

SIXTY-EIGHTH SESSION

***In re* JAWORSKI (No. 2)**

Judgment 991

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Lech Stanislaw Jaworski against the European Patent Organisation (EPO) on 20 December 1988, the EPO's reply of 24 April 1989 and the complainant's letter of 18 May 1989 to the Registrar of the Tribunal stating that he did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 39, 40, 42 and 45 of the Service Regulations 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 facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutch citizen born in 1930, has been employed by the EPO as an examiner at its office at The Hague since his transfer in 1978 from the old International Patent Institute. In 1979 he suffered injury in an air crash and he has been under medical treatment ever since.

By a decision dated 3 September 1986 the President of the Office granted the complainant leave as from 1 September for two months under Article 45 of the Service Regulations, which reads:

"(1) A permanent employee may, in exceptional circumstances and at his own request, be granted unpaid leave on personal grounds."

The period of leave was later extended, at the complainant's request, to 31 October 1987.

By communiqué 59 of 2 June 1987 the President of the Office informed the staff that "all active permanent employees in post on 1 October" 1987 were to get a lump-sum bonus to mark the tenth anniversary of the founding of the Office. On 5 June 1987 the Administrative Council of the EPO decided:

"Permanent employees of the European Patent Office in active employment on 1 October 1987 shall receive a gratuity equal to 5% of the yearly basic salary appropriate to their grade and step on that date. This gratuity will be included in the salary payment for the month of October 1987."

The decision was set out in CA/D 12/87, and the President informed the staff of it in communiqué 63 of 22 July 1987. The English version said that the bonus would be paid to "staff members in post on 1 October this year".

By a decision of 8 October - CA/D 17/87 - the Council granted the bonus to former employees who had retired before 1 October, and the President so announced in communiqué 69 of 9 October 1987.

The complainant resumed duty at The Hague on 2 November 1987. Not having been paid the bonus, he wrote to the head of Personnel to claim it. The head of Personnel answered in a letter of 6 November that only someone in active employment at 1 October was entitled. On 10 November the complainant wrote back to point out that that was not what communiqué 63 said, at least in its English version.

On 16 November the head of Personnel confirmed his earlier interpretation and sent the complainant the text of CA/D 12/87 in the official English, French and German versions.

On 19 November the complainant lodged an appeal. In a report of 17 August 1988 the Appeals Committee recommended rejecting it, and by a letter of 12 October 1988, the decision impugned, the Principal Director of

Personnel informed the complainant that the President of the Office had done so.

B. The complainant submits that the refusal to pay him the bonus is contrary to the terms of the Council's decision as conveyed to the staff in the English version of communiqué 63. Though on leave at 1 October 1987 and so not in active employment, he was still "in post" and therefore entitled to payment.

He alleges breach of the principle of equal treatment. Since even those who had retired got the gratuity, so should anyone who was still on the staff even if he happened to be on leave at the material date. The Council's intent was to give a bonus to everyone who had served the EPO, and that was why part-time employees, for example, got it. It was even paid to those who started duty on 1 October 1987. Had he himself been retired instead of being on unpaid leave he too would have got it.

He seeks the quashing of the impugned decision, payment of the gratuity, moral damages amounting to 3,000 guilders, and costs.

C. In its reply the EPO observes that the texts of communiqué 59 and of CA/D 12/87 in all three languages were plain: the bonus was due only to those "in active employment". The complainant was sent the three versions of CA/D 12/87 on 16 November 1987 and so was duly informed of the terms of the Council's actual decision. He may not find any claim on an alleged discrepancy in the English version of communiqué 63.

The three language versions of the Council's decision concur in conferring entitlement only on employees "in active employment on 1 October 1987". Articles 39, 40 and 42 of the Service Regulations, which define "active employment" and "nonactive status", make it clear that, since the complainant was not at the material date performing "the duties pertaining to the post" he held, he was not entitled.

The complainant may not find any claim on communiqué 63, which was a mere announcement to the staff and conferred no right. The French and German versions were plain enough, and even the English was not at odds with the text of the Council's decision, the term "in post" meaning much the same in the context as "in active employment". After all, the complainant was not on any particular post while on leave; indeed Article 45(5)(c) provides that during such leave "another person may be appointed to the post occupied by the employee concerned".

