SEVENTIETH SESSION

In re HOFMANN (No. 2)

Judgment 1062

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Dieter Gerhard Hofmann against the European Patent Organisation (EPO) on 18 December 1989, the EPO's reply of 5 March 1990, the complainant's rejoinder of 10 May and the Organisation's surrejoinder of 30 July 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38, 84 and 107 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. The EPO has concluded with insurance brokers, van Breda and Company International, on behalf of several insurance companies a "collective insurance contract" for the protection of staff. Title II of the contract covers "Death and total permanent invalidity insurance" and applies to staff who qualify under the EPO Service Regulations.

Article 84(1) of the Regulations reads:

"The benefits payable shall be as follows:

...

(b) in the event of death of the permanent employee or permanent invalidity totally preventing him from performing duties corresponding to his level of employment in the Office: a lump sum equal to 2.75 times his annual basic salary ...";

and 84(4):

"One third of the contribution, calculated by reference to the basic salary of the permanent employee, which is required to meet the insurance of the risks under paragraph 1b) shall be charged to the employee, but so that the amount charged to him shall not exceed O.6% of his basic salary."

The monthly premium is set in the collective insurance contract, and every five years the EPO reviews the amount with van Breda. It did so late in 1987.

The complainant, who was born in 1949, is a permanent employee of the EPO. Up to the end of 1987 his contribution came to 0.1881 per cent of basic salary. Thus his pay slip for December 1987 showed an amount of 7,053 Deutschmarks as basic salary and a deduction of 13.27 Deutschmarks therefrom as his contribution to the premium for death and invalidity insurance for that month.

By circular 163 of 20 January 1988 the Personnel Department of the Office informed the staff that the premiums were put up as from 1 January 1988 because of a rise in the number of successful claims in the last few years. For any permanent employee below the age of 55, like the complainant, death insurance was thenceforth to cost 0.374 per cent and invalidity insurance 0.0638 per cent of basic salary, a total of 0.4378 as against the 0.1881. The complainant's pay slip for January 1988, which he got on the 26th, showed a deduction of 30.88 Deutschmarks as his one-third contribution to the premiums.

On 18 April 1988 he lodged an internal appeal under Article 107 of the Service Regulations against the increase on the grounds that the EPO had failed to consult the General Advisory Committee (GAC), a body comprising

representatives of both staff and management, as Article 38(3) of the Regulations required. That provision says that the Committee shall "be responsible for giving a reasoned opinion on" any proposed amendment to the Regulations or implementing rules "and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff ...". Over 450 other staff members lodged similar appeals at about the same time.

In its report of 23 May 1989 on the complainant's and the other appeals the internal Appeals Committee, holding that the EPO had acted in breach of 38(3), recommended levying contributions at the old rates until the President had got the GAC's opinion and refunding the amounts overpaid with interest at the rate of 8 per cent a year from 1 January 1988. But by a communiqué of 4 October 1989, the impugned decision, the Personnel Department announced that the President of the Office had rejected the appeals.

B. The complainant submits that the increase in premiums and therefore the impugned decision were unlawful: Article 38(3) applied, it was not complied with, and there was no "obvious urgency" warranting an exception. Not until the GAC held its 63rd meeting on 3 December 1987 in West Berlin did it hear of the EPO's intention to put the premiums up. A staff representative at once objected to the lack of consultation, but the GAC was unable to give a "reasoned opinion" by 1 January 1988 since it did not have full information, the subject was complex, and the Christmas break was near. It was wholly the EPO's fault that no consultation took place. It had known for five years that the insurance contract would have to be renewed by the end of 1987 since clause 2 said so. The duty laid down in 38(3) is all the stricter because it has authority to increase the financial burden on its staff by varying the terms of the collective contract: 38(3) is the only safeguard the staff have. Proper explanation and discussion of the big increase in premiums were called for. Judgment 744 (in re Snell) affords a precedent for enforcing such a requirement.

