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

**SEVENTY-FIFTH SESSION**

# *In re* FARNESE

**Judgment 1282**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Giuseppe Pasquale Farnese against the European Patent Organisation (EPO) on 6 March 1992 and corrected on 18 May, the EPO's reply of 6 August, the complainant's rejoinder of 7 November 1992, the Organisation's surrejoinder of 1 February 1993, the complainant's comments of 19 February and the EPO's further brief of 5 March 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Articles 12(2), 28, 53, 54(2), 62, 73, 84, 93, 95, 106, 107 and 108(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Article 11 of the Office's Pension Scheme Regulations;

Having examined the written submissions and decided not to order hearings;

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

A. The complainant, an Italian who was born in 1951, joined the EPO on 7 January 1980 as a patent examiner in Directorate-General 1 (DG1) at The Hague.

His supervisors found his work satisfactory in his first three years but in decline from 1984. At the time the practice was to transfer examiners to Munich after a three-year stint at The Hague, but the complainant applied for and obtained leave to stay on at The Hague on personal grounds.

Between 24 November 1987 and 13 November 1990 he took 365 days' sick leave, 255 of which fell in 1990, and was allowed to undergo medical treatment in Italy over long periods.

After seeing the Head of the Bureau of Personnel of DG1 on 19 December 1989 he resolved not to apply for unpaid leave before he had spent at least ten years in the EPO's employ.

In conversation with a personnel officer on 25 January 1990 he said that he did not care for his work and that the climate at The Hague was bad for his health; he asked whether he could get a severance grant under Article 11 of the Pension Scheme Regulations.

On 29 January 1990 he saw the Vice-President of DG1 and the same personnel officer and suggested serving the EPO in Italy, where his many contacts would enable him to spread information about patents. The Vice-President pointed out that it was national patent offices that gave out such information and he could not be given such duties, but the Office would be willing to accept his resignation as from 6 January 1990 and so let him qualify for severance grant before expiry of the ten- year time limit in the Pension Scheme Regulations. He then asked to be allowed to stay on for a few months more so that he could look for another job. The Vice-President explained that he could not stay on and still get the severance grant but offered him a temporary contract as an examiner under which he would be paid at piece rates by the file. But he was afraid that he was not well enough to keep up his output and earn a living that way and he therefore turned the offer down.

On 10 January 1990 the Head of the Bureau of Personnel had got a written application dated 8 January from him for permission to take sick leave in Italy. The EPO's medical officer saw him and reported in February 1990 that although it was hard to determine the adverse effects of climate and pressure of work some solution ought to be found for the sake of both sides.

After correspondence and the submission of certificates from Dutch and Italian doctors the complainant applied again in a letter of 7 March for permission to take sick leave in Italy. By a letter of 9 March 1990 his supervisor

agreed.

In a letter of 8 May 1990 and a reminder of 25 May a personnel officer asked him to say when he intended to come back to work; since his own doctor's certificate of 17 March 1990 had prescribed only some 60 days' rest, he was to resume duty forthwith or else have a check-up at The Hague.

In a telefax message of 30 May his doctor stated that he needed another 90 days' sick leave. In a letter of 5 June he offered to undergo medical examination at The Hague and enclosed two certificates dated March 1990 from Italian doctors. On 6 June the Head of the Bureau of Personnel ordered him to report for duty without delay and let a doctor of the EPO's choosing examine him. He had already written a letter on 5 June, and in a letter of 22 June in reply the Head of the Bureau of Personnel cited the provisions on sick leave in Article 62 of the Service Regulations; the Office was, he said, entitled to determine by consulting a doctor of its own choosing whether an employee's sick leave was warranted; in any event an employee might take sick leave outside his place of residence only if the President had given him permission; under the circumstances the Office had to regard the complainant's absence as unauthorised.

In a telefax of 28 June the complainant objected to that construction of the Regulations though he said he was still willing to let the EPO's doctor examine him. The EPO's medical officer did examine him on 11 July, said that the climate at The Hague was bad for his health and extended his sick leave without objecting to his going to Italy.

On the same day the Head of the Bureau of Personnel saw him and told him he was to be transferred to Berlin as from 1 September 1990. His answer was that he could accept transfer only as from 1 January 1992.

