

SEVENTY-FIRST SESSION

In re GODIN, LEDRUT (No. 3) and VERSCHELDEN

Judgment 1130

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought by Mr. Christian Godin and Mr. John Verschelden and the third complaint brought by Mr. Pascal Ledrut against the European Patent Organisation (EPO) on 5 November 1990 and corrected on 19 November, the EPO's replies of 6 February 1991, the complainants' rejoinders of 11 March and the Organisation's surrejoinders of 17 April 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 49(11) and (13), 64(6), 88, 93(2)(d) and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

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

A. Article 49(11) of the Service Regulations of the European Patent Office reads:

"... a permanent employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary than that received in his former grade and step increased by the equivalent of one 12-monthly incremental step in his former grade in the case of Categories A, B and C ..."

Article 49(13) says:

"In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration."

And Article 64(6) provides:

"The remuneration of the permanent employees shall be subject to periodic review and shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee of Government budget experts of the Co-ordinated Organisations."

In accordance with Article 64(6) salary scales are adjusted each year as at 1 July, and only provisionally do the scales that have been in force for the preceding year continue in force after that date. On the Co-ordinating Committee's recommendations the Administrative Council approves the new scales in December each year and makes them retroactive to 1 July.

The complainants are permanent employees of the EPO stationed at its office (GD1) at The Hague. By notes of 15 July 1988 the Head of the Personnel Department of GD1 informed them that they were promoted from grade A3 to A4 at dates and steps that they would be told of later.

Under cover of a note dated 28 July 1988 from the Head of the Personnel Department each of the complainants was sent a text dated 1 August 1988 and headed "Calculation of incremental step on promotion". Mr. Ledrut was thereby informed that his promotion took effect as from 1 July 1988 and that in accordance with Article 49(11) and (13) his step in A4 was 8, with no seniority; Mr. Verschelden's date of promotion was 1 August 1988 and his new step was 6, with no seniority; and Mr. Godin was to be promoted at 1 October 1988 and to have step 7, again with no seniority.

Early in December 1988 the Administrative Council adopted new salary scales to take effect as from 1 July 1988.

In Judgment 936 (in re Geisler No. 2 and Wenzel No. 3) which it delivered on 8 December 1988, the Tribunal found a flaw in a change that the Council had made in the scales of EPO pay; it declared the scales invalid insofar as they took into account a levy on the earnings of Dutch civil servants known as the "Inhouding".

On 16 December 1988 the complainants were paid at the grade and step notified to them in August 1988 and the payment consisted both of pay for the month of December and of the arrears due under the salary scales the Council had just approved.

They were paid at the same rates for January and February 1989.

On 15 March 1989 the Head of the Personnel Department sent each of them a note saying that the "application of the new salary scales" required retroactive lowering of their steps on promotion to A4 and that the sums already paid to them in excess of their entitlements would be "withheld in March 1989". Mr. Ledrut's step was retroactively reduced to 7 as from 1 July 1988; Mr. Godin's to 6 as from 1 October 1988; and Mr. Verschelden's to 5 as from 1 August 1988. Mr. Ledrut was accordingly required to pay back 3,020 guilders, Mr. Godin 1,888 and Mr. Verschelden 2,065, and they had those sums docked from pay for March 1989.

On 1 June 1989 each of them lodged an appeal under Article 108 of the Service Regulations against the deduction. The Principal Director of Personnel answered on 1 August that the President had provisionally rejected the appeals and referred them to the Appeals Committee.

Believing that a similar appeal by another official, Mr. Zaegel, had been allowed, Mr. Ledrut and Mr. Verschelden wrote to the Head of the Personnel Department on 1 December and Mr. Godin on 4 December asking for the same treatment. The Head of the Personnel Department rejected Mr. Ledrut's and Mr. Verschelden's requests on 6 December and Mr. Godin's on 11 December. On 16 February 1990 Mr. Ledrut and Mr. Verschelden lodged second appeals under Article 108, and Mr. Godin did so on 23 February. By letters of 12 March 1990 the Principal Director of Personnel said that the President had rejected the second appeals but had referred them as well to the Appeals Committee.

The Appeals Committee reported on 26 July on all the appeals. By a majority of three members to two it recommended allowing the complainants' appeals of 1 June 1989 and restoring their steps at the dates of promotion according to the original calculations made in 1988. The dissenting members recommended rejecting those appeals.