The complainant asks the Tribunal to set aside the decision to increase his contributions, order that they be restored to the figure of 0.1881 per cent of basic salary and that he be paid the amounts wrongfully deducted since 1 January 1988 plus interest at the rate of 10 per cent thereon, and award him 2,000 Deutschmarks in costs.

C. The EPO submits that the complaint is unfounded. It points out that it had not yet signed with van Breda the codicil to the contract embodying the new provisions when it informed the GAC of the increase at its meeting on 3 December 1987. It then told the members of the GAC that it was ready to discuss the matter and to put full information at their disposal. It did not sign the codicil until 19 April 1988. The GAC might, if so minded, have given an opinion on the outcome of the negotiations, and the staff representatives might have asked it to meet for the purpose before the end of the year.

Negotiations are not worth starting until late in the year, when the brokers have the most recent data available for the purpose of reckoning new premiums. Yet there was an urgent need to reach agreement on the new rates since they were to come into effect at 1 January 1988 and it was undesirable to apply them retroactively. The staff representatives never asked for the further information offered. The President put the matter on the agenda of the GAC's meeting on 13 April 1988 - a week before the codicil was signed - and the Committee then discussed it, but again the staff representatives apparently did not think it worth carrying further.

The GAC was asked in November 1988 whether it wanted to state an opinion on the subject and it declined to do so. It then reaffirmed an earlier practice of delegating its supervisory function by appointing a staff representative and a management representative to follow the negotiations with the brokers on the matter of premiums for medical insurance. Having had no reason to believe that it wished to depart from that practice, the President cannot be taken to task for not seeking the GAC's opinion on the matter of death and invalidity insurance.

D. In his rejoinder the complainant asks what the legal basis can have been for charging the staff higher rates of contribution from January to March 1988 when the EPO did not sign the codicil until 19 April 1988. It is specious to argue that the Administration was willing to discuss the matter. What it told the GAC on 3 December 1987 merely shows up its awareness of its failure up to then to enable the GAC to give a reasoned opinion. Since there was no time thereafter for the GAC to consider the matter properly before the new rates came in, the offer of information and discussion was pointless.

The matter was not urgent: the EPO did not even put it on the agenda of the GAC's December 1987 meeting, and the President did not exercise his discretion under 38(5) to set a time limit for the GAC's opinion.

The fact that in earlier years the GAC, with the staff representatives' consent, delegated the task of overseeing the

review of medical insurance premiums just means that the staff representatives took a flexible approach to that rather complex matter. Such delegation did not apply to death and invalidity insurance. Had the GAC been told in time that the clauses of the contract on such insurance were to be altered it might have taken the same approach. It neither expressly nor by implication waived its right to be consulted. To bring it in only when the decision could no longer be changed was a travesty of consultation.

E. In its surrejoinder the EPO submits that the complainant's rejoinder in no way weakens the force of the arguments in its reply. It maintains that there was an established practice, which the complainant does not dispute, of delegation of its supervisory function by the GAC. There is no reason not to apply the same procedure to insurance of the risks of death and invalidity as to medical insurance. In both cases the premiums are similarly reckoned. The staff representatives on the Committee were not diligent in seeking information. Since they knew that the time had come to revise the premiums they could have taken the initiative and asked the Committee to take up the matter.

CONSIDERATIONS:

1. The EPO is party to a collective insurance contract with a consortium of six insurance companies, administration of the contract being delegated to a firm of insurance brokers, van Breda and Company International, who are responsible for negotiating the terms of renewal of the contract. Under Article 84(4) of the Service Regulations the employee shall pay one-third of the contribution required to meet the costs of insurance against death and total permanent invalidity, provided that the amount shall not exceed 0.6 per cent of basic salary.

In January 1988 the EPO decided to increase the rates of contribution by its staff in the period from 1 January 1988 to 31 December 1992 to the cost of insurance of risks under those heads. The present challenge to that increase rests on the alleged failure by the EPO to follow the procedure for consultation set out in the Service Regulations.

The procedure for consultation

2. Article 38 of the Regulations establishes joint committees for the Office comprising a General Advisory Committee and local advisory committees. Article 38(3) reads:

"The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply ..."

