complainant that he would have now to pay a total minimum contribution of 898 marks for his daughter's upkeep in order to satisfy the condition of "mainly and continuously supported". This corresponded to a personal contribution of 483.70 marks, on top of the 414.30 marks awarded as a dependants' allowance. A form attached to the letter indicated that his total contribution had been calculated as 25 per cent of the basic salary at grade C1, step 1, as this was the lower amount; the calculation on the basis of 6 per cent of his salary showed a higher amount of 1274.34 marks.

On 20 June 1996 the complainant filed an internal appeal "against the decision of the President ... making the award of a dependant's allowance for [his] daughter ... conditional on [his] paying a minimum amount of 1,274.34 [marks]". In a letter of 31 July 1996 the Director of Personnel Management informed the complainant that his minimum contribution was only 898 marks and that based on information he provided for the year 1995 his monthly payment exceeded this amount; therefore, his eligibility for the allowance would continue. On the basis of this information he asked the complainant if he wished to pursue his appeal. In its report of 25 January 1999 the Appeals Committee unanimously recommended that the appeal be dismissed as unfounded. It also recommended that the decision on the "necessary minimum financial support" payable by the complainant be reviewed.

Since the time the complainant first filed his internal appeal an adjustment was made on 1 July 1998 to both salary and the dependants' allowance, increasing to 940.53 marks the total monthly amount he had to contribute in maintenance. On 6 April 1999 the Principal Director of Personnel informed him that, based on the unanimous recommendation of the Appeals Committee, the President had rejected his appeal. That is the impugned decision.

B. The complainant contends that the requirement that an official must contribute to his dependant's maintenance an amount far in excess of the allowance received from the Office, is not supported by the Service Regulations, and would never be approved by the Administrative Council, and does not take into account any obligations established by a national court order. He argues that the President of the Office issued Circular No. 82 and Communiqué No. 6 without authority and that these were directed at limiting the applicability of Article 69. The Service Regulations only require that the child be "mainly and continuously" supported by the staff member, but the effect of the guidelines has been to redefine Article 69 with the result that the sum he pays in maintenance is in excess of the statutory requirements of supporting his child "mainly and continuously". It also exceeds the amount specified by the national courts.

The complainant submits that not only has his appeal been rejected, but the letter informing him of the rejection referred to further stipulations governing the receipt of the dependants' allowance: payments must be made to the mother up until his child reaches the age of 18 and he must present receipts to this effect signed by his former wife. He particularly contests this stipulation as he is concerned about a risk that not all of the money will go to his child.

He seeks: (1) the quashing of the decision of 6 April 1999; (2) a ruling that the EPO be required to recognise "national family court decisions" and to accept that "full support" as defined by a national court meets the requirement under Article 69 of supporting "continuously" and "mainly"; and (3) a ruling that the EPO be obliged to apply the Service Regulations "verbatim" and submit to the Administrative Council's competence for any amendments.

C. In its reply the Organisation argues that the complaint is irreceivable. The complainant is entitled to and receives the dependants' allowance. Furthermore, he voluntarily pays a higher amount than what is required by the Service Regulations. He is not adversely affected by the 1996 guidelines and therefore his complaint is only of an academic nature.

Subsidiarily, it contends that setting a precondition for entitlement to an allowance is not a breach of the Service Regulations, and that the amount of the contribution required is justified. Since the Service Regulations themselves do not define the concept of "mainly and continuously supported" it is up to the President, and within his discretionary power, to lay down the exact meaning of those terms. It is particularly important to have the concept defined in a case where the child is not resident with the permanent employee. Article 10(2)(a) of the European Patent Convention empowers the President to adopt internal administrative instructions.

An increase in the amount of personal contribution was warranted and two objective methods of calculation were adopted. The EPO stresses that it is the lower of the two resulting amounts that the employee must pay. The new guidelines were the result of a thorough discussion with the General Advisory Committee. The complainant did not protest when the 1981 guidelines required a personal contribution of 150 marks, therefore it appears that he does not object to the idea that a permanent employee should be required to contribute a sum larger than the dependants' allowance; what he is contesting is its amount.

It objects to the complainant's request for oral hearings since he has failed to show that anything can be gained by such hearings.

D. In his rejoinder the complainant contests the EPO's argument that the complaint is irreceivable. Rejection of his complaint would allow the President to "escalate" the amount of the personal contribution without furnishing objective grounds under the Service Regulations. Notwithstanding the fact that his contributions exceed the arbitrary amount set by the Office, such high levels of contributions set by the Office are tantamount to duress, particularly when it can be shown that they are not fundamentally warranted. He presses his plea for oral proceedings, or subsidiarily, he applies for leave to enter further written submissions so that he may answer any allegations made by the defendant.

