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

FORTY-NINTH ORDINARY SESSION

In re DEVISME

Judgment No. 532

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European on Patent Organisation (EPO) by Mr. François Raymond Devisme on 17 November 1981, the EPO's reply of 17 February 1982, the complainant's rejoinder of 22 March, his further communication of 27 April and the EPO's surrejoinder of 7 June 1982;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 38(3), 65 and 106 to 113 of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, 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. A dispute over working hours led to a strike by EPO staff known as "examiners" at The Hague, including the complainant, in March 1981. There were further strikes, usually lasting three days a week, from 12 May to 18 June 1981. By a circular of 20 May the Chief of Personnel told the staff that salary deductions would be made according to the number of working days not worked in a month. On 20 June the complainant appealed under Article 107(1) of the Service Regulations claiming the sums he said had been wrongly deducted from his salary. On 18 September he wrote again, and on 30 October the President of the Office replied that, his claims being refused, the matter would go to an Appeals Committee in accordance with Article 109 of the Service Regulations. He is now challenging the implied rejection of his claims.

B. The complainant contends that according to Article 109(2) the President ought to have decided on his internal appeal within two months, by 20 August 1981, and from that date direct appeal lay to the Tribunal against the implied rejection. The express rejection of 30 October had no effect on the time limits, and the complaint was filed within the time limit set in Article VII(3) of the Statute of the Tribunal. Turning to the merits, the complainant cites Article 65(1) b) of the Service Regulations, which provides that "Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths" and the deduction made accordingly. The method prescribed in the circular, less favourable to the staff in that it requires the deduction, for example in May 1981, of nineteenths, is in breach of Article 65. The Tribunal is asked to quash the decision in the circular, to order repayment to the complainant of the sums wrongly deducted from his salary, plus interest at 10 per cent a year from 1 May 1981, and to award him costs.

C. In the EPO's view the complaint is irreceivable. After obtaining the express decision of 30 October the complainant may not challenge an implied decision under Article 109(2). The Appeals Committee has not given its opinion, the President has not taken a final decision, and the internal means of redress have not been exhausted. The complaint is, moreover, devoid of merit. On 16 December 1981 the President agreed to repay the sums claimed by the examiners. This decision, part of a compromise with the staff, affirmed the right to use the working days" method of calculation in future and is not an admission that the circular was unlawful. The principal sums claimed by the complainant were accordingly repaid to him in January 1.982. Since the EPO was not bound to repay the sums, it is not bound to pay interest on them. Besides, interest would be due only from the date on which they were deducted.

D. In his rejoinder the complainant maintains that his complaint is receivable. The time limits set in Articles 108 and 109 of the Service Regulations are mandatory, and the internal claim has been implicitly rejected. He wrote again on 18 September 1981 to make sure that access to the Tribunal was clear. As to the merits, he withdraws his claim to repayment but still seeks the quashing of the decision and the payment of interest. For want of any more

specific rule Article 65(l) ought to have been applied. It is wrong to withhold payment for each working day not worked since salary is not calculated according to the number of working days. Interest is due on the sums repaid - admittedly only from the date of the deductions - because the original salary deductions were unlawful.

E. In its surrejoinder the EPO points out that the Appeals Committee has not yet given its opinion, and is not bound by any time limit. It develops its arguments on the merits In particular it reasserts its right to apply the method of calculation prescribed in the circular so as to offset the consequences of strikes of the particular kind declared by the examiners. No interest is payable because there is no duty to repay, and besides, the complainant has not suffered, and does not even allege, any prejudice; nor was the matter raised in the internal claim.

CONSIDERATIONS:

The material rule

1. Article II, paragraph 5, of the Statute of the Tribunal states that the Tribunal is competent to "hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other intergovernmental international organisation approved by the Governing Body which has addressed to the Director-General a declaration recognising, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure".

As is stated, the declaration recognises not only the Tribunal's competence but also the applicability of its Rules of Court. An organisation which makes such a declaration accepts the provisions of the Statute and the Rules of Court, and any provisions in its own rulebook on the receivability of complaints filed with the Tribunal are of no effect, whether they comply with the Tribunal's rules or not.

