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

EIGHTY-THIRD SESSION

In re Cook (No. 7) and Rosé (No. 2)

Judgment 1664

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Steven Derek Cook and the second by Mr. Alain René Pierre Rosé against the European Patent Organisation (EPO) on 28 June 1996, the EPO's single reply of 30 October 1996, the complainants' joint rejoinder of 4 February 1997 and the Organisation's surrejoinder of 14 April 1997;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The European Patent Office, the EPO's secretariat, has for several years been an "observer" in the system of the coordinated European organisations[(1)]. The pay of the Office staff used to be adjusted by the EPO's Administrative Council, according to Article 64(6) of Service Regulations, on recommendations by the Coordinating Committee of Government Budget Experts of those organisations.

By decision No. CA/D 20/88 of 8 December 1988 the Council approved a procedure which it adapted from that of the coordinated organisations for adjusting the pay of the Office staff. Article 64(6) as amended by the Council says:

"The remuneration of the permanent employees shall be subject to periodic review. It shall be adjusted by the Administrative Council in accordance with a procedure adopted by that body, account being taken, so far as applicable to that procedure, of recommendations by the Co-ordinating Committee of Government Budget Experts."

The procedure of adjustment is based on two notions. One is the need to ensure parity of purchasing power in staff pay between EPO duty stations by applying international indices of prices and coefficients. The other notion, dubbed "parallelism", is that pay at the EPO should keep in line with pay in the main government departments of the seven member States that are taken for the sake of comparison. The percentage figure finally worked out is known as the "specific indicator". It is the weighted average of civil service pay in the seven countries and its purpose is to correct variations in the international price indices.

Article 3(3) of the procedure says that the "remuneration levels of civil servants in central government services ... are supplied by the relevant Member States' civil services". Between 1988 and 1992 some of the countries gave incomplete data on pay: information from France discounted bonuses paid to civil servants over and above basic salary and the United Kingdom left out merit increments. But the Office worked out the scales from the data it did have.

Article 13 of the procedure says:

"Should the information supplied by the civil services of the seven reference countries in accordance with Article 3 of the present procedure be corrected for a given country with retroactive effect after having been forwarded to the Office, the President shall, with the agreement of the independent experts referred to in Article 1(3) modify, as appropriate, the salary scales in force, which he will submit to the next meeting of the Administrative Council for approval.

This adjustment will take effect on 1 July of the year for which it has been decided."

In 1993 the French civil service forwarded to the Office its salary scales in force at 1 July 1992 and at 1 July

1993. This time it included the bonuses. Also in 1993 the British sent the Office fuller information on salaries for the period from 1 July 1992 to 30 June 1993. Both sets of data were forwarded to the European Patent Office.

On 9 December 1993 the Administrative Council decided on the President's proposal to "adjust as from 1 July 1993 the salaries and other components of the remuneration of the staff of the Office" on the strength of all the data it had.

The complainants are employed at the EPO's Directorate-General 1 (DG1) at The Hague. On 25 February 1994 Mr. Rosé and on 10 March Mr. Cook wrote to the President objecting to their salary slips for December 1993. They challenged the reckoning of the specific indicator "particularly as regards the counting of bonuses in some countries, which has a bearing on the specific indicator applying at 1 July 1993 but also for the previous years". They asked the President to correct the salary scales in force since 1 July 1993 and, if need be, for the two previous years as well and, should he refuse, to treat their letters as appeals. The matter went to the Appeals Committee. In its report of 15 November 1995 the Committee pointed out that Article 13 of the procedure allowed retroactive adjustment and that "corrected" figures were available for 1992. It recommended allowing the appeals and taking those data into account as from 1 July 1992. By a staff circular of 2 April 1996 the Vice-President of Directorate-General 4 announced that the appeals were rejected.

B. The complainants argue that the Organisation committed a breach of Article 64(6) of the Service Regulations. In their submission all the conditions for applying that rule were met, and the refusal to do so was a departure from the procedure the EPO had itself brought in on 8 December 1988 and an offence against "parallelism". That way lay arbitrariness.

The complainants further plead breach of their rightful expectations. The staff were, they say, entitled to continuance of the same method of adjustment as part of their right to the objective and stable reckoning of pay. Besides, the Organisation owes them a duty of care and so ought to have sought more information from the two governments and taken account thereof.

They ask the Tribunal to quash the decision of 2 April 1996; order the EPO to grant them as from 1 July 1992 another adjustment of pay based on a new reckoning of the specific indicator at that date with due regard to the further information from France and the United Kingdom; and to pay them interest at the rate of 10 per cent a year on the amounts wrongfully withheld. They seek costs.

