

EIGHTY-EIGHTH SESSION

In re Baillet (No. 3)

Judgment 1931

The Administrative Tribunal,

Considering the third complaint filed by Mr Bernard Jean Raymond Baillet against the European Patent Organisation (EPO) on 24 February 1999, the EPO's reply of 14 May, the complainant's rejoinder of 28 June and the Organisation's surrejoinder of 30 September 1999;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

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

A. Article 64(1) of the EPO Service Regulations says:

"Save as otherwise expressly provided in these Service Regulations, a permanent employee who is duly appointed shall be entitled to the remuneration appropriate to his category, grade and step. He may not waive his entitlement to remuneration."

Information on the complainant's career is to be found under A in Judgments 1547 (*in re* Baillet and others) of 11 June 1996 and 1618 (*in re* Baillet No. 2 and others) of 30 January 1997. Judgment 1663 (*in re* Bousquet No. 2 and others) of 10 July 1997 is also relevant although Mr Baillet was not a party in that case.

In order to settle once and for all a dispute about the adjustment of the pay of staff at the European Patent Office, the EPO's secretariat, the Administrative Council took a decision, CA/D 4/96, on 8 March 1996. Under articles 3 and 4 of the decision, staff were to be paid a lump sum for the period from 1 July 1992 to 31 December 1995 on condition that they signed an "individual declaration" undertaking not to pursue any appeals under way against the application of the adjustment procedure and not to file any new ones. Article 6 of the decision provided for the addition to Article 64(1) of the Service Regulations of the following note: "This provision shall not invalidate the individual declaration concerning decision CA/D 4/96".

On 9 March 1996 the Salary Section sent the complainant a provisional "lump-sum payslip" for the period from July 1992 to December 1995 together with the above-mentioned individual declaration. The lump sum to be paid amounted to 16,804.59 guilders. Having failed to return the declaration the complainant did not receive the lump sum. By a letter of 29 May 1996 he asked the President of the Office to order the competent department to pay him the lump sum. On the same day an official of the Salary Section sent him a note stating that he had not yet received the complainant's signed declaration on the basis of which the lump sum was to be paid, and that a new declaration form would be sent to him which he should return before 7 June. Refusing to comply, in a letter of 31 May the complainant again asked the President to order payment of the lump sum or else to treat his letter as an internal appeal. By a letter of 19 July 1996 the Principle Director of Personnel told the complainant that his letter had been registered as an internal appeal.

The complainant's appeal having been joined to those of other EPO officials, the Appeals Committee held a first hearing at Berlin on 15 October 1997. In a letter of 17 October to the Chairman of the Committee the complainant, whose duty station was The Hague, objected that he had not been invited to attend the hearing. The Chairman replied in a letter of 4 November 1997 that only the appeals lodged by officials serving in Berlin had been dealt with at the hearing. By a letter of 5 November 1997 the Director of Personnel Development informed staff who had not signed the declaration that the President had decided to allow them to benefit from the terms of the ruling of Judgment 1663.

The Appeals Committee heard the complainant on 24 June 1998 at The Hague. In its report of 23

September, which covered the complainant's appeal and those to which it had been joined, the Committee recommended rejecting them as devoid of merit. By a letter of 30 November 1998, the impugned decision, the Director of Personnel Development informed the complainant that the President had decided to reject his appeal.

B. The complainant explains that the lump sum he claims is part of his remuneration within the meaning of Article 64 of the Service Regulations. It is therefore owed to him as a duly appointed official and he may not waive his entitlement to it.

The intent of the note added to Article 64 is contrary to that of the article itself because the aim of the note is to make payment of part of an official's pay dependent on his relinquishing his right to appeal. Having been introduced in March 1996 the note may not be applied retroactively to an amount due for the period from July 1992 to December 1995.

The Appeals Committee was wrong to have joined his appeal to those of other staff members. By so doing it failed to consider the particularities of his position and delayed the processing of his appeal. Furthermore, it disregarded the principle of equal treatment by excluding him from the hearing in Berlin.

He asks the Tribunal to quash the President's decision of 30 November 1998, to order the EPO to pay him the lump sum, to be worked out taking into account the application of Judgment 1663, i.e. 17,813.23 guilders plus interest on sums due since March 1996. He claims one euro in damages for the Appeals Committee's negligence in processing his appeal.

C. In its reply the EPO submits that the complaint is irreceivable. The complainant has no cause of action since the Organisation decided to pay him in their entirety the amounts resulting from the application of Judgment 1663. Obviously, the complainant's sole aim is "additional and unwarranted enrichment". Besides, at no point in the internal appeal procedure did he ask for the lump sum to be calculated taking into account the application of Judgment 1663. He did not submit his claim to interest on sums due within the time limit for internal appeals and his claim to compensation for the Appeals Committee's negligence was not submitted to the President.

In subsidiary pleas the EPO explains that to treat the lump sum as a part of the complainant's remuneration would be contrary to the terms of the Service Regulations, the Council's decision of 8 March 1996 and the individual declaration. Since the declaration stated that its purpose was to settle the salary dispute "by mutual agreement" the amount in question is "the result of a compromise". So to sign the declaration would not infringe the requirement not to waive entitlement to remuneration.

The Appeals Committee may hold separate hearings for appellants serving in different duty stations, and there is nothing preventing the Administration from submitting a single position on all the appeals. The delay in processing the complainant's appeal was due to the fact that the other appellants wanted more time to prepare their submissions.

D. In his rejoinder the complainant refutes the EPO's objections to receivability. He asserts that the lump sum he claims is not the pay adjustment that the President granted him pursuant to Judgment 1663.

