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

FORTY-FIRST ORDINARY SESSION

In re BIGGIO (No. 3), VAN MOER (No. 2) and FOURNIER

Judgment No. 366

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the International Patent Institute (which has since been integrated into the European Patent Office) by Mr. Carlo Giuseppe Frederico Biggio, Mr. Alain Maurice Joseph Van Moer and Mr. Michel Robert Fournier on 31 December 1977 and brought into conformity with the Rules of Court on 30 January 1978, the defendant organisation's single reply of 6 April, the complainants' single rejoinder of 10 July and the defendant organisation's statement of 16 August 1978 that it did not wish to file a surrejoinder;

Considering that the three complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering the applications to intervene filed by

Mr. Michel Allard,
Mr. Michel Armitano-Grivel,
Mr. Simon Behmo,
Mr. Eric Bijn,
Mr. Joseph Boeykens,
Miss Annie Boulon,
Miss Anne-Marie Bourseau,
Mr. Claude Burgaud,
Mr. Jean-Michel Cannard,
Mr. Jacques Coquelin,
Miss Katya Cremers,
Mr. José David,
Mr. Yves Debay,
Mr. François De Smet,
Miss Leona De Vos,
Mr. François Feuer,
Miss Françoise Garnier,
Mr. Christopher Green,
Mr. Henri Hauglustaine,
Mr. Jean-Claude Herbelet,
Mr. Dan Iverus,
Miss Michèle Jacquemain,
Mr. Antony Jagusiak,
Mr. Patrice Lapeyronnie,
Miss Annick Martin,
Mr. Henry Menager,
Miss Nicole Merchiers,
Mr. Jean-Pierre Nadelhoffer,
Mr. Hervé Nicolas,
Mr. Hubert Niveau de Villedary,
Miss Anne Nuyts,
Mr. Louis Pelsers,
Mr. Yan Eng Phoa,
Mr. Dalius Sagatys,

Miss Martha Samüel,
Mr. Vincent Schmidt,
Mr. Miehel Sogno,
Miss Blanche Steelandt,
Mr. Alfred Stoos,
Mr. Max Suter;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the Staff Regulations and pension regulations of the former International Patent Institute, the Staff Regulations of the European Patent Office and the Agreement on the integration of the Institute into the European Patent Office;

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. Mr. Biggio joined the staff of the International Patent Institute on 1 July 1972 as an examiner at grade A7, step 1, with 12 months' seniority and had his appointment confirmed>on 1 July 1973. On 18 April 1977 he was promoted to grade A6, step 1, with nine months' step seniority with effect from 1 July 1976. Mr. Van Moer, also an examiner, was promoted to grade A6, step 1, with effect from 1 September 1976 and with nine months' step seniority on 18 April 1977. Mr. Fournier joined the staff of the Institute on 1 October 1972 at grade A8, step 2. He was promoted on 1 October 1973 to grade A7, step 1, and with effect from 1 October 1977 to grade A6, step 1.

B. The complainants challenge a decision taken by the Administrative Council of the Institute on 29 September 1977 endorsing the transfer of Institute staff to the European Patent Office and making the complainants subject to the Staff Regulations of the Office. The complainants allege that some provisions of those Staff Regulations impair essential rights which they formerly enjoyed and which led them to consent to join the Institute staff (for example, their regrading in the new grades, their new remuneration, expatriation allowance, travel allowance and the pension scheme). They impugn the decision taken by the Administrative Council of the Institute on 9 December 1977 to dismiss their internal appeal against the decision of 29 September 1977.

C. On 5 October 1973 the Diplomatic Conference on European Patents set up an interim committee of the European Patent Organisation. Between 1974 and 1977 that committee negotiated an agreement on the integration of the International Patent Institute into the European Patent Office. It was made up of 16 delegations representing the States which had signed the Convention on European Patents and including the delegations of eight out of the nine member States of the Institute. Elected representatives of the Institute staff were invited to join the interim committee and its working parties for consideration of staff questions (the Staff Regulations and the transfer of staff from the Institute to the Office). There were some matters relating to the conditions of transfer of Institute staff on which the competent working parties could not agree. The interim committee therefore appointed an ad hoc committee to make new proposals to it. The draft proposals made by the ad hoc committee were later included as Chapter III of the Agreement on the integration of the Institute into the Office, and the Agreement was approved by decision of 29 September 1977 - the one the complainants are impugning.

