

## EIGHTY-EIGHTH SESSION

*In re Ousset*

Judgment 1933

The Administrative Tribunal,

Considering the complaint filed by Mr Jean-Bernard Ousset against the European Patent Organisation (EPO) on 11 March 1999 and corrected on 8 April, the EPO's reply of 2 July, the complainant's rejoinder of 19 July and the Organisation's surrejoinder of 21 October 1999;

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

Having examined the written submissions;

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

A. Facts material to the present case are set out under A in Judgments 1663 (*in re Bousquet No. 2* and others), of 10 July 1997, and 1931, (*in re Baillet No. 3*) delivered on this day.

In the light of Judgment 1663 it became clear that, in the case of certain staff members, the remuneration paid on the basis of the salary scales deriving from decision CA/D 4/96 of the EPO's Administrative Council was lower than the pay which would have resulted from the application of the method in force, as interpreted by the Tribunal. On 23 October 1997, the President of the European Patent Office, the secretariat of the EPO, proposed to the Council the introduction of a safeguard clause providing for a compensatory allowance to correct this reduction in pay for the period January 1996-June 1996. The Council gave its approval in a decision dated 5 December 1997.

The complainant, who was born in 1954 and is of French nationality, is a staff member of the Office at grade A3, serving in Berlin. He was an intervener in the case which led to Judgment 1663.

By a letter of 4 November 1997, the Director of Personnel Development informed the complainant of the sum that was due to him in application of Judgment 1663, namely 30,414.35 German marks for the period between July 1992 and December 1995. At his request, the complainant was informed by the Salary Section by electronic mail on 18 November 1997 that Judgment 1663 had not resulted in the establishment of new salary scales, but merely in a recalculation of individual basic salary rates. The Salary Section proposed to establish "theoretical" pay slips for him.

By a letter of 28 January 1998, the complainant appealed to the President of the Office. Wishing to verify the correctness of the sums paid by the EPO in execution of Judgment 1663, he requested pay slips which were updated in line with the above judgment for the period July 1992-December 1995, and updated basic salary scales for the period July 1992-June 1996, that is up to the coming into force of the new method of reckoning salaries adopted by the Council. He lodged an appeal with the Appeals Committee, which issued its opinion on 23 September 1998 and recommended that the complainant's remuneration should once again be recalculated, as of 1 July 1996, and that any resulting arrears should be paid. By a letter of 14 December 1998, which is the impugned decision, the Director of Personnel Development informed the complainant that the President had decided to dismiss his appeal.

B. The complainant recalls that in Judgment 1663 under 12, the method of reckoning salaries at issue in that judgment was found to be "wrong". The method adopted by the Council in December 1988 was only modified when the new method came into force, viz. on 1 July 1996. To ascertain whether the 1988 method had been correctly applied up to that date, and therefore whether the adjustment he had received corresponded to what was due to him, the complainant should have been provided with updated salary scales and pay slips. He contends that the EPO should have produced these scales, since in 1995 the former

President of the Office said he would undertake to correct the salary scales retroactively and apply them to each staff member if the Tribunal found in the complainants' favour in the case which was to lead to Judgment 1663. Furthermore, the execution of that judgment should have led to the establishment of salary scales corresponding to the adjusted pay received by the complainant and "real" pay slips, meaning pay slips "based on remuneration which corresponded to a basic salary scale". However, the EPO only provided "theoretical" pay slips, without indicating whether they corresponded to "real" pay slips.

The complainant recalls that, as of 1 July 1996, the complainants and interveners in the case which led to Judgment 1663 suffered a decrease in their nominal pay due to the fact that they had not signed the individual declaration entitling them to a lump-sum payment. Those staff members who signed the declaration have seen their pay rise. There was therefore discrimination between staff members of the Office.

The complainant requests the Tribunal to order:

- the EPO to establish all the "real" pay slips updated in the light of Judgment 1663 for the period from July 1992 to December 1995, and the basic pay scales updated until the coming into force of the new method of reckoning salaries on 1 July 1996;
- the application in his case, up to 1 July 1996, of the method of reckoning salaries decided upon in December 1988; the correction of his salary so that he suffers no loss of pay for the past and in the future, and the payment of interest on the sums due.

He also claims costs.

C. In its reply the EPO contests the receivability of the complaint. It says that the claim for real pay slips lacks cause of action. In practice, being in possession of his former pay slips and the theoretical pay slips, the complainant was able to verify the correctness of the sums that he had received and to observe that the pay slips at issue had lost their theoretical nature.

With regard to the claim for the establishment of updated salary scales, the complainant shows no cause of action since, for the period between July 1992 and December 1995, his theoretical pay slips indicated the amount of his basic pay adjusted in line with Judgment 1663. For the period between 1 January 1996 and 30 June 1996, he had at his disposal basic pay scales and scales of the compensation allowance enabling him to calculate the amount of his basic pay deriving from the execution of Judgment 1663.

