

FORTIETH ORDINARY SESSION

***In re* CALLEWAERT-HAEZEBROUCK (No. 2)**

Judgment No. 344

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Patent Institute by Mrs. Hilde Callewaert-Haezebrouck on 1 December 1976, the Institute's reply of 23 December and the complainant's rejoinder of 10 January 1977;

Considering the applications to intervene filed by

Mrs. Elia Bonnevalle-Calbrecht,
Miss Annie Françoise Jacqueline Boulon,
Mrs. Cornelia Davis-Van Teijlingen,
Miss Marie-Paule Demeter,
Mrs. Tresia Johanna Gagesteijn-Zaal,
Mrs. Marie-Noël Haslauer-Licour,
Miss Angelina Koster,
Mrs. Molly Jane Koster,
Mrs. Jacoba Anna Paauwe-Van Der Zwaan,
Mrs. J.F.M. Ramakers-Adam,
Mrs. Johanna Antonia Roelofs-Helderman,
Mrs. Nicole Françoise Schuermans-Hassele,
Mrs. Sylvia Steyn-Oudshoorn,
Mrs. Piaternella Maria Van Bergen-Baak,
Mrs. Pauline Huguette Van Breemen-Hubert,
Miss Adriana Magdalena Maria Van Niel,
Mrs. Yvonne Westmaas-Nijhuis;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, the Institute Staff Regulations, particularly Articles 17 and 54, and Articles 28 and 30 of Appendix IV to the Regulations;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant, an Institute staff member, applied to have her husband admitted to membership of the sickness insurance scheme. He was admitted as from 1 January 1973 and she undertook to pay the full costs. The premium for 1973 was deducted from her salary payment for April 1973. The premiums for 1974 and 1975 were paid in those years by means of monthly deductions from her salary, but in calculating their amount allowance was made for a 25 per cent contribution from the Institute. An audit at the end of 1975 revealed that for the Institute to contribute was in keeping neither with the complainant's undertaking to pay the full costs of insuring her husband nor with Articles 28 and 30 of Appendix IV to the Staff Regulations, which provide that insurance of a staff member covers also "his wife" and that the Institute should contribute 25 per cent of the premium for the "spouse". A sum of 481 guilders, the amount paid by the Institute towards the insurance premium for the complainant's husband for 1974 and 1975, was deducted from her salary payments for February and March 1976.

B. By letter of 3 March 1976 the complainant appealed against the deduction. She said that she had undertaken to pay the full costs of insuring her husband only on the strength of what the Institute had told her, namely that according to Articles 28 and 30 of Appendix IV to the Staff Regulations the Institute contributed to the payment of insurance premiums only for a wife. Those provisions, she said, discriminated against staff members on grounds of sex and the Institute acted wrongly in deducting from her salary the amount of its own contribution to the cost of

insuring her husband. Lastly, supposing the Administration had made a mistake she herself ought not to suffer for it. In a letter of 15 March the Director-General replied that her husband's position with regard to medical and hospital insurance had to be promptly settled because the collective contract between the Institute and the insurance company "refers to the provisions of the Institute Staff Regulations, which do not allow the affiliation of the spouse of a female staff member". In view of that letter and after discussing the matter with the competent officials the complainant agreed that her husband should be removed from the list of those insured under the collective insurance agreement. She nevertheless pursued her appeal against the making of deductions from her salary payments for February and March 1976.

C. In its report of 2 September 1976 the Appeals Committee held that Article 28 of Appendix IV to the Staff Regulations did clearly prescribe different treatment for male and female staff members: "by allowing only 'wives' of staff members to be insured under the collective agreement it denies female staff members, solely on grounds of sex, a benefit enjoyed by male staff members". The Committee held that Article 17(2) of the Staff Regulations, which provides that staff members are appointed without distinction as to race, creed or sex, was a corollary of a more general rule that personal criteria of that kind do not warrant any difference in treatment between staff members. The Institute was therefore bound to interpret Article 28 of Appendix IV as allowing the insurance of a husband under the collective agreement on the same terms as that of a wife. The Committee concluded that "in contributing towards the premiums for insurance of the complainant's husband the Institute fulfilled its obligation under Article 30" of Appendix IV to the Staff Regulations and there were therefore "no grounds for recovery" by the Institute "of the sum paid allegedly by mistake". The Committee therefore recommended refunding to the complainant the 481 guilders deducted from her salary payments for February and March 1976. The Director-General disagreed with the Committee's recommendation and by decision of 13 October 1976 dismissed the complainant's claim.

D. On 8 October 1976 the complainant claimed repayment of 190 guilders, or 25 per cent of the premium for insurance of her husband in 1973. She also applied to have her husband restored to the list of insured persons with retroactive effect from the date on which he had been removed from it. On 18 October she asked that her child should be insured whether or not her husband was engaged in gainful activity. The Director-General finally dismissed her three claims by letter of 3 November. The Institute says, however, that the complainant justified her claim for insurance of her child on the grounds that her husband was not engaged in gainful activity and her child was admitted to membership of the sickness insurance scheme with effect from 10 September 1976.