C. The EPO replies that the complaints are irreceivable insofar as they challenge the lawfulness of the specific indicator as at 1 July 1992 and the pay scales applying at that date. The Council's decision of 9 December 1993 did not provide for the payment of arrears for the previous years. It therefore merely confirmed its decisions setting pay scales for those years in disregard of the missing data. The complainants failed at the time to challenge the pay slips reflecting those scales.

The Organisation submits on the merits that it did take account of the further information from France and the United Kingdom in 1993 when it set the pay scales for 1 July 1993. As to the earlier scales, although Article 13 of the procedure allows retroactive correction, there will be none unless there has been some error. Here there was none. Although the two governments originally took the view that the further information was not generally applicable to their civil servants, yet changed their minds in 1993, they did not thereby admit to any error.

The complainants' plea about breach of parallelism is mistaken. The Organisation has consistently applied the procedure it adopted in 1988 on the strength of the available data. It also did its utmost to get the information that the governments would not supply.

D. In their rejoinder the complainants explain that they are not questioning the lawfulness of the specific indicator applied as at 1 July 1993. They challenge the Organisation's objection to the receivability of their main claim and press their pleas on the merits.

In their submission the breach of parallelism is beyond dispute. The information provided by the French Government in 1992 and 1993 on pay at 1 July 1992 was inconsistent: yet the EPO used it. The breach is

evident too from comparison of the specific indicator with the British data. The idea of "error" is not in Article 13, which comes into play whenever there is "information ... corrected". The EPO was in bad faith: though it refused to take account of the further data for 1992 its earlier attempts to get them show that it knew full well it could not ensure parallelism on the strength of the information it did have.

E. In its surrejoinder the Organisation maintains that the complainants are treating the further data for 1992 as correction for that year whereas the purpose was to use them in reckoning the 1993 adjustment by comparing the two years. Article 13 does contain the notion of error, which is implied in the word "corrected".

CONSIDERATIONS

1. Until 1 July 1988 pay at the EPO was aligned with pay in the "coordinated" organisations, which regularly reviewed and adapted it.

The EPO felt that that system did not wholly meet its own needs. So in 1988 it brought in a method of adjustment which took the co-ordinated organisations' own figures but adapted them for its own purposes. Its Administrative Council accordingly amended Article 64(6) of the Service Regulations and on 8 December 1988 took a decision of which the text is headed "Procedure adapted from that of 159th and 212th reports of the Co-ordinating Committee of Government Budget Experts for adjusting the remuneration of permanent employees of the European Patent Office".

The new procedure has two aims. One is to ensure "parallelism" in pay between the EPO and the civil services of seven countries that are taken for the sake of comparison. The other is to maintain equality in the purchasing power of pay between EPO duty stations. Pay at each duty station is adjusted to the local cost of living subject to application of a "specific indicator". The cost of living is taken from international price indices, and coefficients ensure parity of purchasing power from one duty station to another. Indices and coefficients alike come from a unit set up by the coordinated organisations and known as the "Inter-Organisations Study Section on Salaries and Prices". But the indicator is worked out from data on net pay that come from government departments of the seven countries. The procedure explains how to reckon the indicator.

Article 3(3) says:

"Remuneration levels of civil servants in central government services ... are supplied by the relevant Member States' civil services ..."

and Article 13:

"Should the information supplied by the civil services of the seven reference countries in accordance with Article 3 of the present procedure be corrected for a given country with retroactive effect after having been forwarded to the Office, the President shall, with the agreement of the independent experts referred to in Article 1(3), modify, as appropriate, the salary scales in force, which he will submit to the next meeting of the Administrative Council for approval.

The adjustment will take effect on 1 July of the year for which it has been decided."

2. From 1988 until 1992 there was difficulty over the figures from France, which left out bonuses, and from the United Kingdom, which omitted merit increments.

In adjusting pay as at 1 July 1989 bonuses were discounted. The reasons were stated in a note of 14 September 1989 from the Remuneration Working Group (GTR) to the President of the Office:

"The GTR noted that the payment of category bonuses in national civil services to satisfy national pay claims created problems in establishing the exact level of national remuneration. The bonuses are not included in remuneration and so are not taken into account in the procedure. Given the extent to which bonuses are applied in certain countries (France, for example) the GTR will continue examining the matter and if appropriate, propose a way of taking them into account."

The same decision was taken on the adjustments as at 1 July 1990 and 1 July 1991.

For the adjustment as at 1 July 1992 the EPO again failed to get data on bonuses and merit increments. So it worked out the indicator on the strength of the data actually supplied, i.e. discounting French bonuses and

British increments.

The staff representatives, some of whom were on the Remuneration Working Group, were quite aware of that.

On 6 August the British and on 22 September 1993 the French let the EPO have the information it had asked for on bonuses and increments to reckon pay as at 1 July 1992 and 1 July 1993.