By letters dated 6 August 1990 the Principal Director of Personnel informed the complainants that for the reasons put forward by the two dissenting members of the Committee the President of the Office rejected their appeals. The complainants got those letters on 3 September and are impugning them in their complaints.

B. All three complainants put forward the same pleas.

(1) They contend that the decisions in the Head of the Personnel Department's notes of 15 March 1989 were unlawful because they were retroactive. The calculation of the complainants' steps in their new grade was the consequence of the salary scales that were in force at the dates of their promotion and may not be altered later to their detriment.

(2) The texts dated 1 August 1988 cannot make the decisions of 15 March 1989 lawful: they are merely standard forms sent out each year to officials who get promotion and, when read in proper legal context, do not remove from the 1989 decisions their retroactive character. Indeed for the EPO to rely on them in support of its contention to that effect is an abuse of authority.

(3) There is breach of the complainants' acquired rights. Mr. Godin was granted the benefit of his new step for five months, Mr. Verschelden for seven, and Mr. Ledrut for eight, including three months following the Council's adoption of new scales in December 1988. The EPO acted ultra vires in that it took decisions that would have been of a kind admissible only under the provisions of the Service Regulations on disciplinary measures, in particular Article 93(2)(d).

(4) The withholding of sums from salary in March 1989 was in breach of Article 88 of the Service Regulations, which allows "recovery of undue payment" only "if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it". Neither of

those conditions was met in the complainants' cases.

(5) The other official, Mr. Zaegel, who was also promoted in the second half of 1988 and later had his step reduced, was granted redress. The refusal to allow the complainants similar redress was not only in breach of the principle of equal treatment but also based on a misreading of the factual evidence. Mr. Zaegel was not promoted at the same date as any of the complainants. The respective merits of Mr. Zaegel and the complainants were presumably already taken into account in setting the different dates of their promotions, and it was therefore mistaken to grant Mr. Zaegel redress on the grounds that he alone deserved it.

Each of the complainants seeks the quashing of the impugned decision of 6 August 1990; either his reinstatement in the step he was granted at 1 August 1988 and repayment of the sum withheld, or else retroactive promotion, as at 1 January 1988 for Mr. Ledrut and Mr. Verschelden and as at 1 February 1988 for Mr. Godin; and an award of 1,000 guilders in costs.

C. In its replies the EPO submits that the decisions reducing the complainants' incremental steps as at the dates of their promotion are lawful. It submits that the reason why the salary scales of the preceding year have to remain provisional as from 1 July in any given year until the following December is that time is needed to gather the data required for drawing up the new scales. Until the Council approves the new scales in December, with retroactive effect to 1 July, any decisions based on the old scales provisionally kept in force since that date are themselves provisional. The sums paid over to the complainants by virtue of such decisions were therefore mere advances on their salary and were subject to correction. Indeed the Head of the Personnel Department's notes of 28 July 1988 sending them the texts headed "Calculation of incremental step on promotion" warned that that calculation was based on the scales in force, and that if new scales were given retroactive effect their step, and seniority at that step, might have to be retroactively changed as well. There was therefore no breach of the rule against retroactivity.

The new scales approved in December 1988 as from 1 July 1988 removed an unfair anomaly whereby on promotion to A4 from at least step 9 in A3 officials used to get an extra step and so they put on a par all promotions from A3 to A4. The complainants, who would have benefited from that anomaly, had no right to its continuance under the new scales and may not properly plead any breach of their acquired rights in its removal.

Lastly, there was nothing unlawful about declining to make the complainants' promotion retroactive to earlier dates. Promotion is ordinarily granted on grounds of merit and takes effect at the date by which the official has the required whole number of years of experience, but the President may set promotion as from an earlier date in recognition of exceptional merit. The other official, Mr. Zaegel, was thought worthy of earlier promotion but none of the complainants was: since they were in a different factual position there was no breach of the principle of equal treatment.

D. In their rejoinders the complainants submit that the EPO is confusing promotion and the adjustment of salary in order to make out that whereas the promotion is inviolate other elements are only provisional. Moreover, what is provisional is not just the calculation of step on promotion but the date of promotion, as Mr. Zaegel's case shows: his promotion was shifted from the second to the first half of 1988 without consulting any joint body or even announcing the decision. So the EPO is making promotion meaningless, in breach both of Article 49 of the Service Regulations and of the law of the international civil service.