There was no breach of the principle of equal treatment since the complainant was not in the same factual position as those who did get the bonus. Unlike part-time employees and new recruits he was not "in active employment" on 1 October 1987. Moreover, they and former staff members were receiving from the Organisation either a salary or a pension at the material date, whereas the complainant was receiving no pay at that time.

CONSIDERATIONS:

1. The complainant, an official of the European Patent Office, is asking the Tribunal to set aside a decision the President of the Office took on 12 October 1988 to refuse him a "gratuity", or bonus, that was paid to staff at a date at which he was on "unpaid leave on personal grounds".

2. The staff were paid the bonus, which came to one-

twentieth of basic yearly salary, to mark the tenth anniversary of the founding of the Organisation. The Administrative Council of the EPO took the decision to that effect on 5 June 1987: the bonus was to be paid to employees "in active employment on 1 October 1987" and added to their pay for October 1987. It was later paid to retired officials as well pro rata according to length of service.

3. Being on leave at 1 October 1987 for personal reasons that are not material to the case, the complainant was not paid the bonus. By a letter of 19 November 1987 he lodged an internal appeal arguing that his leave was only temporary, that he was still an employee of the EPO and that he should be put on a par with staff "in active employment".

4. The President referred his appeal to the Appeals Board. After reviewing the decision against the Service Regulations the Board held that, not having been "in active employment" within the meaning of those Regulations at 1 October 1987, he did not qualify for the bonus. The Board unanimously recommended rejecting his appeal, though it did suggest that on grounds of equity it might be right to pay him the bonus since, albeit on leave and not

in active employment, he had earlier served the Organisation.

5. By a letter of 12 October 1988 the President told the complainant that he accepted the Board's recommendation.

6. In this complaint, which he filed in time, the complainant seeks the quashing of the President's decision, the payment of the bonus and awards of 3,000 guilders in damages for moral injury and of costs.

7. He argues, first, that although he was on leave he was still on the staff and should therefore be put on a par with someone "in active employment", and he cites the English version of the President's communiqué, No. 63 of 22 July 1987, announcing payment of the bonus "to staff members in post on 1 October this year". Secondly, he contends that since the point of the bonus was to acknowledge the services rendered to the Organisation by its staff in its first ten years someone on leave should get the bonus like any other staff member.

8. The EPO's answer is that the Council's intent was to confine the bonus to those who were actually working for the Organisation; that someone on unpaid leave was not; that the bonus was announced soon enough for the complainant to have had time to go back to work if he wanted to secure it; and that since it was stated as a percentage of pay the grant of it presupposed the payment of salary or pension, neither of which is the official on unpaid leave entitled to.

9. Though free to award a bonus to staff and decide who qualifies for it, the EPO must follow objective criteria and not draw arbitrary distinctions. So the material issue is whether the complainant was discriminated against in being disqualified because he was on unpaid leave.

10. The conditions for paying the bonus as determined by the Council plainly adopt the distinction drawn in Article 39 of the Service Regulations between three kinds of administrative status: active, non-active and reserve. According to Article 40 only permanent employees "in active employment" are entitled to remuneration and to advancement to a higher step and eligible for promotion, and according to Article 42 permanent employees with "non-active status" - and they include someone granted leave on personal grounds - are not entitled to remuneration. The argument the complainant founds on communiqué 63 is irrelevant: who was to benefit was decided by the Administrative Council, and in unambiguous terms. Entitlement cannot depend on a turn of phrase, however it is to be construed, that appears in an information circular from the President.

11. The inference is that in confining the bonus to those in active employment the Council held to the distinction in the Service Regulations and so made the restriction on objective grounds. The complainant must have known when he applied for leave that he would have "non-active status" and that that would affect his entitlement to pay and to the other benefits of employment. And another point that makes it reasonable to refuse the bonus to those on non-active status is that it took the form of additional salary and so was the corollary of the entitlement to remuneration that is suspended for such staff.

12. The conclusion is that the complainant was not discriminated against. The refusal of the bonus being a logical consequence of the status which he held under the Service Regulations and which after all he had applied for, the Council was not at fault in confining the bonus to staff in active employment and to pensioners.

13. The complainant's claims therefore fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 23 January 1990.

(Signed)

Mohamed Suffian
Mella Carroll
P. Pescatore
A.B. Gardner

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