In a letter of 23 August 1990 the Vice-President informed him of the decision to transfer him to the EPO's sub-office in Berlin, where the climate was different, as from 1 November 1990. In his reply of 7 September the complainant said he had lodged two internal appeals on 10 August. In one, 33/90, he claimed material and moral damages and the Organisation's assistance under Article 28 of the Service Regulations in establishing the personal liability of five EPO officials, including the Vice-President, for victimising him. In the other appeal, 34/90, he set out his grievances in much the same terms and asked for disciplinary action against the five officials.

After getting a certificate dated 20 August from the complainant's doctor, who extended his treatment until 30 November, the EPO turned for a second opinion to a medical consultant of the European Space Agency, who in a letter of 28 August certified him physically fit for duty.

In a letter of 17 October he accepted transfer to Berlin as from 1 November 1990. In a registered letter dated 8 November an administrative officer in the Berlin sub-office pointed out to him that Article 62(6) of the Service Regulations limited the amount of paid sick leave within any three consecutive years to 12 months and observed that he would reach that total on 13 November 1990. The letter went on to explain that according to Article 62(7) if after using up his sick leave entitlement an employee was not yet fit for work the Invalidity Committee might extend it if need be; during the extension the employee forfeited advancement, annual leave and home leave and drew half the basic salary he had been getting on expiry of the maximum period of sick leave.

Having got a telegram and a letter dated 19 December ordering him to report for work in Berlin on 27 December, he sent a telefax message on 25 December saying that he did not feel up to it. In a letter of 17 January 1991 the Director of the Berlin sub-office warned him that his unauthorised absence would be subtracted from his annual leave credit and when that ran out his pay would be suspended, whatever disciplinary action might be taken. In a letter of 18 February the Director told him that his pay was being suspended as from 6 February.

On 27 January he had filed a third internal appeal, 7/91, against his transfer to Berlin. In a letter of 13 March he lodged a fourth appeal, 8/91, against the withholding of the installation allowance he claimed he was entitled to from the date of transfer.

In a letter of 8 April 1991 the Principal Director of Personnel told him that since the Invalidity Committee had found him to be permanently and totally disabled the President had decided to relieve him of duty and grant him an invalidity pension under Article 54(2) of the Service Regulations as from 1 April 1991. He thereupon filed a fifth internal appeal, 31/91, claiming arrears of pay and compensation for the injury allegedly inflicted on him during the period of his illness.

In a letter of 5 December 1991 the Principal Director of Personnel notified to him the President's decision to reject

all five of his appeals on the Appeals Committee's unanimous recommendation. That is the decision he is impugning.

B. The complainant submits that the EPO wanted to get rid of him because his staff union work had lowered his output.

The EPO's treatment of him after his health failed was unfeeling: it tried to get him to resign or take unpaid leave. He denies citing Article 11 of the Pension Scheme Regulations and asking for a permanent assignment in Italy; he merely offered the EPO his help in issuing information about patents while he was under treatment there. The confidential note of 27 February 1990 from the Head of the Bureau of Personnel shows the EPO's arbitrary handling of his case. It offered him only three options: resigning after he came back from sick leave, accepting transfer to Munich or Berlin, and leaving with a termination indemnity under Article 53(1), (3) and (4).

He supplied several medical certificates and submitted to examinations by doctors of the EPO's own choosing whenever it asked him to. Its harassment of him further damaged his health.

He asks for disclosure of all his staff reports and of the Invalidity Committee's report.

He claims (a) disciplinary action within the meaning of Article 93 of the Service Regulations against five EPO officials, namely his supervisors and the personnel officers who handled his case; (b) damages under Article 28 of the Service Regulations in the form of the lump-sum equivalent of a monthly income of 6,884.44 Deutschmarks for life; (c) moral damages; (d) the quashing of his transfer to Berlin; (e) installation allowance; (f) payment of interest at the rate of 11 per cent a year on his arrears of pay from December 1990 to April 1991; (g) fair compensation for annual leave not taken in 1990 and 1991; and (h) costs.