D. The defendant organisation states: "In substance the integration agreement embodies the desire of both parties to reconcile as far as possible the need to preserve the conditions of service laid down in the Institute Staff Regulations with the need to bring former Institute staff within the structure of the EPO Staff Regulations and let them enjoy the benefits their transfer can bring. That policy does mean departing from the rules laid down in the Institute Staff Regulations but is inevitable. First, to apply two sets of staff regulations within a single organisation, even supposing it were possible, would make for such administrative problems that the organisation's efficiency might suffer. Secondly, to go on applying obsolescent rules to the former Institute staff would be bound to harm their interests in the medium term and in the long run."

E. The complainants and several hundred other staff members lodged an internal appeal against the decision of 29 September 1377 mentioned in B and C above. By a decision of 9 December 1977, which the complainants also impugn (see B above), the staff members concerned were informed that no appeal would lie to the Appeals Committee of the Institute. The reason was that the Administrative Council of the Institute had decided to accept the integration agreement and the Staff Regulations of the EPO, and so any Institute staff who sat on the Appeals Committee "may consider himself directly affected by the impugned decision and may therefore disclaim

competence".

F. In their claims for relief the complainants ask the Tribunal to quash the impugned decisions: (1) for breach of the Institute Staff Regulations; (2) for breach of the general principles of law and particularly the principle of acquired rights; and (3) for breach of the procedural rules. They ask that their acquired rights be restored to them. In their rejoinder they ask the Tribunal: "to declare itself competent to hear the complaints; to declare irregular the decision to transfer staff in so far as it altered the complainants' position in law in disregard of the procedural and substantive rules; to declare that the transitional arrangements cannot be imposed on the complainants and made applicable to them because those arrangements are detrimental to the complainants both in their entirety and in the specific respects mentioned; and to reserve the complainants' rights to compensation".

G. The defendant organisation takes the view that the Tribunal is not competent to hear the claims, mainly on the grounds that the complainants do not allege non-observance of the terms of their appointment or of the provisions of the Staff Regulations but seek to have quashed, albeit in part, a decision taken by the supreme body of an international organisation authorising the signature of an international agreement on the integration of one international organisation into another. The complaints are also irreceivable because they impugn a decision to authorise the signature of an international agreement. That decision is not analogous to a collective or individual decision taken under the Staff Regulations - the only kind of decision which may be impugned before the Tribunal. Moreover, the claims for relief serve no purpose. Even if the impugned decision were quashed nothing would be changed: the integration agreement has been signed and would still be in force, and the Institute would still be dissolved. Lastly, instead of claiming their individual rights the complainants merely contest the authority of the two organisations to make rules and their sovereign authority "to conclude international agreements". For the foregoing reasons the rebuttal of the complainants' contentions by the defendant organisation is of purely subsidiary importance. The organisation maintains that those contentions are groundless. It therefore asks the Tribunal to declare the complaints irreceivable; to declare that it is not competent to hear them on the merits, subsidiarily, to dismiss them as unfounded; and to award full costs against the complainants.

CONSIDERATIONS:

As to the applications to intervene:

1. Many Institute officials have filed applications to intervene. They are entitled to join in the present proceedings as interveners in so far as their factual and legal position is identical or at least similar to that of the complainants. Since they themselves failed to file a complaint in time, however, they may neither put forward pleas nor lodge claims which differ from those of the complainants. It is therefore necessary to consider only the content of the complaint, and the applications to intervene will fare in the same way as do the complaints.

As to the defendant organisation:

2. The complainants, who were members of the staff of the International Patent Institute, filed the complaints against the Institute on 23 December 1977. By an agreement signed on 19 October 1977 the Institute was integrated into the European Patent Office, the secretariat of the European Patent Organisation (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 procedure:

3. First, the EPO pleads that the Tribunal is not competent. It contends that the Tribunal may not hear applications for the quashing of legislative acts and a fortiori may not review decisions to approve international agreements since that would impair the authority of the States parties.

In fact the complainants are not contesting the validity of the Agreement by which the Institute was integrated into the EPO; they merely contend that provisions of the Agreement should not apply to them. They are therefore not asking the Tribunal to disregard State sovereignty. It is immaterial that the provisions which they say should not apply are embodied in an international agreement and not in the Staff Regulations of an organisation which still exists. Whatever the nature of the text which contains the provisions, they have the same purport, namely the legal position of the staff of an organisation. Where a provision of the Staff Regulations is amended the Tribunal may

order the defendant organisation to apply the old text and not the new. So, too, when provisions of Staff Regulations are amended so as to comply with clauses in an international agreement the Tribunal may order the application of the former rather than the latter. In the present case, therefore, the plea that the Tribunal is not competent fails.

