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

FIFTY-FOURTH ORDINARY SESSION

In re DESMONT and GAGLIARDI

Judgment No. 625

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Patrick Desmont on 5 March 1984 and corrected on 4 April and the complaint filed against the EPO by Mr. Mario Gagliardi on 2 March 1984, the EPO's reply of 25 May to Mr. Gagliardi's complaint and its reply of 25 June to Mr. Desmont's, Mr. Gagliardi's rejoinder of 17 July and Mr. Desmont's of 20 July, and the EPO's surrejoinders of 5 October 1984;

Considering the applications to intervene in Mr. Gagliardi's complaint filed by:

A. Alders-Meewis,

M. Attfield,

H. Betz,

S. Brett,

A. Cadeddu,

D. Chalret,

B.E. Chambers,

H. Chavonand,

E. Colonnella,

G. Costabile,

P. Ehrenreich,

H. Eichinger,

S. Fabiani,

G. Fornfischer,

M. Freundl,

G.A. Friedenberger,

M. Graham,

B. Grant,

J. Griffiths,

H. Gruber,

K. Grundkowski,

D.S. Jacobs,

N. Jeger,

K. Jouliardt,

F. Klein,

L. König,

A. Kozmus,

F. Leister,

J. Lortal,

A. Lovrecich,

H. Luitz,

D. Mader,

H. Maierl,

H. Möderndorfer,

K. Naumann,

M. Nehls,

H. Payer,

H. Pichler,

H. Prokscha,

E.C. Reisinger,

M. Repinski,

E. Rieger,

K. Rippe,

W. Roepstorff,

G. Roosenburg,

B. Rotteveel-Kley,

A. Scattone,

L. Schewior,

W. Schuster-Kächele,

R. Stempfle,

W. Sussbauer,

F. Telari,

A. Walch-Colling,

J.M. Weckerlé,

N. Werner,

C.D. Witt,

H. Würges,

H.R. Ziegelbauer; Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 38(3), 64(6) and Title VIII of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Considering that the complaints raise the same issues and should be joined to form the subject of a single decision;

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. In 1979 the EPO and several other organisations, known as the "co-ordinated organisations", adopted a new system of adjusting staff pay. The pay of staff in categories B and C was to be governed by the best prevailing local rates. Reviews were to be carried out every three years; a survey was made of the best local rates, the results were collated, and a weighting factor applied to determine the new salary scales. The weighting factor was based on pay in the public sector (10 per cent), the private sector (80 per cent) and other international organisations, viz. the European Communities (10 per cent). For all staff categories salaries were increased yearly if the cost of living rose by at least 2 per cent. By 1982 several governments found salaries too high and wanted to cut them by from 20 to 30 per cent. The Co-ordinating Committee of Government Budget Experts of the co-ordinated organisations put out a report (No. 191) dated 18 February 1983 on the subject. The report went to the Administrative Council of the EPO. On 17 March 1983, by decision CA/D 1/83, the Council approved the report and thereby amended the system with retroactive effect from 1 July 1982. As proposed in paragraph 35 of the report it decided, for B and C category staff, that if their hours of work proved to be longer than in a reference group of enterprises in the host country the percentage increase in their salaries granted on account of the difference in hours would be "frozen" at 1 July 1983: some fringe benefits were also blocked and to be steadily done away with. The Council decided, as proposed in paragraph 36, that yearly salary increases due on account of a rise in the cost of living should be payable only if the rise was at least 3 per cent, not 2 as before. Pension rights were also altered. The EPO employs the complainants in Rijswijk and they belong to category B. On 10 June 1983 each of them, along with other staff members in the categories affected, submitted to the Chairman of the Council an internal appeal against decision CA/D 1/83. At a session it held from 6 to 9 December 1983 the Council decided that Article 106 of the EPO Service Regulations, which relates to appeals against individual decisions, did not allow appeal within the Organisation against the Council's own decisions. The President of the Office so informed the staff in writing on 9 December 1983 and that is the decision the complainants are challenging.

B. The complainants put forward the same arguments as those in Mr. Giroud's second complaint and in Mr. Lovrecich's complaint, which are recapitulated in Judgment No. 624, under B. They contend in particular that decision CA/D 1/83 is unlawful insofar as it affects the salaries of B and C staff in the Netherlands and in the Federal Republic of Germany. They observe that it discounts an order of 6 October 1982 of the Court of Justice of the European Communities which had the effect of increasing by an average of 3.3 per cent the basic salary rates in force in the European Communities. That increase, they believe, ought to have been reflected in the weighting factor applied in working out salary sales for the B and C categories, as explained in A above. The complainants ask the Tribunal to set aside the Council's decision of 17 March 1983. They seek orders (1) that the salary scales for B and C staff in the Netherlands and in the Federal Republic of Germany be calculated as at 1 July 1982 with due regard to the salary scales in force at that date in the European Communities and applied retroactively; (2) that they receive retroactive compensation for the effects of correcting the Communities' scales as at 1 July 1980, plus interest at 12 per cent a year on the sums consequently due as from the dates on which they fell due. They also seek costs.