C. In its reply the EPO submits that the complainant's professional shortcomings and his staff union activity are irrelevant to the dispute and that the doctors blamed his ailments on the climate in the Netherlands, not on overwork.

The Organisation is entitled to examine an employee and check that sick leave is warranted, especially when allowing him to take it away from his duty station. The European Space Agency's medical consultant at Frascati, in Italy, whom the EPO had chosen, examined the complainant on 28 September 1990 in the presence of his own doctor, had him go into hospital just long enough to undergo clinical tests and certified him fit for work in a letter of 28 November 1990.

What prompted his transfer to Berlin under Article 12(2) of the Service Regulations was a desire to remove him from the effects of the climate at The Hague, which all the medical certificates blamed for his condition, and let him go on working. He had already turned down transfer to Munich in 1983 on personal grounds.

As to the injury he alleges, he was granted, on top of an invalidity pension of some 7,500 Deutschmarks a month, a lump sum under Article 84 worth two-and-three-quarter times his yearly basic salary. He also continues to get the family allowances he was entitled to as a serving official.

His claim to disciplinary action against the officials who handled his case is irreceivable insofar as it does not challenge any decision by the President. Besides, his charges against them are groundless: they were at pains to find a solution, talked over with him the possibility of special leave or an award of severance grant before he had completed ten years' service, and let him go to Italy for treatment during his long periods of sick leave.

Although his doctor prescribed 45 days' sick leave on 30 November 1990, the medical officer's certificate of 28 November declared him fit to return to work. So the Organisation had good reason to order him back on 27 December and to punish his absence by suspending his pay in keeping with Article 95 of the Service Regulations.

His transfer to Berlin was notified to him in a letter of 23 August 1990 which he received on 7 September; so he had until 7 December 1990 to file an appeal. Since he did not do so until 27 January 1991 his claim to the quashing of the transfer is irreceivable.

His claim to installation allowance is devoid of merit. Article 73(2) of the Regulations says that the allowance shall be payable "from the permanent employee's date of entry into service with the Office or of his transfer from one place of employment to another". On his own admission he never had any intention of working in Berlin.

Lastly, the EPO says it has made over the suspended salary payments and will promptly inform the Tribunal of its decision on his claim to interest thereon. He was to receive with his payment of pension for August 1992 compensation for the accrued six-and-a-half days' annual leave.

D. In his rejoinder the complainant maintains that his staff union work aroused the EPO's hostility. It victimised him to the point of persecution. It took two months to agree to let him go to Italy for treatment, and in the meantime his disease reached his central nervous system; it suspended various entitlements; it made him pay for trips out of his own pocket to undergo medical examinations; it threatened disciplinary action; it withheld education allowances for his three children; it ordered his transfer to Berlin while he was on sick leave; and the President of the Office refused by implication to discipline the officials who were persecuting him. He seeks disclosure of the Invalidity Committee's report to establish their liability.

He challenges the diagnosis by the doctor from the European Space Agency: why should it carry greater weight than the opinions of the doctors he himself had seen?

He founds his claim to installation allowance on Article 73(2) of the Regulations, which says that it is due on the date of "transfer from one place of employment to another". The EPO made him open a bank account in Berlin for which he had to bear the cost. It has not paid him education allowances for his three children since January 1991.

E. In its surrejoinder the Organisation says that during a strike of EPO employees the complainant made remarks that were in breach of his duty of discretion and such as to alarm applicants for patents and he accused three member States with representatives on the Administrative Council of blocking negotiations between staff and management.

Since he had earlier refused transfer to Munich the EPO had no choice but to assign him to its sub-office in Berlin, where he would not only be removed from the harmful effects of the climate but be able to carry on his work and staff union activities. But he never took up duty there and his only two appearances there were before the Invalidity Committee, in March 1991. So he does not qualify for installation allowance.

Several times he failed to submit a timely medical certificate to cover absence from work. So the Organisation had to order him either to report for duty or undergo a check-up. As the maximum period of sick leave was to run out on 13 November 1990 it asked him on 8 November to name a doctor to sit on the Invalidity Committee. He did not demur at the time. The Organisation has paid him salary and compensation for annual leave which he had not taken.