4. Secondly, the defendant organisation contends that by taking the impugned decision on 9 December 1977 the Administrative Council of the Institute dismissed appeals lodged against its decision of 29 September 1977 to authorise the signing of the integration agreement. The organisation argues that a decision to approve an international agreement is not analogous to a collective or individual decision based on Staff Regulations, the only kind of decision which may be impugned before the Tribunal. Hence, it maintains, the complaints are not receivable.

The second plea fails on the same grounds as the first. The complainants take exception, not to the conclusion of the integration agreement, but to the application of some of its provisions. Since those provisions are the same in kind as the staff regulations of an organisation there is no bar to the complainants' appealing to the Tribunal against the application of those provisions: according to Article II, paragraph 5, of its Statute the Tribunal hears "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations...".

5. The complainants allege that the Institute disregarded the rights to be consulted which the staff enjoy under the Staff Regulations. That plea also fails.

First, the complainants are mistaken in taking the Institute to task for not referring their claims to the Administrative Advisory Committee provided for in article 90 of the Institute Staff Regulations. There was no reason to consult that body, which advised the Director-General, because the matters at issue fell within the competence of the Administrative Council.

Secondly, the failure to refer the matter to the Committee of the Retirement and Provident Scheme cannot be regarded as a procedural flaw. According to articles 50 and 65 of the rules setting up that committee it is competent only in regard to the application and amendment of those rules. The matter at issue was the replacement of the rules with the clauses of an international agreement.

Thirdly, contrary to what the complainants contend, there was a reason why the Administrative Council did not refer their claims to the Appeals Committee. The questions they had raised affected all Institute staff members bar none. The Appeals Committee consisted entirely of Institute officials, as article 84 of the Staff Regulations required, and its members would therefore themselves have had an interest in the outcome of the case. In other words, they were so placed that there were grounds for declining to convene them.

As to the merits:

6. The complainants contend that the integration agreement infringes their acquired rights. A right is acquired when he who has it may require that it be respected notwithstanding any amendment to the rules. In particular, it may be either a right which arises under an official's contract of appointment and which both parties intend should be inviolate, or a right which is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment.

7. The complainants point out that they were transferred from grade A6 of the Institute staff to grade A2 of the EPO staff, the grade which corresponds to Institute grade A7. They contend that they are worse off because their seniority in grade A6 was less than the seniority of Institute officials in grade A7.

The EPO's reply carries conviction. First, in accordance with article 5.4 of the integration agreement the complainants may count the years of service they completed in both grades,

A7 and A6, and so their opportunities for advancement remain the same. Moreover, according to article 11.2 they may not be paid less than they were before. In any event, there is nothing to suggest that there would be any risk of their being assigned to a lower post than before. Putting in a single grade former Institute officials of grades A6 and A7 therefore constitutes no breach of any acquired right.

8. The complainants allege a basic breach of their right to remuneration. They say that the system of remuneration

which the Institute took over from the European Communities has been replaced with a less favourable one introduced by the "coordinated organisations".

Their argument is fundamentally mistaken. According to article 39.3 of the Institute Staff Regulations "the sums referred to in Appendices II A and II B are identical to the sums applicable to European Communities staff stationed in the Netherlands, the Communities tax on basic salary being deducted at rates calculated according to the rules applicable to a married official with two dependent children"[(1)]. All that that means, however, is that on 1 January 1972, when the text came into force, Institute officials were as a rule paid salaries identical to those of European Communities staff stationed in the Netherlands. Neither article 39.3 nor any other provision of the Institute Staff Regulations guaranteed that parity would continue. In other words, the complainants do not have an acquired right to application of the European Communities system. That is shown, besides, by the fact that in its offers of appointment the Institute refers, without going into detail to "salary scales which are at present being aligned with those of the European Communities".

Moreover, the integration agreement has not brought about any salary cut: the complainants are paid as much as they were at the Institute. By virtue of article 9.1 and 9.2 an official transferred from the Institute to the EPO shall receive a "compensatory allowance" in addition to the basic salary payable according to the scale applicable to other EPO officials.

It is true that, according to the second paragraph of article 9.2, the compensatory allowance shall at all times be calculated on the basis of the salary scales which were in force in the Institute and in the EPO on 31 December 1977, and so former Institute officials will fare less well than European Communities staff if the salaries of the latter rise faster than the salaries of EPO staff. But transferred officials have no acquired right to be paid the same salary from 1 January 1972 as European Communities staff, and so they cannot allege unfair discrimination.

As to the method of salary adjustment, the complainants do not have an acquired right to application of the methods practised in the Institute. Hence the fact that the EPO Staff

Regulations do not prescribe the same incremental curves as did the Institute rules does not constitute any breach of the complainants' terms of appointment.

