

NINETY-THIRD SESSION

Judgment No. 2127

The Administrative Tribunal,

Considering the complaint filed by Mr M. R. against the European Patent Organisation (EPO) on 2 July 2001 and corrected on 25 July, the EPO's reply of 17 October, the complainant's rejoinder of 23 November and the Organisation's surrejoinder of 12 December 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, an Italian national born in 1951, joined the staff of the European Patent Office - the EPO's secretariat - in 1979 as an examiner. He is currently employed at grade A5.

His spouse, the mother of his two children, died on 2 July 1991. In accordance with Article 25(4) of the Pension Scheme Regulations, the Office paid an orphan's pension to each of his two children with effect from 1 August 1991.

Following the remarriage of the complainant in October 1998, the Remuneration Department informed him by a letter of 4 November that the payment of the orphan's pension to each of his two children would cease with effect from November 1998 pursuant to Rule 25.4/1 ii) of the Implementing Rules to the Pension Scheme Regulations. On 29 January 1999 the complainant requested the President of the Office, in his own name but also in the name of his children, to set aside the decision of 4 November 1998, to restore the orphan's pension payments and to order the payment of these pensions with retroactive effect from November 1998. The President rejected this request. On 22 March 1999 the Director of Personnel Development informed the complainant that the matter had been referred to the Appeals Committee. In its opinion of 6 April 2001 the Committee recommended that the appeal be rejected for lack of merit. By a letter of 11 April 2001 the Director of Personnel Development informed the complainant that the President had decided to follow that recommendation. That is the impugned decision.

B. The complainant submits that the way in which Rule 25.4/1 ii) has been interpreted and applied is contrary to Article 26 of the Pension Scheme Regulations concerning the cessation of entitlement to an orphan's pension. This rule cannot contradict Articles 25 and 26 of the Pension Scheme Regulations since it is merely intended to govern their implementation.

He adds that the present interpretation of Rule 25.4/1 ii) contravenes the generally recognised principle of the protection of families and children. Furthermore, this rule is plainly unfair in that its effect is to withdraw a pension from an orphan in the absence of any action on the part of the latter or modification of his or her status as an orphan (except in the case of adoption by the new spouse, which does not apply here).

He submits that the orphan's pension has nothing in common with an allowance to which a staff member may be entitled: this pension is paid to the child - and not to the staff member - and is subject to national taxation, whereas the salary and allowances paid to a staff member by the Office are exempt from such taxation.

Furthermore, the complainant considers that his right to be heard by the Appeals Committee has been violated, since the Committee included in its opinion arguments based on Articles 51 and 52 of the Pension Scheme

Regulations - which neither he nor the EPO had mentioned in their written submissions - without notifying him accordingly and without providing him with an opportunity to respond to these arguments.

Lastly, the complainant argues that the introduction of Rule 25.4/1 ii), in view of the interpretation given to it by the Office, has the effect of modifying the terms of the social welfare cover provided by the Office, after the beginning of his employment and without any compensation.

The complainant asks the Tribunal to set aside the decisions of 4 November 1998 and 11 April 2001, and to order the resumption of the payment of the orphan's pension to each of his two children with retroactive effect from November 1998.

C. In its reply the EPO submits that the introduction of Rule 25.4/1 ii) does not affect the complainant's acquired rights. Indeed, this rule does not result in any substantial modification of the complainant's conditions of employment. Furthermore, it does not affect the actual existence of a right to an orphan's pension, but merely modifies its conditions of application.

The reference to Article 52 is merely intended as a reminder of the legal framework in which the disputed rule was adopted. Furthermore, although it is true that the defendant is not one of the Coordinated Organizations⁽¹⁾ and that it is therefore not legally bound to apply the coordination measures referred to in Article 51, the provisions of the EPO's Pension Scheme Regulations are nevertheless modelled on those of the Coordinated Organizations. The decision to introduce the disputed rule was intended to bring the rules applicable within the EPO into line with those in force in the Coordinated Organizations, so as to establish a degree of uniformity in the application of the pension scheme. This decision is not contrary to Article 50(1) of the Pension Scheme Regulations, which provides that Article 51 shall not apply as long as the EPO is not a member of the Coordinated Organizations. With regard to the complainant's assertion that his right to a hearing was violated, it is unfounded since the complainant waived his right to a hearing before the Appeals Committee.