He rebuts the EPO's explanations and points out that the Organisation took over a year to submit to the Appeals Committee its position on his internal appeal.

E. In its surrejoinder the EPO presses its pleas and submits that the internal appeal procedure, which lasted just over two years, was not "exceptionally long".

CONSIDERATIONS

1. In Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference is made and which related to a dispute concerning salary adjustments, the Tribunal upheld the complaint and invited the EPO to recalculate the adjustments. The judgment also benefited a number of staff members who had intervened in the complaint. However, the great majority of the staff members had previously agreed to a proposed settlement envisaging a new method of calculation for the future and the payment of a lump sum by the European Patent Office to all staff who signed the individual declaration accompanying the proposal.

The EPO also granted the adjustment deriving from Judgment 1663 to staff members who, although they did not participate in the procedure leading to Judgment 1663 (as complainants or interveners), had not signed the individual declaration. The complainant, who was in this latter category, was informed of the measure on 5 November 1997.

In March 1996, he had received a provisional "lump-sum payslip" showing an amount of 16,804.59 guilders, bearing the indication "please return the signed declaration (original) to: Salary Section", with a declaration form attached. Without having signed the form, the complainant sent a request on 29 May 1996 to the President of the Office claiming payment of the lump sum. After the reason for its non-payment had been indicated to him (he had not signed the declaration), he wrote directly to the President claiming that the refusal to pay the sum was in breach of Article 64(1) of the Service Regulations. Considering that the request was devoid of merit, the President transmitted it to the Appeals Committee. Considering that the payment of the envisaged sum was purely in the nature of a settlement, the Administration called for the dismissal of the complainant's appeal, which had been joined to those made by twenty-four staff members with similar claims. It was only on 23 September 1998 that the Appeals Committee issued an opinion. It unanimously recommended dismissing the appeals. It considered, in particular, that staff members who had refused to sign the declaration did not appear to have suffered any prejudice, since they had obtained the full benefit of Judgment 1663. On 30 November 1998, in the impugned decision, the President dismissed the complainant's internal appeal.

2. The complainant claims the payment of the "lump sum impugned in internal appeal 33/96, calculated taking into account ... Judgment 1663, that is the sum of 17,813.23 Dutch guilders (8,083.30 euros), plus interest for the delay in payment since March 1996", as well as the token payment of one euro "in damages for the Appeals Committee's negligence in processing internal appeal 33/96". He bases his claims on Article 64 of the Service Regulations, which he says entitles him to the payment of the lump sum, which forms part of the remuneration of staff members. He claims, in addition, that the adjustments deriving from Judgment 1663 are also owed to him.

The EPO contends that the complaint is irreceivable because the internal means of relief have not been exhausted and, in subsidiary argument, that it is devoid of merit. It asserts that the complainant did not ask the President for payment of both the lump sum and the adjustments deriving from Judgment 1663, nor did he claim compensation for the delays of the Appeals Committee. On the merits, the EPO submits that the claims are untenable. The lump sum was intended to grant the staff members a part of the contested adjustment. Since he obtained the whole of the adjustment, the complainant suffered no injury and cannot claim the payment of the lump sum as well. Even if the lump sum were due to him, it would have to be deducted from the amount payable in accordance with Judgment 1663.

3. The initial claim was made to the President at a time when the Tribunal had not yet delivered Judgment 1663. In his initial claim, the complainant did not envisage the possibility of the accumulated payment of both the lump sum and the full adjustment, which other staff members had claimed from the Tribunal.

The lump sum and the adjustment deriving from Judgment 1663 have the same purpose. In both cases they are intended to grant staff members an additional sum in respect of the adjustment of their salaries. The only difference is in their form. The lump sum takes the form of a settlement, while the adjustment resulting from Judgment 1663 is based directly on the Service Regulations, as interpreted by the Tribunal. However, both of them are intended to satisfy the same claim to the payment of a salary adjustment.

Since the Office recognised and paid to the complainant the total amount of the adjustment in accordance with Judgment 1663, that is the sum of 31,130.41 guilders, his claim no longer shows any cause of action.

The complainant wrongly pleads a breach of Article 64 of the Service Regulations. Although this provision states in paragraph 1 that "a permanent employee who is duly appointed shall be entitled to the remuneration appropriate to his category, grade and step" and that he "may not waive his entitlement to remuneration", and, in paragraph 2, that "remuneration shall comprise basic salary and, where appropriate, any allowances", this does not in any way invalidate the argument that the lump sum and the adjustment deriving from Judgment 1663 are of the same material nature.

The issue of whether, if the judgment had not come out in their favour, the staff members who had not signed the individual declaration would have been able *ex post facto* to benefit from the lump sum proposed under that settlement, is therefore no longer of any relevance.

The complainant's present complaint is clearly vexatious, as he undoubtedly realises. For the above reasons, which are also set out in Judgment 1932 (*in re* Vollering No. 17) of this day, the complaint must fail.

4. The complainant, not without reason, raises the issue of the delays by the Appeals Committee. However, even though he was undoubtedly entitled to a decision, these delays caused him less injury insofar as his complaint no longer showed any cause of action. After an inadmissible delay, he was entitled in accordance with the case law to refer the matter directly to the Tribunal: see Judgments 1674 (*in re* Gosselin) under 6; 1684 (*in re* Forté) under 3; and the judgments cited therein. However, the delays in the procedure could be explained in part by the need to find a solution to the dispute relating to salaries within the Office. In the present case, they also allowed the EPO to find a solution whereby the complainant obtained the full adjustment that he claimed.

In these circumstances, there is no need to award the complainant token damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
James K. Hugessen

Catherine Comtet