CONSIDERATIONS:

1. The complainant joined the EPO on 7 January 1980 as an examiner in Directorate-General 1 (DG1) at The Hague.

From 1988 his health so declined that he applied for several periods of sick leave to follow treatment in Italy, his own country. He had his sick leave extended on 11 July 1990 for the last time after a check-up by the EPO's medical officer. On 23 August 1990 the Vice-President of DG1 informed him of a decision to transfer him to the Organisation's suboffice in Berlin as from 1 November 1990. But he thereupon produced a certificate dated 20 August from his own doctor saying that he must stay off work until 30 November 1990 to undergo the tests that the decline in his health required.

On 10 August 1990 he had filed two internal appeals, one dated 8 August and numbered 33/90 the other dated 9 August and numbered 34/90, which he based on Articles 28 and 93 of the Service Regulations. He asked the Organisation in 33/90 for assistance in suing his supervisors and in 34/90 for an award of compensation for physical and moral injury and for the disciplining of his supervisors. On 7 September the President of the Office rejected both appeals and referred them to the Appeals Committee.

On 17 October the complainant told the EPO that he would go to Berlin but was not yet well enough to take up duty there. He had a check-up by another doctor on 28 September 1990 and on the strength of the findings of later tests the doctor appointed by the EPO for the purpose declared on 28 November that he was physically fit to go back to work. The Organisation therefore ordered him back to work on 27 December 1990 and when he refused decided on 17 January 1991 to suspend his pay for dereliction of duty.

On 27 January 1991 he filed a third appeal, 7/91, against the decision of 23 August 1990 to transfer him to Berlin. The President rejected it on 28 February 1991 and referred it to the Appeals Committee.

On 28 January 1991 the complainant claimed payment of installation allowance. Having got no answer, he filed another appeal on 13 March 1991, 8/91, and appealed to the Appeals Committee against the implied rejection of it.

Lastly, on 24 May 1991 he filed yet another appeal, 31/91, against the decision of 17 January 1991 to suspend his pay and claimed payment of interest, compensation for financial injury and compensation for wrongful debiting of his yearly leave entitlement. The EPO rejected that appeal on 10 June 1991 and referred it too to the Appeals Committee.

On 8 November 1991 the Committee took up the five appeals and recommended rejecting them, though it suggested checking all the payments made to the complainant by way of salary and under other heads. By a decision of 5 December 1991, the one now impugned, the President endorsed the Committee's recommendation.

Since the impugned decision rejects all five appeals, the Tribunal will take up the merits of each in turn.

Appeals 33/90 and 34/90

2. The complainant is asking the Tribunal, as to appeals 33/90 and 34/90, to order the EPO to pay him in accordance with Article 28 of the Service Regulations the lump-sum equivalent of a monthly income of 6,884.44 for life in damages for the injury caused to him "by reason of his office or duties" and to discipline five senior officers under Article 93.

3. The Organisation submits, as to the claim that formed the subject of appeal 33/90, the appeal did not, as according to Article 107 of the Service Regulations it ought, challenge a prior individual decision and was irreceivable. The present claim, too, is therefore irreceivable.

4. That plea is upheld. According to Article 106(2) of the Service Regulations a permanent employee may submit to the appointing authority a request that it take a decision relating to him, and according to Article 107(1) he may lodge an internal appeal against an act "adversely affecting" him. It is plain on the evidence that appeal 33/90 did not challenge a prior act adversely affecting the complainant. So the Appeals Committee was right in holding the appeal to be irreceivable and the President was right in endorsing that view.

It is irreceivable for another reason. In his internal appeal the complainant pleaded the liability of his five supervisors and asked for the EPO's assistance, whereas in his complaint he alleges that the Organisation itself is directly liable. On that score too he has failed to exhaust the internal means of redress.

5. Appeal 34/90 is irreceivable as well under Articles 106 and 107 since, like 33/90, it did not challenge any decision adversely affecting the complainant.

He does make out in his rejoinder that by objecting in appeal 34/90 to mistreatment at the hands of several EPO officers he was challenging an implied decision by the President not to discipline them, as was his duty as executive head of the Organisation. But according to Article 106 and the rules of procedure of national and international administrative tribunals rejection may be inferred only when an organisation neglects to answer a prior written claim.