Article 26 of the Pension Scheme Regulations, which is merely a general rule, required clarification. Since it is "undeniable that the remarriage of a widowed permanent employee helps to reduce the burden of child care and maintenance", it was legitimate to provide for the cessation of the orphan's pension payments.

The complainant's view that payment of an orphan's pension should cease only in the event that the children are adopted by the new spouse is entirely unfounded. Indeed, a number of national legal systems (such as the French and Belgian systems) provide that the right of the children of the surviving spouse to an orphan's pension shall cease not only in the event that the latter remarries, but also as soon as the surviving spouse begins to cohabit with a new partner.

The complainant's argument that the orphan's pension is subject to national taxation is equally unfounded. The taxation of pensions - be they retirement, invalidity or orphan's pensions - stems from Article 16 of the Protocol on Privileges and Immunities of the EPO, an agreement between the Organisation and its host state, so the latter was under no obligation to grant the same privilege of income tax exemption to pensions as it does to the salaries paid to staff members.

Lastly, the defendant emphasises that there is no direct legal link between the Office and the children of its staff members; their entitlement to an orphan's pension is closely linked to the employment relationship between their parents and the Office.

D. In his rejoinder the complainant submits that "[i]n relation to the provisions [of] Article 26, Rule 25.4/1 ii) removes ... a substantial part of the right to an orphan's pension and is not confined to the application of these provisions".

He denies that he waived his right to a hearing before the Appeals Committee.

He asserts that the burden of child care and maintenance cannot be considered to be reduced if the new spouse has no legal obligation towards the children of the staff member's previous marriage.

E. In its surrejoinder the defendant contends, with regard to the right to a hearing before the Appeals Committee, that the complainant himself requested written proceedings.

It emphasises that as a result of his remarriage, the complainant is no longer alone in caring and providing for his children.

CONSIDERATIONS

1. The complainant's spouse, the mother of his two children, died on 2 July 1991. With effect from 1 August 1991 an orphan's pension was granted to each child pursuant to Article 25(4) of the EPO's Pension Scheme Regulations.

The complainant remarried in October 1998. By a letter of 4 November he was informed that because of his remarriage, payment of the above-mentioned pensions would cease. He challenged this decision in vain. Having exhausted the internal means of redress, he now appeals before the Tribunal against the decision of the President of the Office to reject his appeal in accordance with the recommendation of the Appeals Committee. He seeks the resumption of the orphan's pension payments to his children.

The EPO asks the Tribunal to dismiss the complaint for lack of merit.

2. The relevant articles of the Pension Scheme Regulations provide as follows:

"Article 25

Rate of pension

...

(4) The children or other dependents of a widowed staff member whose deceased spouse was not employed by one of the Organisations listed in Article 1 shall each be entitled to [an orphan's] pension of twice the allowance for a dependent child.

...

Article 26

Cessation of entitlement

Entitlement to a pension under Article 25 shall cease at the end of the month in which the child or other dependent ceases to qualify for the dependents' allowance under Articles 69 and 70 of the Service Regulations for permanent employees of the Office.

...

Article 51

Co-ordination

These Regulations must be applied in a uniform manner by the different Organisations listed in Article 1; to this end, the Secretaries and Directors General of those Organisations and the President of the Office shall consult among themselves in order to carry out the appropriate co-ordination.

Article 52

Implementing Rules

(1) Implementing Rules for giving effect to these Regulations shall be adopted by the Administrative Council acting on a proposal by the President of the Office and after consulting the General Advisory Committee.

(2) These Implementing Rules shall be brought to the attention of the staff."

The Implementing Rules to the Pension Scheme Regulations, which entered into force on 4 June 1981,

contain the following provision in particular:

"Rule 25.4/1

Pension of an orphan dependent on a widowed staff member

i) The orphan's pension mentioned in this Article (children or other dependents of a staff member who is the widower, or widow, of a spouse not a staff member of a Co-ordinated Organisation) shall be due only if the staff member became widowed while in service ...

ii) If the staff member remarries or leaves the Co-ordinated Organisations, the orphan's pension shall cease to be paid.

..."

3. The complainant submits, inter alia, that his right to a hearing was violated by the Appeals Committee, which referred in its opinion to Articles 51 and 52 of the Pension Scheme Regulations on its own initiative, to justify the challenged decision, without giving him an opportunity to address this issue.