2. In 1977 the President of the European Patent Office declared the EPO's formal recognition of the competence and Rules of Procedure of the Tribunal.

Article 109 of the Service Regulations is headed "Appeal to the Administrative Tribunal of the International Labour Organisation", and paragraph (2) reads: "If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected." In so far as this purports to provide that, failing a decision by the President of the Office on an internal appeal within two months, a complaint may be duly filed with the Tribunal, the provision must be treated as invalid because this is a matter of procedure which only the Tribunal's own Statute and Rules of Court can settle. It is indeed expressly dealt with in Article VII( ) of the Statute: "Where the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of nienty days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration." Only by its own rule will the Tribunal settle the procedural point in this case, namely whether there is an implied decision to dismiss challengeable before the Tribunal even though the internal means of redress have not been exhausted.

The meaning of "decision" - under Article V, paragraph 3, of the Statute of the Tribunal

3. The matter turns on the meaning to be given to the term "decision" in Article VII(3) of the Statute of the Tribunal. The Tribunal interprets it as denoting any action by an officer of the organisation which has a legal effect.

Accordingly, where such an officer merely acknowledges receipt of an appeal addressed to him, that will not amount to a decision, even if he says he intends to look into the matter as promptly as possible. Such an acknowledgement has no legal effect and is not a decision such as will rebut the presumption of dismissal.

But that Article VII(3) is applicable does not mean that there is no final decision, viz. a decision not open to further challenge within the organisation. What it refers to is a "decision upon any claim", that is, a decision which relates to the claim but does not necessarily dispose of it. To infer a decision to dismiss where no final decision has been taken within the sixty days would greatly broaden the scope of Article VII(3), particularly when the organisation's rules establish an appeals body but do not set time limits for its reports. In such case Article VII(3), which is presumably to be treated as covering the exception, would in fact become the rule. Moreover, to broaden the scope of paragraph 3 would unduly restrict that of paragraph 1, which requires the complainant to exhaust the internal

means of redress.

The application of Article VII(3) in this case

4. On 20 June 1981 the complainant filed an appeal with the President of the Office against a decision determining the method of calculating sums to be deducted from salary because of a strike. The sixty-day time limit set in Article VII(3) thus expired on 19 August 1981. In the meantime the complainant got only one communication from the Office, a letter dated 9 July 1981 saying that a decision would be notified to him after consideration of his appeal, which had been passed on to the Appeals Committee. This communication had no legal effect and was not a decision as defined above. Accordingly, it was open to the complainant from 20 August 1981 duly to appeal to the Tribunal against an implied decision to dismiss his claim.

He did not do so. All that he did, on 18 September 1981, was to ask the President of the Office to confirm the rejection of his appeal. In his reply of 30 October the President said that he could not allow the complaint and that it was therefore being passed on to the Appeals Committee for its opinion. On 17 November the complainant lodged this complaint with the Tribunal.

5. The President's letter of 30 October had two legal consequences: it made provisional rejection of the internal appeal, and referred it to an advisory body. The letter therefore constitutes a "decision" within Article VII(3). From 30 October 1981 the complainant could no longer properly challenge any implied decision, since there was an express one. Accordingly Article VII(3) does not apply, and under Article VII(1) the complaint is irreceivable, the internal means of redress not being exhausted.

It is immaterial that until the President sent his letter of 30 October 1981 the complainant could have filed a complaint by virtue of Article VII(3 . He has only himself to blame for approaching the President on 18 September 1981 instead of going straight to the Tribunal. In any event, since an express decision was taken on 30 October, there has been no question since then of challenging any implied decision.

Before coining to the Tribunal again the complainant should await the Appeals Committee's report and the President's final decision. But he need not wait indefinitely. He may appeal directly to the Tribunal if one of two conditions is fulfilled: if the appeals body fails to report and there are grounds for believing that it will not do so within a reasonable lapse of time; or else if the President fails to take a final decision within sixty days of receiving the appeals body's report.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, P.C., Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 November 1982.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner

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