SEVENTY-NINTH SESSION

In re HALD

Judgment 1449

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Elisabeth Maria Catherina Josephina Hald against the World Health Organization (WHO) on 15 April 1994 and corrected on 20 May, the WHO's reply of 18 August, the complainant's rejoinder of 15 November 1994 and the Organization's surrejoinder of 20 February 1995;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of a witness;

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

A. The complainant, a Dutchwoman, has been employed by the WHO since 1984 in the General Service category of staff at its Regional Office for Europe at Copenhagen (EURO). The Organization pays her child allowance for each of her two dependent children.

Because of changes in national tax law the Danish Government began on 1 July 1987 making tax-free lump-sum payments for any dependant under the age of 18 who is resident in Denmark provided that at least one parent is "liable" to taxation in the country, whether or not that parent actually has to pay income tax. The payment is known in Danish as "Bornefamilieydelse" (BFY), i.e. "child" or "family allowance"

Under revision 32 of the "Employment conditions for staff in the General Service category", which was in effect when the BFY came in, payment by the WHO of its own allowance for a dependent child "is subject to the provision that a staff member having an entitlement shall have the allowance reduced by the amount of any benefit paid from public sources by way of social security payments by reason of such child".

Revision 33, which was distributed on 25 January 1990 but took effect from 1 October 1988, stipulated that the benefits to be docked from the WHO's child allowance would include any paid from public sources "by way of social security payments, or under public law ...".

There was discussion between "concerned parents", the complainant among them, and the Administration about whether the WHO should dock the amount of the BFY from the child allowance.

A personnel officer announced in a memorandum of 22 November 1989 to the General Service staff at the Regional Office that "all allowances received under public law, including the child-family allowance, must be deducted" but that such deductions would take effect only as from 1 January 1990.

On 27 March 1990 the complainant, acting "as a representative for a group of concerned staff members", lodged a statement of appeal with the regional Board of Appeal alleging that the words "under public law" in the revised employment conditions were inappropriate and that the Administration had failed to consult the staff about the revision as it must under Staff Rule 920. She asked the Administration (1) to go back to the wording in force before revision 33, (2) not to deduct the BFY from the child allowance and (3) to refund her costs.

In its report of 31 January 1991 the regional Board recommended return to the former text or finding "a new wording" but continuing to deduct the BFY from the child allowance, albeit as from 25 April 1990. It also said that the wording of the Staff Rules "should be improved" and the complainant should get costs.

In a letter dated 5 March 1991 the Regional Director told her that he had decided to ask "headquarters" to give effect to the deduction of the BFY from the child allowance as from 1 March 1990 and agreed to pass on the regional Board's views about recasting the rules.

By a memorandum of 24 April 1991 the Director of Personnel told the Regional Director that the Director-General saw no need to rephrase the rules or put off the deductions until 1 March 1990.

On 29 April 1992 the complainant appealed to the headquarters Board of Appeal. In its report of 19 November 1993 the headquarters Board recommended dismissing her case but paying her the costs of travel to Geneva.

By a letter of 18 January 1994, which she impugns, the Director-General endorsed the headquarters Board's recommendations.

B. The complainant submits that the impugned decision is unlawful. The WHO added the words "under public law" to the terms of employment to deprive her of "Danish tax alleviation" in the form of the BFY because it is not a social security benefit. In any event the WHO may not reckon dependants' allowances on the basis of tax rebates.

She pleads breach of equal treatment inasmuch as the Administration denies the BFY to officials in the General Service category but lets staff in the Professional category benefit from it. The policy also prevents single or divorced parents from getting either the BFY or the WHO allowance.

She alleges procedural flaws in the internal appeal procedure.

She asks the Tribunal to declare invalid the outcome of her two appeals, and order the WHO to revert to the "former wording" of the conditions of employment, "thus restoring the right of the appellant and other [General Service] staff in EURO to receive BFY without a corresponding reduction in WHO child allowance".

C. In its reply the WHO contends that the deduction of the BFY from the child allowance is lawful. The employment conditions having been properly revised and the staff association duly consulted, it was bound to deduct from the allowance a publicly funded benefit for a dependent child.

In revising the terms of employment the WHO sought to avoid double payments to some of its staff and to bring conditions of employment into line with the rules and with the best prevailing practice in the area. Even if revision 32 remained in force the Administration would have to deduct the BFY from the allowance, as the case law bears out.

The WHO says it also deducts the BFY from the child allowance it pays to staff in the Professional category. It denies discriminating against single or divorced parents and mishandling the complainant's case.

D. In her rejoinder the complainant points out what she sees as inconsistencies in the WHO's reply. The gist of her argument is that the BFY is not a social security payment. Unlike precedents on which the Organization relies, her case turns on tax matters, not social benefits. She says there is no evidence to suggest that the Director-General delegated authority to the Director of Personnel to revise the conditions of employment.

She further seeks "reimbursement in full" of her costs, including those she incurred for appeal to the headquarters Board.

E. In its surrejoinder the WHO produces evidence of delegation of authority by the Director-General to the Director of Personnel.

It submits that what matters is not whether a benefit is "referred to" as a social security payment or a tax allowance but what its "essential purpose" is: the BFY and the child allowance serve one and the same purpose.

As to the complainant's claim to refund of the costs she incurred on appeal, the WHO observes that it has already offered to refund the cost of her travel to Geneva, and that

is enough.

CONSIDERATIONS:

1. The complainant has been employed by the WHO's Regional Office for Europe at Copenhagen since 1 November 1984. She works in the Strategic Planning and Evaluation Unit and holds a grade - C.06 - in the General Service category of staff. The Organization pays her child allowance for each of her two dependent children.

2. Until the end of June 1987 the Danish State paid to some parents an allowance for a dependent child which was known as the "Bornetilskud". The Organization deducted the amount of any such payment from the allowance it paid to a staff member in the General Service category who had a dependent child. It did so in pursuance of clause II.1 of the "Employment conditions for staff in the General Service category" (revision 32), which provided that the child allowance should be reduced by "the amount of any benefit paid from public sources by way of social security payments by reason of such child".

3. On 1 July 1987 the Danish Government introduced a benefit known as the "Bornefamilieydelse" (BFY). It is a tax-free lump-sum payment made in respect of any dependant under the age of 18 who is resident in Denmark. It is paid to the parents of a dependent child, whatever their income may be, as long as at least one of them is liable to taxation in Denmark.

4. By revision 33, distributed on 25 January 1990 but effective as from 1 October 1988, the Organization amended the employment conditions for staff in the General Service category to provide that the allowance it paid for a child should be "reduced by the amount of any benefit paid from any public source by way of social security payments or under public law, by reason of such child". The amendment consisted in the insertion of the phrase "or under public law".

5. A personnel officer announced to all General Service staff in the Regional Office by a memorandum of 22 November 1989 the decision to deduct the amount of the BFY from the child allowance as from 1 January 1990. The complainant challenged the decision in an appeal of 27 March 1990 to the regional Board of Appeal. Her appeal having failed, she went on 29 April 1992 to the headquarters Board of Appeal. The headquarters Board unanimously recommended rejecting her appeal, the Director-General informed her by a letter of 18 January 1994 that he did so, and that is the decision she is impugning.

6. The complainant argues that the BFY is not a social security payment; that it does not replace the allowance known as the Bornetilskud that was deducted from the WHO child allowance; that the revision of the employment conditions for General Service staff was invalid; and that its purpose was to prevent such staff from getting tax relief. The Organization replies that the amendment was valid and that the BFY is deductible from the child allowance because it is a payment "by way of social security". It is not in dispute that, to quote the material rule, payment is made from a "public source" and "by reason of" a dependent child.

7. In Judgments 1296 (in re Cook) and 1297 (in re Theuns No. 3) the Tribunal ruled on somewhat similar claims in cases which were brought against the European Patent Organisation (EPO) and which were about payment of a state child allowance in the Netherlands. There the issue was whether the child allowance paid by the Dutch State was "of like nature" to the dependant's allowance paid by the EPO. The Tribunal held that both the state allowance and the EPO allowance were paid on account of the dependency of the child and the social obligations of the parent. Their purpose was the same, namely to contribute to the costs of child maintenance.

8. Here the text to be interpreted is different, the issue being whether the BFY is a benefit paid "by way of social security payments". The term "social security" has not been given any fixed narrow meaning in revision 33 but is a way of describing payments to the citizen which from country to country may be variously referred to as social or social security benefits, social welfare payments, family allowances, child benefits, and so forth: the essence of them is that their purpose is to meet social needs.

9. The State collects taxes, the levy being usually eased by means of tax relief, i.e. money that the State forgoes. The purpose of such tax relief will vary according to the government's objectives. It may be to foster industry, encourage the export trade, increase employment, alleviate poverty or disability, or lighten the parents' financial burden in bringing up children. In the last case parents may get tax relief in respect of a child which is unrelated to any income the child may have: it is tantamount to an additional personal allowance for the tax-paying parent. Or, as in Denmark, tax relief may be granted, up to a ceiling, on a child's income.

10. In many countries the State also disburses social benefits to those who have social needs. If payment is subject to a means test, then of course only someone who qualifies will receive the benefit. But legislation may also provide that the State may claw money back where income is above certain ceilings, the benefit paid by the State being treated in effect as taxable income. Alternatively, legislation may provide that a benefit which is not means-tested is also tax-free.

11. The Bornetilskud was a means-tested allowance. As part of the reform of taxation in Denmark, it was abolished - except for the single or divorced parent - and at the same time tax relief was reduced for any income of the child. By way of replacement the BFY was introduced as a tax-free benefit that is paid to parents regardless of their income, provided that one of them is liable to Danish tax.

12. The complainant contends that the BFY is a tax allowance, not a social security benefit. That is not so. Once legislation was passed reducing the tax relief on the child's income, the amount of the reduction ceased to be a tax allowance. That reduction of the tax allowance coupled with the elimination of the Bornetilskud resulted in a new form of social benefit. The fact that the history of the BFY may be traced back to a tax allowance does not mean that it is itself such an allowance. The Danish State has replaced a means- tested child benefit, the Bornetilskud, with a tax-free benefit for all parents which is not means-tested, at the same time reducing the tax relief on the child's income. The BFY has all the attributes of a social security payment and none of a tax allowance. The requirement that one of the parents be liable to Danish tax does not alter the nature of the benefit.

13. Since the Organization succeeds in the plea that the BFY is a payment made by way of social security, it lawfully deducted the amount of the BFY from its own child allowance. There is therefore no need to rule on the complainant's various other pleas.

14. The conclusion is that the complainant's claims fail in their entirety.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

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