Article 38(5) further provides:

"Opinions of the joint committees which are required in respect of administrative decisions must be delivered within the time limits laid down in each case by the President of the Office, such time limits being not less than fifteen working days. Once the time limit has expired, the opinion shall no longer be required."

The EPO's reply

3. The Organisation maintains that the absence of an opinion by the General Advisory Committee (GAC) does not make the challenged decision unlawful. It points out that not until 4 December 1987 did it complete negotiations with the brokers about the premiums to take effect at 1 January 1988 and the matter was therefore urgent. It cites the minutes of the GAC's 63rd meeting on 3 and 4 December 1987, which under the heading "General Information" record that, the GAC had been told that because of an increase in the costs of death and invalidity insurance there would be a substantial increase in the contributions payable by employees and that, if the GAC wished, the Administration would give more details and data about the negotiations.

The President of the Office put the matter on the agenda of the Committee's 64th meeting, which took place on 13 April 1988, but the Committee gave no opinion. At its 67th meeting, on 24 and 25 November 1988, it agreed to delegate its functions in the matter to a representative of the Administration and a representative of the staff on condition that it should be informed of the outcome of the negotiations.

The EPO submits that that was an established practice of the GAC's and that, in the absence of any decision to the contrary, the Committee intended to dispense with the requirement of giving "a reasoned opinion" on the new rates of contribution.

The Tribunal's ruling

4. The first issue is whether the decision to increase staff contributions to the costs of death and invalidity insurance was a proposal within the meaning of Article 38(3).

The answer is that it was, because the payment of contributions for such coverage was compulsory and indeed one of the conditions of service.

5. Secondly, did the proposal fall within the exception in Article 38(3) as a "case of obvious urgency"?

It was known that the previous insurance contract would terminate at 31 December 1987, and by 4 December it was clear that there would be an increase in staff contributions. It cannot therefore be properly argued that the increase was unforeseeable. Although the negotiations were not completed until 4 December 1987 the Administration must have been aware before 3 December 1987, the date of the GAC's meeting, what the brokers were asking for and whether other insurers could offer lower rates. Consultation in the context of Article 38 entails giving the GAC enough information to enable it to come to "a reasoned opinion". Merely telling it that the Administration would give it more details and provide data on the negotiations if it so wished did not comply with Article 38, which is plainly intended to make for proper consultation between the two sides.

6. As the Organisation admits, though the matter was put on the agenda of the GAC's meeting on 13 April 1988, the President set no deadline for it to give an opinion. At that meeting a staff representative asked whether copies of the documents setting out the proposals by van Breda and the counter-proposals by the EPO could be made available to the Staff Committee. On 30 August 1988 the Office gave the Staff Committee document GAC/6/88, and the GAC discussed it at its 67th meeting, on 24 and 25 November 1988. The two sides disagreed as to whether an opinion was necessary and, as was said above, that was when the Committee decided to delegate its function to a representative of the administration and a representative of the staff.

The Article 38 procedure calls for joint consultation: it does not transfer decision-making authority from the Administration to the GAC. The submission of document GAC/6/88 to the Committee and its decision to delegate its function fulfilled the requirements of Article 38, because by 24 November 1988 the GAC was in a position to give a reasoned opinion.

7. In the light of the foregoing the decision to apply the higher rates of contribution to the complainant from 1 January 1988 cannot stand. They did not become properly payable until 26 November 1988. The complainant, who has never disputed liability to pay contributions at the old rates, must be repaid the difference between the amounts reckoned at the old and the new rates for the period from 1 January 1988 to 25 November 1988. But inasmuch as he remained fully covered during that period by insurance against the risks of death and total permanent invalidity the Tribunal will not order the payment of interest.

DECISION:

For the above reasons,

1. The decision to increase the complainant's contributions to the costs of death and invalidity insurance is quashed from 1 January 1988.

2. The decision is confirmed as from 26 November 1988.

3. The EPO shall pay back to the complainant the amounts wrongfully deducted for the period from 1 January 1988 to 25 November 1988.

4. It shall pay him 2,000 Deutschmarks in costs.

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

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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