The EPO emphasises that the complainant, who was only an intervener in the case *in re* Bousquet (No. 2) and others, cannot make claims in his present complaint, "which gives the impression of being an application for an interpretative ruling", that are "much broader" than those made by the complainants in the above case.

Nor does the claim for the 1988 method to be applied to the complainant up to 1 July 1996 show any cause of action, since the pay received by the complainant from 1 July 1992 to 30 June 1996 was calculated according to the adjustment procedure, as interpreted by the Tribunal in Judgment 1663. Similarly the complainant's claim to the correction of his pay for the same period shows no cause of action. Insofar as the claim bears upon the future, it is irreceivable because the internal remedies have not been exhausted. The same applies to the claim for the payment of interest.

In subsidiary argument the defendant explains that the complainant's pleas are based on the belief that Judgment 1663 led to the invalidation of the scales resulting from the EPO's interpretation of the adjustment method and their replacement by scales calculated in accordance with the Tribunal's interpretation. However, the former scales remained applicable to all the staff members who had accepted them through the individual declaration. If the Tribunal had ordered these scales to be set aside, it would have been ruling beyond the ambit of the case. The EPO executed Judgment 1663 correctly by paying the complainant and interveners in the case "an additional pay adjustment corresponding to the difference between the amounts resulting from the scales established in line with the adjustment procedure, as interpreted by the defendant ... and ... the results obtained by applying the interpretation which the Tribunal ... adopted in its judgment". It is for this reason that the pay slips were qualified as "theoretical".

Since the position adopted by the former President of the Office was merely a political gesture, his successor is not bound to adopt the same attitude.

The decrease in salary suffered by the complainant is not unlawful and all the staff members serving in Germany suffered a "slight decrease" in their overall pay in July 1996. Changes to the procedure for the adjustment of salaries lie within the discretionary authority of the Council. Moreover, there is no rule that pay must perpetually rise.

D. In his rejoinder the complainant contends that the term "theoretical" means that his pay slips lost "all legal or contractual value".

He says that the reference to the fact that he was an intervener in the case *in re* Bousquet (No. 2) and others is irrelevant. The nub of the issue is whether the EPO granted all the relief required under Judgment 1663.

His "theoretical" pay slips mentioned a "basic salary", but it was not derived from a basic salary scale, such as Article 66(1) of the Service Regulations refers to. In the absence of such scales, he says he cannot know whether the salary shown was correct.

He did not insinuate that the Tribunal implicitly set aside the scales which were challenged in the case leading to Judgment 1663.

If the commitments entered into by the President are not honoured, the trust in which he is held by the staff of the Office may be jeopardised.

The complainant asserts that it is not relevant to speak of a compensation allowance for the complainants and interveners in the case which led to Judgment 1663. In practice, the latter suffered a loss of pay which was in breach of the principle that nominal pay must be safeguarded.

E. In its surrejoinder the EPO asserts that the complainant has not put forward any arguments in his rejoinder which would make it change its position. It presses its pleas.

It points out that the guarantee of nominal pay is not applicable in the present case, since the scales in force on 30 June 1996 were not higher than those introduced by decision CA/D 20/96 as of 1 July 1996.

It adds that the complainant was "restored to his rights as if the method of reckoning salaries had never been wrongly applied".

## CONSIDERATIONS

1. In its Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference may be made and which concerned a dispute relating to salary adjustments, the Tribunal upheld the complaint and invited the EPO to recalculate the adjustments. The advantage obtained therein was also extended to a number of staff members who had intervened in the complaint. However, the great majority of staff members had agreed to a proposed settlement based on a new method of reckoning salaries for the future and the payment by the European Patent Office of a lump sum to all staff who signed the declaration attached to the proposal.

The complainant, who was one of the interveners, was consequently paid an additional sum of 30,414.35 German marks for the period between July 1992 and December 1995. The method of reckoning this sum was indicated to him by the Office. Furthermore, in response to a request by the complainant for pay slips, the Office produced pay slips for him, which were qualified as "theoretical", for each of the months in question. The complainant also requested the establishment of "salary scales" for the above period to serve as a basis for the reckoning of the monthly amounts. The EPO did not consider that it was under any obligation to grant this request, since the complainant had already obtained all the necessary information. Judgment 1663 concerned only a limited number of staff members and did not place the President of the Office under the obligation to establish new salary scales.

On 28 January 1998 the complainant appealed to the President. He requested pay slips updated in line with Judgment 1663 for the period from July 1992 to December 1995 and also asked for updated salary scales for

the same period as well as from January to June 1996. Among the reasons which he gave for his request, he noted that, for the period beginning 1 July 1996, the application of a new method of reckoning salaries had resulted in a slight decrease in his monthly pay, while staff members who had agreed to sign the declaration had seen their pay rise. In his view, this constituted an unfair practice and was in breach of the principle of equality of treatment.