There was no such prior claim in this instance. Although the complainant sees such claim in his letter of 7 March 1990, the wording shows that that letter is irrelevant to appeals 33/90 and 34/90 and its purpose was not to secure a decision within the meaning of Article 106.

6. Since appeals 33/90 and 34/90 were irreceivable the claims based thereon are irreceivable too under Article VII(1) of the Tribunal's Statute because the complainant has failed to exhaust the internal means of redress.

Appeal 7/91

7. In appeal 7/91 the complainant sought the quashing of the EPO's decision of 23 August 1990 to transfer him to its sub-office in Berlin as from 1 November 1990.

The EPO contends that the appeal was irreceivable. In its submission not until 27 January 1991 did he appeal against the decision of 23 August 1990, although he might be deemed to have known of it by 7 September 1990, when he reacted to the news and there began the three-month time limit set in Article 108(2) of the Service Regulations for appeal.

In answer the complainant puts forward two pleas. One is that his letter of 7 September 1990 was his internal appeal against transfer. But that is not borne out by its wording: it purports merely "to point out a few facts that appear not to have been correctly recorded at the time of our interview" and that, having been "duly anticipated by my internal appeals sent by registered mail on August 20th, 1990", should be "added as additional evidence to the appeals".

His second plea is, it seems, to attribute his long delay in acting to the state of his health: he was much worse after 20 August 1990 and did not get better until January 1991. He makes out that appeal 7/91 should therefore be treated as receivable.

His argument fails because the time limit of three months, like any time limit, is an objective one in character and ordinarily allows of no extension. Besides, what he says about his health is the less cogent because on 7 September 1990 he was able to write properly to the Vice-President and on 28 November the doctor who had examined him on 28 September declared him fit to go back to work. So he was well enough at the time to file his internal appeal by the deadline.

8. Since appeal 7/91 was irreceivable the related claim in the present complaint must again fail.

Appeal 8/91

9. The complainant's claim to installation allowance under Article 73 of the Service Regulations formed the subject of appeal 8/91 and does not raise the same issue of receivability as did the earlier claims.

In reply the EPO quotes the passage in 73(2) which says that "the installation allowance shall be payable from the permanent employee's date of entry into service with the Office or of his transfer from one place of employment to another". In the Organisation's submission that means the date of recruitment or the date of actual transfer: Article 73 merely prescribes the entitlement to the allowance without going into the conditions for acquiring entitlement.

10. In any event the claim discloses no cause of action since the complainant never took up his post in Berlin and indeed in appeal 7/91 challenged the transfer. He may not properly claim an allowance on account of transfer when he had no intention of complying. Under this head too the complaint must fail.

Appeal 31/91

11. In appeal 31/91 the complainant claimed interest on his arrears of pay from December 1990 to April 1991, to be reckoned from the due date to the actual date of payment, and fair compensation for the annual leave he had not taken in 1990 and 1991.

12. The Organisation does not object in principle to the payment of the interest but says it merely wants to check the reckoning and will submit its decision on the matter to the Tribunal as soon as it can.

The Tribunal records that statement on the understanding that the interest must cover the full period of suspension up to the date of payment.

13. As to the claim to compensation for annual leave, the Organisation states that it has already carried out the exercise. If by the date of this judgment the Organisation has not settled the complainant's entitlement it must do so without delay.

The complainant's other claims

14. The complainant applies for disclosure of staff reports, so as to shed light on the Organisation's policy of traducing him, and of the Invalidity Committee's report.

15. Those applications fail because they have a direct bearing on the claims which were made in appeals 33/90,

34/90 and 7/91 and which for the reasons set out in 4, 5 and 7 above are irreceivable.

16. The admission of some of the claims made in appeal 31/91 warrants an award towards costs.

DECISION:

For the above reasons,

1. The Organisation shall, in accordance with 12 above, pay the complainant interest at the rate of 10 per cent a year on the arrears of pay.

2. It shall pay him 500 Swiss francs towards costs.

3. All his other claims are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
Mella Carroll
E. Razafindralambo
A.B. Gardner

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