E. The complainant is appealing against the Director-General's decisions of 13 October and 3 November 1976. She asks the Tribunal to declare:

(a) that Article 28 of Appendix IV to the Staff Regulations discriminates between male and female staff members, that such discrimination is a breach of a general principle of law and that the Institute is bound to interpret Article 28 of Appendix IV as allowing the insurance under the collective agreement of (1) husbands of staff members on the same terms as wives and (2) children of female staff members on the same terms as those of male staff members;

(b) that the Institute acted wrongly in calling upon the complainant to settle as soon as possible her husband's position with regard to sickness insurance and in making her child's membership subject to discriminatory conditions and that her husband should therefore continue to be covered by the Institute's sickness insurance scheme without interruption from the date of his original admittance and her child should be admitted without having to fulfil any discriminatory conditions;

(c) that the Institute should refund to her the sum of 671 guilders, its 25 per cent contribution towards payment of the insurance premiums for 1973, 1974 and 1975, pay her damages and defray the expenses she has incurred; and

(d) that the Institute bears full liability for any prejudice she may suffer should her husband or her child have no sickness insurance.

F. As to the interpretation of Article 28 of Appendix IV to the Staff Regulations, the Institute observes that the Director-General is bound to apply the provisions of the Staff Regulations or any other text in force at the date on which he takes a decision. The wording of Article 28 is clear enough to need no interpretation. The Tribunal may not review the lawfulness of rules established by the supreme body of the Institute to govern the conditions of employment of staff members. "It is for the Administrative Council of the Institute, a legislative body, to make

such amendments in the Staff Regulations as it thinks fit. Until the Council makes such amendments the provisions in force are binding", and the complainant cannot properly "contend that a decision which fully respects those provisions" was taken "in accordance with an unlawful text". Further, her claim for repayment of a sum which she paid in 1973 was not made until 8 October 1976 and should therefore in any event be dismissed. Nor is her claim allowable for her husband's retroactive readmittance to the sickness insurance scheme "since under its contract with the insurance company the Institute may not ask that company to admit someone with retroactive effect". Lastly, the complainant's contention that the Institute should bear full liability for any prejudice she may suffer because her husband or her child is not insured is unfounded: in the absence of insurance by the Institute, it was for her or her husband to take out proper insurance. Any prejudice for which she may claim damages would be due to her own improvidence in the circumstances and the Institute disclaims all liability. In any event she would suffer such prejudice only if she or her husband received no benefit from any other insurance scheme. The Institute therefore asks the Tribunal to dismiss the complaint in its entirety.

G. In her rejoinder the complainant concedes that the Tribunal may not amend the texts in force but argues that it can at least "decline to apply texts which are in flagrant breach of the European Convention on Human Rights, an instrument signed by the governments whose representatives make up the Administrative Council of the Institute". Article 28 of Appendix IV is so worded because the Staff Regulations were originally based on a notion of the "breadwinner" which has since been removed from the Staff Regulations themselves (for example Article 54). It would therefore be a mistake and a violation of the spirit of the Staff Regulations to preserve that notion in Appendix IV. The discrimination embodied in Article 28 of Appendix IV is contrary to Article 17 of the Staff Regulations, a more general provision which lays down that staff members are appointed without distinction as to race, creed or sex. As to her claim for repayment of a sum she paid in 1973, in his letter of 3 November 1976 the Director-General upheld his decision of 13 October that the text of the Staff Regulations was clear and he had to apply it. In other words, her claim was dismissed not because it was time-barred but on the merits, and the Institute may not now plead irreceivability. Supposing that the agreement between the Institute and the insurance company does bar her husband from unbroken membership of the sickness insurance scheme, the Institute, "being bound to exclude her husband, should bear full liability for doing so and the consequences of the prejudice she suffered after her husband had been excluded". In her view, the Institute's reply explicitly acknowledges that she has suffered prejudice if she or her husband has received no benefits and, having acknowledged the prejudice, the Institute bears liability for it. In her rejoinder the complainant confirms her original claims for relief.

H. By letter of 25 January 1977 the Institute informed the Registrar of the Tribunal that it did not wish to file a surrejoinder.

CONSIDERATIONS:

As to the interventions:

The interveners mentioned above have an interest in the allowing of the complainant's pleas. Their interventions are therefore receivable.

As to the defendant:

On 1 December 1976 Mrs. Callewaert-Haezebrouck, an official of the International Patent Institute, filed the complaint against the Institute. By an agreement signed on 19 October 1977 the Institute was integrated into the European Patent Office, the secretariat of the European Patent Organization (EPO). Having recognised the jurisdiction of the Administrative Tribunal, with the agreement of the ILO Governing Body, from 1 January 1978 the EPO replaced the Institute in disputes with its staff members still pending at that date before the Tribunal. Thus in this case the EPO has become the defendant.

As to the lawfulness of the impugned decision:

According to Article 28 of Appendix IV to the Staff Regulations, adopted by the Administrative Council in its capacity as an executive body, membership of the Institute sickness insurance scheme is open to "the staff member, his wife and dependent children under the age of 21 who are not engaged in any gainful activity, are not married and are

actually maintained by the staff member".⁽¹⁾

The Director-General contends that that text explicitly applies only to wives of male staff members and not to husbands of female staff members and that the complainant cannot therefore claim the benefit of the provision for her husband, who was not a member of the Institute staff.

The Director-General so interprets Article 28 as to discriminate between male and female staff members, only the wives of male staff members being entitled to benefit from the insurance of their husbands.

Such discrimination offends against the general principles of law, and particularly of the international civil service, and the Tribunal cannot allow application of a text which so discriminates.

Hence the complainant is right to contend that her husband and her daughter should be admitted to membership of the sickness insurance scheme on the terms laid down in Article 28.

She is therefore entitled to repayment of the 481 guilders improperly deducted from her salary in 1976. On the other hand, her claim for payment of the contribution which the Institute should have made for her husband in 1973 is disallowed on the grounds that it is time-barred.

DECISION:

For the above reasons,

1. The applications to intervene are declared receivable.
2. The Director-General decisions of 13 October and 3 November 1976 are quashed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 8 May 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. Registry translation.