The President did not grant the request directly and treated it as an internal appeal. The Appeals Committee recommended that "the appeal be accepted and that a new calculation be made of the complainant's pay for the period beginning 1 July 1996, taking into account the Committee's opinion, as well as the payment of the resulting arrears".

On 14 December 1998, the President dismissed the appeal insofar as it concerned the period 1992-1995 for the reasons set out by the Committee and, for the period beginning 1 January 1996, "for reasons related to the collective appeal RI/84/97" explained in communiqué No. 34 of 26 November 1998.

2. In his complaint, the complainant continues to seek "real" pay slips and updated salary scales. Furthermore, he claims not to have to suffer any loss of pay up to 30 June 1996 or in the future, and to be awarded interest and costs. He complains of a decrease in his pay as of 1 July 1996, while the staff members who had agreed to the settlement by signing the individual declaration have benefited from a pay rise which, he says, is in breach of the right to equality of treatment.

The Organisation contends that the complaint is irreceivable, and subsidiarily is unfounded. It says that it shows no cause of action either with regard to the issuing of pay slips and salary scales or to payment of salary adjustments up to 30 June 1996. With regard to his pay as of 1 July 1996, it argues that the complainant has not exhausted the internal remedies.

3. The complainant requests hearings. But he does not show that they are necessary and the Tribunal sees no need to order them.

4. The complaint gives rise to certain problems of receivability, which will be examined together with the merits.

It is not necessary to determine whether, and if so to what extent, the complaint relates to the execution of Judgment 1663 or consists of a complaint raising separate issues.

5. The claim relating to pay slips shows no cause of action, since the Office provided pay slips. It is devoid of merit insofar as the complainant wants them to be entitled "real" and not "theoretical" pay slips. In practice, their meaning and scope are not open to doubt. The evidence shows that the adjective "theoretical" was used to show that these pay slips were intended to serve as a basis, not for the payment of current salaries, but for the retroactive reckoning of the necessary additional pay. The pay slips contained all the details required to verify their correctness. This claim is unconvincing and therefore fails.

6. So does the claim for the establishment of salary scales, for the valid reasons invoked by the EPO. The complainant received, on an individual basis, all the information allowing him to verify the reckoning of his pay. He has no cause to request the establishment of general scales, which would not have been applicable to the great majority of staff members.

7. The complainant also appears to claim an adjustment of his pay up to 30 June 1996, but without providing details on this point.

The claim shows no cause of action insofar as he has already obtained satisfaction and that all the internal remedies have not been exhausted (Article VII(1) of the Statute of the Tribunal).

8. In practice, the complainant is seeking an increase in his monthly pay from 1 July 1996, as the amount of his monthly basic salary was 10,935 instead of 11,150 German marks. He complains of inequality of treatment and is claiming that the rate of increase granted to staff members who agreed to the settlement should be applied in his case to the augmented pay obtained as a result of Judgment 1663.

The receivability of this claim is debatable. It was undoubtedly not contained in the initial request, although

the scope of the claim was extended during its examination by the Appeals Committee, with the latter's consent. Moreover, in the impugned decision, the President dismissed the appeal on the merits without expressing any reservations as to its receivability. In these circumstances, the issue is whether the internal means of resisting it have been exhausted (Article VII(1) of the Statute of the Tribunal) and, without any breach of the principle of good faith, the Organisation is entitled to argue that they have not. However, there is no need to rule on this issue since the claim is in any case devoid of merit.

The complainant rightly does not contest the fact that, as of 1 July 1996, the EPO applied a new method, with new scales, for the reckoning and adjustment of salaries. Nor does he challenge the new method.

Moreover, the complainant does not claim any general right to the maintenance of his level of pay.

He merely invokes a breach of his right to equality of treatment. Consistent precedent has it that an official can complain of the consequences of another staff member being treated more advantageously only if he is in an identical or similar situation to that person.

In the present situation, he is clearly not. The staff members who benefited from the advantages deriving from Judgment 1663 were, for the period at issue in the judgment, manifestly at an advantage in comparison with those who had agreed to the proposed settlement. But the judgment did not confer upon them a right to the proportional maintenance of this advantage in the future on the occasion of subsequent salary adjustments. In these conditions, the concern of the EPO to place staff members on an equal footing, from this point of view, does not give rise to any criticism and the complainant is wrong to infer that he has suffered a breach of his right to equality of treatment.

It should also be recalled that the slight decrease in the complainant's pay in July 1996 did not jeopardise his living standards: on the scope of acquired rights as they relate to pay levels, see Judgments 1642 (*in re* Huber and Tresco), under 7(b); and 1618 (*in re* Baillet No. 2 and others), under 21 and 22, and the case law cited.

9. The principal claims fail, and so must the subsidiary ones.

## 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