E. In its surrejoinder the Organisation presses its arguments that the President acted within his discretionary authority when he adopted the implementing guidelines for Article 69 and denies that he is bound by either national

laws or court decisions; he is only required to apply the Service Regulations equally to all employees. It reiterates its previous objection to oral proceedings, and objects to the complainant's request for further submissions.

CONSIDERATIONS

1. The complainant pays maintenance for his child from a previous marriage who lives with her mother in La Paz, Bolivia.

2. Under Article 69(1) of the Service Regulations he is entitled to a dependants' allowance for his child under the conditions laid down in Article 69(3) a), which specifies that for the purpose of the Regulations a dependent child shall be:

"the legitimate, natural or adopted child of a permanent employee, or of his spouse, who is mainly and continuously supported by the permanent employee or his spouse."

3. Guidelines for implementing Article 69(3) were enacted by the President of the European Patent Office and issued in Circular No. 82 dated 19 February 1981. These provided that any child not resident with the permanent employee would be considered as being "mainly supported" by the employee if the employee was paying by way of maintenance an amount which exceeded the dependants' allowance paid by the Office by a personal contribution (for grade A3 and higher) of 150 German marks.

4. New guidelines replacing Circular No. 82 were enacted with effect from 1 April 1996 and notified in Communiqué No. 6 dated 20 March 1996. One alteration concerned the amount of financial support which a staff member had to provide for a child not in his custody in order to have the child recognised as being "mainly and continuously supported" by him. The new guidelines provided that the financial support provided had to equal: for one child, "6% of the employee's basic salary plus the amount of the dependants' allowance, or 25% of the basic salary of grade C1/1 if this amount is lower".

5. After the coming into operation of the new guidelines the minimum monthly contribution which the complainant had to pay towards his child's maintenance in order to qualify for payment of the dependants' allowance was 898 marks, being 25 per cent of the basic salary at grade C1, step 1. The complainant mistakenly understood the notice to mean he had to contribute 1,274.34 marks and lodged an internal appeal on 20 June 1996 against the decision to make his receipt of the dependants' allowance conditional on his paying that amount, and contesting the provisions of the new guidelines.

6. The Director of Personnel Management informed the complainant on 31 July 1996 of the precise amount of his personal contribution and noted that, since the financial support provided by him exceeded the minimum monthly amount, he would continue to receive the dependants' allowance. The complainant pursued his internal appeal requesting that the new provisions should be withdrawn or that they should not be applied in his case.

7. The Appeals Committee recommended: (1) dismissing as unfounded the complainant's contention that the new provision concerning the minimum financial support payable under Communiqué No. 6 was unlawful; and (2) reviewing the decision on the necessary minimum financial support payable by him.

8. By a letter dated 6 April 1999 the Principal Director of Personnel told the complainant that the President had decided to reject his appeal in accordance with the unanimous opinion of the Appeals Committee. He told the complainant that in a case where the criteria set out in the Communiqué were not fulfilled it was still possible to examine a case by direct reference to Article 69, and he asked him to furnish further particulars as set out in the letter. That is the decision impugned.

9. The complainant asks the Tribunal: (1) to quash the decision of 6 April 1999; (2) to rule that the European Patent Office has to "recognise national family court decisions" and in particular "accept that 'full support' defined by a national court [meets] the requirement in Article 69 of supporting 'continuously and mainly'"; and (3) to rule that the EPO must apply the Service Regulations "verbatim" and to "submit to the Administrative Council's competence" for amending the Regulations.

10. On 4 June 1999, the date on which this complaint was lodged, the minimum monthly contribution which the complainant was required to pay in order to qualify for the dependants' allowance was 940.53 marks. In fact in 1998 the complainant paid a monthly sum of 1,565.54 marks which is higher than the minimum monthly

contribution required to qualify for the allowance.

11. The Organisation claims that the complaint is irreceivable because the complainant is not adversely affected by the impugned decision and the complaint is of a purely academic nature. It also claims that the matter at issue in his third claim for relief did not form part of the internal appeal.

12. The complainant argues that the payments he made are partly compulsory (under a German court order), partly conditional (based on an assumption of the cost of schooling), partly voluntary (providing for restaurant visits), and partly provisional (through the establishment of a sinking fund set up as the current court order is not final and further retroactive payments may be necessary).

13. In the opinion of the Tribunal the designation of different descriptions to different parts of the payment made by the complainant are irrelevant. The sum which the complainant pays in total exceeds the sum of the minimum contribution set out in the guidelines. The complainant has not shown that he is adversely affected by the Communiqué. He continues to be entitled to the dependants' allowance and therefore shows no cause of action. His third claim for relief did not form part of the internal appeal. That aspect of his complaint is therefore irreceivable and must fail (see Judgment 1520, *in re* López Lahesa and others, under 7).

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet