Registry's translation, the French text alone being authoritative.

SIXTY-NINTH SESSION

In re LAMMINEUR

Judgment 1041

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pierre Constant Gustave Lammineur against the European Patent Organisation (EPO) on 10 October 1989, the EPO's reply of 5 January 1990, the complainant's rejoinder of 13 March and the Organisation's surrejoinder of 2 May 1990;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 56(4), 64(2), 65(1), 67, 107(1), 111 and 113(3) 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 complainant, whom the EPO employs in General Directorate 1 at The Hague, took part in a strike in May 1987. Pay slips for September 1987 showed deductions in pay for the days on which he and other staff had not worked at the rate of one-thirtieth of the applicable monthly rates for each such day. The deductions from his pay consisted not only in basic salary but also in the compensatory allowance due to him as a former employee of the International Patent Institute and in several allowances provided for in Article 67(1) of the EPO Service Regulations. The total came to some 960 guilders.

On 6 November 1987 he and others addressed an identical appeal to the President of the Office under Article 107(1) of the Service Regulations objecting to the deduction of their allowances. By a notice dated 8 December 1987 and posted up on 4 January 1988 the Principal Director of Personnel announced that the President had provisionally rejected their appeal and was referring it to an Appeals Committee. In a note of 5 December 1988 the chairman of the Committee-to-be informed the Principal Director of Personnel that no members could be found whose impartiality would be beyond question.

On 28 September 1989 the President informed the Staff Committee that he would take no decision until the Appeals Committee had reported.

The complainant filed his complaint on 10 October.

On 17 November the President asked the chairman of the Appeals Committee to try again to form the Committee. In a note of 4 January 1990 the chairman informed the President that he had succeeded in finding members who, as Article 111 of the Service Regulations required, had no personal interest in the case, but he added:

"Neither the appellant nor his representative were able to be present at the hearing set down for 27 November (too short notice). They were not agreeable to a written procedure and insisted on their right to be heard in person as soon as a suitable date could be found (Art. 113(3)).

The case will therefore be carried over into 1990. As soon as the 1990 Committee has been appointed, I shall make another effort to make up a Committee to deal with the case."

B. The complainant is impugning the rejection he infers from the Organisation's protracted failure to answer his claims of 6 November 1987: he says he cannot expect the appeal proceedings to end in any reasonable time.

As to the merits he cites Article 65(1)(c) of the Service Regulations, which says that on ceasing to be entitled to

any of the allowances provided for in Article 67 the employee "shall receive the sum due up to the last day of the month in which entitlement ceases". That means that the allowances must be paid in indivisible monthly units. That view is borne out by Article 56(4) about payment for part-time work. The constant practice of the former International Patent Institute was, and that of the EPO has been, to deduct only basic salary. Moreover, in Judgment 615 (in re Giroud and Beyer) the Tribunal held that "the only provisions of the staff regulations to be suspended are those which are incompatible with the work stoppage". That means leaving allowances alone. Indeed any other ruling would be unfair to the employees' dependants.

The complainant seeks the quashing of the decision to deduct the allowances and payment of the sums withheld, plus interest reckoned at the rate of 10 per cent a year, and costs.

C. The EPO replies that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because the internal appeal proceedings are not over. The President has said that he will take no final decision until the Appeals Committee has reported; yet by refusing to take part in the proceedings the appellants have prevented the Committee from reporting.

Besides, the complaint is devoid of merit. The President complied with Article 65(1) of the Service Regulations in withholding the allowances. In Judgments 566 (in re Berte and Beslier) and 615 the Tribunal held that though an organisation might make special rules on deductions from pay in the event of strike it must duly incorporate them in its staff regulations. Since the EPO has put no such special rules in the Service Regulations 65(1) applies to strikes as to any other case in which absence from duty warrants reducing pay. Since Article 64(2) defines "remuneration" as used in 65(1)(b) to "comprise basic salary and, where appropriate, any allowances", the allowances too may be docked in the event of strike.

That being so, the practice of the former International Patent Institute and of the EPO itself is irrelevant. When the EPO repaid in October 1985 sums withheld from pay because of a strike it informed the staff by notice that it did so "without prejudice to any method for docking pay in the event of future strikes".

The complainant's other pleas are beside the point. The circumstances in which full payment of allowances is required and which are stated in the Regulations are derogations from the general rule in 65(1).

D. In his rejoinder the complainant maintains that his complaint is receivable because the time that has elapsed since he challenged the decision of September 1987 is unreasonable. In an earlier case about a strike, in April 1985, it proved impossible to set up an impartial Appeals Committee, and he has good reason to suppose that on his case too the Committee will fail to report. The EPO may not properly plead its own dilatoriness.

As to the merits he submits that the EPO's restrictive reading of 65(1) is mistaken. Since the allowances do not have the same purpose as basic salary reliance on the definition in 64(2) is mistaken. There is a general principle embodied in the law of several countries that protects the payment of allowances because of their social purpose. Equality of treatment means docking only basic salary, which everyone gets, and not penalising some employees because of personal circumstances.