The complainants enlarge on their contentions that the Organisation acted in breach of the rule against retroactivity and of their acquired rights. They cite the case law in support of that view. They submit that sound management requires stability in the position of officials and that in their case the outcome is absurd and, compared with the treatment of Mr. Zaegel, unfair. For purely bureaucratic reasons the EPO stubbornly persists in reversing a position established at the dates of their promotion and confirmed from mid-December 1988 to mid-March 1989.

They press their claims.

E. In its surrejoinders the Organisation submits that the pleas in the complainants' rejoinders do not weaken the case made out in its replies. The decisions they impugn were in keeping with the EPO's obligations under the Service Regulations. How to treat another official on promotion was at the President's discretion. There was no breach of their acquired rights: the Organisation was bound to do no more than apply the rules in force at the date of promotion.

CONSIDERATIONS:

1. By decisions dated 15 July 1988 the complainants, whom the EPO employs at The Hague, were promoted from grade A3 to A4. By a note dated 28 July 1988 the Head of the Personnel Department informed each of them of the incremental step he was granted on promotion: Mr. Ledrut got step 8 in A4 as from 1 July 1988; Mr. Verschelden step 6 as from 1 August 1988; and Mr. Godin step 7 as from 1 October 1988.

In December the Administrative Council of the Organisation approved new salary scales with retroactive effect from 1 July 1988. By notes dated 15 March 1989 the Head of the Personnel Department informed each of the complainants that because of the new scales their steps had to be changed, also with retroactive effect: Mr. Godin was to go down from step 7 to 6 as from 1 October 1988, Mr. Ledrut from 8 to 7 as from 1 July 1988 and Mr. Verschelden from 6 to 5 as from 1 August 1988. The consequence was that each had sums docked from his pay for March 1989, and they are objecting on several grounds to the retroactive reduction in step.

The rule against retroactivity

2. Their first plea is that the decisions of 15 March 1989 were unlawful because they were retroactive and to their detriment.

The rule against retroactivity, though a general principle of law, is not absolute. One qualification is, as indeed the complainants acknowledge, that the retroactive decision will be admissible in law where the effect of it is favourable to the staff member it applies to. Another qualification is that the rule will not hold where the retroactive decision supersedes an earlier one which, at the time at which it was taken, was merely provisional and so was to hold good only until replaced by a final decision.

3. The text of the notes of 28 July 1988 makes it plain that whereas the complainants' actual promotion to A4 is in no way provisional the grant of the steps is:

"... the calculation of step is based on the present scales of pay. If new scales were applied with retroactive effect as from [the date of promotion] a recalculation might mean the retroactive grant to you of a higher or lower step and possibly different seniority."

Since the original grant of steps had been provisional there was nothing unlawful about replacing them several months later with retroactive decisions granting them lower steps.

Besides, the decisions of 15 March 1989 were not to the complainants' detriment. Under the monthly basic salary scale approved in December 1988 the complainants were ultimately granted, as Article 49(11) of the Service Regulations requires, a step that gave them a higher basic salary than their pay at their former grade and step. The decisions were therefore favourable to the complainants and for that reason, too, there was no breach of the rule.

The alleged breach of the rules

4. The complainants' second plea is that the docking from their pay of the difference between the provisional and definitive steps was in breach of Article 88 of the Service Regulations, which says that sums overpaid may be recovered only "if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it".

5. The procedure followed had been standard practice for years. As the complainants well knew, their ultimate incremental step was not to be determined until later, after the Council had adopted the new scales. Even if they did not know that, the notes of 28 July 1988 explained the position clearly to them. There was therefore no breach of Article 88.

The alleged breach of equal treatment

6. Thirdly, the complainants allege breach of the principle of equal treatment in that another official who had also objected to the reduction in step fared better: unlike them he had the date of his promotion retroactively changed to an earlier one so that he ultimately got back the same step as he had been provisionally granted before the adoption of the new salary scales.

7. All that the principle of equal treatment requires is that everyone who is in like position both in fact and in law should fare alike.

If the backdating of the other official's promotion was not lawful the complainants may derive no entitlement from it, because equality in law does not mean equality in the breach of it. But even if the backdating was lawful it would not help their case. The other official was not in the same factual position as they because the Organisation took a different view of his merits and concluded on those grounds that he should be granted a higher step.

There was no breach of the principle in this case.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

Jacques Ducoux
Mohamed Suffian
José Maria Ruda
A.B. Gardner