C. In its replies the EPO explains how pay in the co-ordinated organisations is determined and that, though not

itself one of those organisations, it seeks to apply the same salary scales. It is for the President of the Office and for him alone to take individual decisions applying to each staff member the salary scales approved by the Council for B and C staff. Only when such individual decisions have been taken are the rights of staff members affected. The EPO submits that the complaints are irreceivable because they challenge a general decision of the Council which was taken in accordance with Article 64(6) of the Service Regulations and which had no effect on the legal position of the complainants or of other B and C staff. The only decisions challengeable under Article VII(2) of the Statute of the Tribunal are those taken by the President. But the decision now impugned is a quasi-legislative act, and the Tribunal has no power to review its lawfulness. Individual decisions applying the general decision to the complainants were notified to them at the end of March 1983, and it is those they ought to have appealed against under Title VIII of the Service Regulations. They did not do so, cannot now do so in time, and their complaints are therefore irreceivable because they failed to exhaust the internal means of redress. The EPO makes subsidiary submissions on the merits. (1) It maintains that Article 64(6) of the Service Regulations was correctly applied. (2) The practice of the co-ordinated organisations is not to take retroactive account of factors which did not become known before the deadline for gathering data: that deadline was 1 July 1982, and the European Court of Justice did not make the order relied on by the complainants until 6 October 1982. (3) That the Joint Advisory Committee was consulted is clear from the preamble to the impugned decision and from minutes of a meeting the Committee held on 14 and 15 October 1982 and on 1 February 1983. The EPO asks the Tribunal to dismiss the complaints as irreceivable or, subsidiarily, to dismiss them as devoid of merit.

D. The rejoinders cite the arguments on receivability which are put forward by Mr. Giroud in his second complaint and by Mr. Lovrecich and which are summed up in Judgment No. 624, under D. The complainants believe they have exhausted the internal means of redress. By altering the monthly salary scales the decision they are objecting to causes them injury and they are therefore entitled to challenge its lawfulness. The decisions which the President of the Office is to take are in no way discretionary. The complainants also argue the merits. They press their claims for relief and seek damages at the increased figure of 4,000 Deutschmarks.

E. The EPO submits in its surrejoinder that the issue of receivability is not the same in the present cases as in Giroud No. 2 and Lovrecich: the impugned decision brings into force within the Organisation salary scales for B and C category staff as the Co-ordinating Committee suggested in its l91st Report. It has no effect on the legal position of staff and can have none until applied to them by the competent authority. Actually it has been followed up by administrative decisions by the President (March 198J) which do affect the salary rights of B and C staff. But the complainants have omitted to file in time, as required by the Service Regulations, internal appeals against the decisions taken with regard to each of them by the President. What they were expressly challenging in their appeals to the Administrative Council was the general decision, and their complaints are therefore irreceivable. Subsidiarily, the EPO answers their arguments on the merits.

CONSIDERATIONS:

Joinder

1. The two complaints raise the same issues of fact and of law, at least insofar as they are relevant to the decision. The Tribunal therefore joins the two cases and delivers a single decision.

Receivability

2. The EPO submits that the complaints are irreceivable on the grounds that they challenge a decision of the Administrative Council. The plea succeeds.

The mere fact that the impugned decision affects several categories of staff and is therefore general in character is not in itself sufficient to make the complaints irreceivable. Decisions which may be challenged before the Tribunal do not have to be individual in nature. That they may also be general is plain from Article VII, paragraph 2, of the Statute of the Tribunal, which sets the time limit for filing a complaint against a "decision affecting a class of officials", that is to say, a general decision. But a complaint against a general decision will not perforce on that account be receivable. There is also the rule in Article VII(1) of the Statute that the internal means of redress must have been exhausted.

Article VII(1) reads: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff

Regulations." The rule does of course cover mainly cases in which direct appeal lay against the decision within the organisation. But it also means that the Tribunal will declare irreceivable a complaint impugning a general decision against which there can be no direct internal appeal, but which must ordinarily be followed by individual decisions against which such appeal does lie. There are two reasons for so construing Article VII. The first is that the Tribunal is relieved of ruling on the validity of a general decision to which it may be unable to foresee exactly how effect will be given. The second is that the Tribunal will not be acting on an application from a single complainant to set aside a general decision which other staff may not object to.

The decision impugned puts no exact figure on the entitlements of each staff member concerned. That may be done only when individual decisions are taken, ordinarily by the President of the Office or a subordinate, on the strength of the general decision. In this case, although individual decisions were taken, according to the EPO, at the end of March 1983, they were not challenged in time. Accordingly, since no individual decisions have been taken since that date, the complainants may not now challenge the validity of the general decision. Before filing a complaint each must await a new individual decision.

DECISION:

For the above reasons,

The complaints and the applications to intervene in Mr. Gagliardi's complaint are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 December 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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