This plea should be examined first, because if it is well-founded, the impugned decision must be set aside on the grounds of a formal defect.

This plea does not appear to be well-founded. Indeed, an appeals body applies the law automatically, even where the applicable provisions have not been expressly mentioned during the proceedings. As a general rule, it has no duty to inform the interested parties of this before doing so. It is only where the circumstances are such that the interested parties could not reasonably expect the law to be applied to their case in such an automatic way that, in accordance with the principle of due process and the rules of good faith, the authority must notify them accordingly and provide them with an opportunity to put forward their arguments.

This was clearly not the case in this instance. The dispute concerns a problem as to the interpretation of the Pension Scheme Regulations. Since the provisions governing the scope of application and the interpretation of these Regulations contained nothing unusual for the complainant, there was no need to give him a prior opportunity to express his views on this issue. Furthermore, it would have been legitimate to expect the complainant to turn his attention, if necessary, to the problem of the relationship with the Coordinated Organizations, given that the EPO's Administration had explained in clear terms, in its brief responding to the appeal, that from the outset, "whenever difficulties had been encountered regarding the interpretation of the Pension Scheme Regulation", the Organisation had referred systematically "to the Implementation Rules for the pension scheme of the Coordinated Organizations". This necessarily raised a question as to the legal basis of the Office's course of action; under these circumstances, it was not difficult for the complainant to seek and find the applicable provision.

4. The complainant submits that Article 26 of the Pension Scheme Regulations has been violated because it defines in an exhaustive manner the grounds for cessation of entitlement to an orphan's pension, and these grounds do not include remarriage of the staff member. Consequently, Rule 25.4/1 of the Implementing Rules, which is of lesser authority than Article 26, contravenes that article.

The EPO disputes this argument.

(a) It is not necessary in this case to examine whether Articles 51 and 52 of the Pension Scheme Regulations empower the EPO's Administrative Council to depart from a clear and complete provision of the Regulations.

(b) Article 26 of the Pension Scheme Regulations does not have the scope attributed to it by the complainant.

This provision does not provide a complete, case-by-case definition of all situations resulting in the cessation of entitlement to an orphan's pension, but instead stipulates in general and abstract terms that this cessation will occur when the conditions of entitlement to the pension are no longer satisfied.

It is therefore necessary to examine the conditions of entitlement to an orphan's pension, within the meaning

of Article 25(4). As far as the child is concerned, it is clearly not a condition of entitlement to the pension that the deceased was one of the child's parents; indeed, the granting of the pension does not depend on the existence of a formal family relationship with the deceased, but merely on the fact that the child is a dependent of the widowed staff member of the Office. Thus, the pension entitlement arises even where the child had no formal family relationship with the deceased spouse, as in the case of the children of a previous marriage, children born outside marriage, or fostered children. By contrast, as far as the staff member is concerned, entitlement to the pension is subject to the condition that the deceased was his or her spouse.

The conditions governing entitlement to the orphan's pension also reflect its purpose. The fact that it has the effect of doubling the dependent child's allowance is attributable to an obvious desire to assist the widowed staff member, who can no longer rely on the help previously given by his or her spouse, regardless of whether this help resulted from a legal duty of maintenance.

Thus, since the orphan's pension can only be granted to children of a staff member on condition that he or she becomes widowed, it seems logical to consider that this condition is no longer satisfied in the event that the latter remarries. As a general rule, the situation of a staff member who remarries will be approximately equivalent to their situation in their previous marriage.

Consequently, the Implementing Rules do not contravene the provisions of Article 26 of the Pension Scheme Regulations.

(c) This interpretation is further supported by the fact that it represents the solution adopted by the Coordinated Organizations.

5. In view of the foregoing observations, the pleas based on the principle of non-retroactivity and on the infringement of acquired rights are likewise unfounded.

The complainant refers in vain to "the ideal ... of the protection of families and children". This ideal carries no legal weight. Furthermore, the solution that has been adopted is not inequitable, in view of the interests involved.

The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

1. They include the North Atlantic Treaty Organization (NATO), the Organization for Economic

Cooperation and Development (OECD), the Council of Europe (CE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

Updated by PFR. Approved by CC. Last update: 22 July 2002.