E. In its surrejoinder the Organisation develops its pleas on receivability and on the merits, explaining further why it believes that the complainant is misreading the material provisions of the Service Regulations and maintaining that some of his arguments have no bearing on the issue in dispute.

CONSIDERATIONS:

1. In May 1987 the complainant took part in a strike at General Directorate 1 of the EPO, which is at The Hague.

A special pay slip for September 1987 showed that on account of the strike the Organisation had made deductions both from his basic salary and from the various allowances he was entitled to.

Along with other officials he filed an internal appeal on 6 November 1987 against the deduction insofar as it affected his allowances.

A notice posted up on EPO premises on 4 January 1988 announced that on 8 December 1987 the President of the Office had rejected the appeal and referred it to the internal Appeals Committee.

In a note of 5 December 1988 the chairman of the Committee told the Administration that for want of members whose impartiality would be beyond question the Committee could not be set up. At a meeting with staff representatives on 28 September 1989 the President said that the Appeals Committee had not reported and he had therefore not yet taken a final decision on the appeal. On 4 January 1990 the chairman of the Committee told the President that he had succeeded in finding members but a meeting scheduled for 27 November 1989 had been postponed because neither the appellant nor his representative had been able to attend. Although they had insisted on their right to be heard they said they had not been given enough warning. The chairman added that once the Committee had been re-established for 1990 it might report on the appeal.

Without waiting any longer for the Committee to report, the complainant filed this complaint on 10 October 1989.

2. The Organisation submits that the complaint is irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress, the Appeals Committee not yet having reported.

To be sure, nearly two years after filing his appeal of 6 November 1987 he had not got the Administration's final decision. But there is no need to consider the effect of such dilatoriness on the requirement in VII(1) or to rule on the issue of receivability: in any event the complaint fails because it is devoid of merit.

3. The substantive issue is whether it was right to reduce the amount of the complainant's allowances because he had taken part in the strike.

In support of his case that the deduction should have affected only his basic salary he cites Article 65 of the Service Regulations. Article 65(1)(b) says that "Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths", and 65(1)(c) states in the second sentence that "On cessation of ... entitlement [to the allowances] the employee shall receive the sum due up to the last day of the month in which entitlement ceases". The complainant takes that to mean that his allowances are not subject to deduction since his entitlement remains entire until the end of each month, the allowances are paid in "indivisible" monthly amounts and the "thirtieths rule" in 65(1)(b) does not apply to them. He argues that "remuneration" in 65(1)(b) means basic salary alone. He adds that Article 56(4), which is about "part-time work", bears out that the allowances are indivisible.

4. The plea fails.

It is in conflict with Article 64(2), headed "Determination of remuneration", which says that "Remuneration shall comprise basic salary and, where appropriate, any allowances". "Remuneration" in 65(1)(b) must therefore denote both basic salary and allowances.

The sole purpose of 65(1)(c) is to determine entitlement to allowances when such entitlement is to cease (second sentence) and when such entitlement "commences after the date of entering the service" (first sentence). In those two contingencies the official is entitled to payment of the allowances for the full month. But there is nothing to suggest that the allowances are not subject to the thirtieths rule that applies under 65(1)(b) to all forms of "remuneration".

Article 56(4) is irrelevant. What it says is: "A permanent employee shall be entitled, during the period for which he is authorised to work part-time, to remuneration proportionate to the working time authorised. He shall, however, continue to receive in full any dependants' allowances and education allowances to which he is entitled". Contrary to what the complainant maintains, the second sentence does not mean that allowances are paid in indivisible monthly amounts. Indeed the very fact that the Regulations state only two exceptions confirms the rule of pro rata payment that applies to all the other allowances set out in Article 67.

The complaint is therefore devoid of merit.

5. The complainant points out that the appeals body of the former International Patent Institute recommended adopting the narrower construction and applying the thirtieths rule only to basic salary, not to allowances, and that a decision of the EPO's once followed that line.

It is true that the Institute's staff regulations were carried over into the Service Regulations of the EPO, and the Institute's Appeals Committee did recommend confining deductions in the event of strike to items of pay other than social benefits like family and expatriation allowances. But that Committee itself acknowledged that the Institute's

Staff Regulations said nothing of deductions due to strikes and that it could find no rule forbidding deductions from items other than basic salary. Moreover, there is no evidence to show that the Institute acted on the Committee's recommendation.

As for the EPO's own practice, it did, in making deductions from pay in 1983 on account of a strike in 1982, leave untouched the dependants', expatriation and housing allowances. But the precedent does not hold good: in dealing with the matter again in October 1985 the Organization refrained from deciding on the deductions it would make from staff pay in the event of future strikes.

6. There is no need to take up the complainant's pleas that the "internal tax" in the Organisation is levied on basic salary alone and that under the law in some countries social benefits are inviolate. Those pleas are simply irrelevant: his case fails because it is misconceived.

Lastly, his comment that the impugned decision may bring about discrimination in applying Article 65 is a mere value judgment and has no bearing on the lawfulness of that decision.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

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