9. The complainants maintain that the change of the rules on promotion constitutes a double breach of their acquired rights. First, article 30.1 of the Institute Staff Regulations guaranteed to staff members on promotion a "biennial step increment" in their new grade, whereas article 49.11 of the EPO Staff Regulations grants them as a rule only one twelve-month step increment in the grade held before promotion. Secondly, according to article 9.3 of the integration agreement, an official may get no increase in salary on promotion.

It is true that when he takes up employment with an organisation an official may reasonably hope some day to advance in grade and that the rules on promotion create an acquired right in so far as they offer the prospect of advancement. But the substance of the acquired right to promotion is merely the possibility of advancement because it is only on the strength of such a possibility that a staff member may have accepted appointment. The provisions which lay down the conditions governing promotion do not confer any acquired rights on a staff member because, when he takes up his appointment, he cannot foresee how he will fare in his career. On the contrary, those provisions are subject to amendment and the staff member must expect such amendment.

The complainants might presumably allege a violation of their rights if on promotion their salary fell or was lower than that of the other members of the EPO staff. But those contingencies are precluded by article 9.3 and 9.5 of the integration agreement.

Moreover, even if a staff member gets no salary increase on promotion his position is not necessarily just as before. Not only may he be given work which will give him greater satisfaction but he will be better placed for further promotion which does bring a salary increase.

10. The complainants also object to the pension scheme which they must join. They allege that, whereas they ought to be subject to rules which correspond "as far as possible" - to use the words of the Administrative Council of the Institute - to the scheme applicable to European Communities staff, in fact they will suffer loss, and fare less well than the other EPO staff members besides.

Someone who offers his services to an organisation may of course be expected to give decisive importance to the provisions on his pension rights. Any curtailment should therefore be regarded as affecting an acquired right. In this instance, however, the complainants' pleas are open to the following objections.

According to article 20.1 of the integration agreement the pensions of EPO staff shall be paid at the rate of "2 per cent of basic salary per annual pension increment". Article 20.2, however, lays down a special rule in favour of former Institute staff members in receipt of a "compensatory allowance". The benefits due to them may be calculated in one of two ways, either at the rate of 2 per cent of the basic salary or at the rate of 1.75 per cent of the sum of the basic salary and the compensatory allowance, whichever is the more favourable to the beneficiary. Hence the complainants have not suffered any curtailment of their rights. In any event they will be paid a pension equal to that which they would have been paid as members of the Institute staff, and which was calculated at the rate of 1.75 per cent of the total salary. If the pension calculated on the basis of 2 per cent of the basic salary is higher, it will be paid to them.

Their acquired rights would be infringed only if the Administrative Council had guaranteed the application of the pension scheme of the European Communities to former Institute officials. But it did not. As the complainants themselves acknowledge, on 12 October 1972 the Administrative Council said that the Institute rules would correspond "as far as possible" to those of the European Communities. It thus added a reservation which bars the acquisition of rights.

There is no need to consider whether, because their pensions may be calculated in one of two ways, the former Institute officials fare better than the other EPO staff members. Be that as it may, if there is any inequality of treatment, only the latter suffer for it, not the Institute officials, who may not therefore base any claim upon it.

Lastly, it is immaterial that the contribution payable by former Institute officials in respect of the basic salary and the "compensatory allowance" is equal to the contribution payable by the other EPO staff members. It is true that the former Institute officials are entitled only to a pension calculated at the rate of 1.75 per cent of the sum of the basic salary and the "compensatory allowance", whereas the pensions of the other members of the EPO staff are paid at the rate of 2 per cent. Unlike the latter, however, the Institute officials are paid a "compensatory allowance" over and above the basic salary. Hence in so far as the discrimination alleged exists, it may be regarded as having been remedied.

11. The complainants further contend that the EPO system of allowances is less favourable to them than the Institute one. Even if that were true, there would still be no violation of acquired rights.

It is quite clear that expatriation, education and leave expense allowances are matters of importance to someone who joins the staff of an organisation. The question therefore arises whether the outright abolition of such allowances would not violate an acquired right. There is, however, no acquired right to the amount and the conditions of payment of such allowances. Indeed the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty.

Moreover, the second paragraph of article 10.3 of the integration agreement lays down the principle that former Institute officials shall continue to be paid the same education allowance that they were entitled to before.

As to the costs:

12. Since the complaints must be dismissed, the complainants' claim for costs is unfounded.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

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 13 November 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. Registry translation.

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