On 9 December 1993 the Council approved a proposal from the President on the setting of pay as at 1 July 1993. The new figures took account of the further data from the two governments but there was no revision of the scales for the year before under Article 13 of the procedure.

In letters of 25 February and 10 March 1994 to the President the complainants challenged their pay slips for December 1993 on the grounds that the Organisation had failed to apply Article 13.

Their appeals went to the Appeals Committee, and on 15 November 1995 the Committee recommended allowing them. But the President rejected them on 2 April 1996.

Receivability

3. The one issue is whether under Article 13 the further information from France and the United Kingdom ought to have been taken into account retroactively as from 1 July 1992. The reckoning of the new indicator applied as at 1 July 1993 is not under challenge.

4. The Organisation argues that the internal appeals were and that the complaints are irreceivable. In its submission the complainants knew at the time of the previous adjustment that the British and French data were incomplete. Had they wished to challenge that adjustment they could and should have done so at the time and within the prescribed time limits. Their right to do so has lapsed.

A staff member has two quite distinct rights. When a decision adversely affecting him is taken, he may challenge it within the time limits on the grounds of breach of his rights. But if grounds later emerge for review he may object to any new decision, or to the lack of one, within the time limits and again on the grounds of breach of his rights.

(a) The complainants are exercising only the second of those rights. So their appeals and their complaints were timely. Whether the requirements for review are met is, however, a substantive issue.

The Organisation cites Judgment 575 (*in re* Schulz). In that case the complainant was challenging her grading after expiry of the time limit on the grounds that only then had she realised she was being discriminated against. Although the complaint was held to be out of time, there was no question of any right to review or any right to appeal against a decision on review. So the precedent is irrelevant.

If they do have such a right under Article 13 the complainants are not in bad faith in asserting it simply for having failed at the time to impugn the application of the specific indicator as at 1 July 1992. It was not clear how an appeal against the salary adjustment might fare. The Organisation itself admits in its surrejoinder that it had then only the official information from governments to go on. So it was reasonable, since Article 13 allows for review, for the complainants not to make a move until the data were complete.

On that score appeals and complaints are alike receivable.

(b) Insofar as the complaints are also challenging the decision setting the specific indicator, the issue of receivability is taken up in 7 below.

The merits

5. Are the staff entitled to an upward adjustment in pay for the year prior to the introduction of the new scale? The complainants submit that had the Organisation had in time full figures of pay from France and the United Kingdom it would have put up the pay of its own staff earlier.

What, then, does Article 13 require?

The complainants contend that the further information entailed "correcting" the earlier figures so as to give everyone higher pay; the EPO conceded as much when it set the indicator as at 1 July 1993, and indeed earlier by its very insistence on getting the information; and it has already applied Article 13 in like circumstances.

The Organisation demurs. In its submission the information was not "corrected" but simply supplemented on certain matters. And, since the then method of reckoning the indicator as at 1 July in each of the years from 1989 to 1992 discounted the missing information, those matters were not decisive in applying the method. According to that method the new British and French information called for no change in the figures; so the original data were not "corrected" within the meaning of Article 13. If it is the choice of that method that the complainants are objecting to they should have appealed when it was applied so as to set the indicator for 1 July 1992. Since they failed to do so in time they have forfeited the right of appeal. Moreover, the former instances of application of article 13 may be distinguished.

6. Where the pay of international civil servants is adjusted to the cost of living or to pay in national civil services the Tribunal has in several judgments determined whether a revised method should apply retroactively to a period for which there had already been a final decision on adjustment. It has held that, even if the new method might make for nicer or fairer adjustment, the earlier decision must still stand. It is neither necessary nor reasonable to require retroactive application of the revised method: see Judgments 1457 (*in re* Di Palma and others), 1458 (*in re* Damond, Pautasso and Royles), 1459 (*in re* Hoebreck and others), 1460 (*in re* Derqué and others), 1603 (*in re* Bensoussan and others), 1604 (*in re* Damond No. 2 and others) and 1605 (*in re* Heitz No. 3). The Tribunal will follow those precedents, which rest on the precepts that a decision that has not been impugned in time holds good, and that relations between organisation and employee must be stable in law.

Here the EPO revised the method when it set the indicator as at 1 July 1993. It then took account of the French bonuses and British merit increments, whereas it had thitherto discounted them. So according to the old method the further information had no effect on the outcome and called for no "correction" of the indicator under Article 13. In other words, as is customary on review, Article 13 applies only where some error of fact is discovered, not where a mistake of law is alleged to have tainted the earlier decision. The complainants' case posits a mistake of law by the EPO in discounting the bonuses and merit increments. That is just what affords no grounds for review.

To be sure, the complainants are making the fairly plausible assumption that, had the Organisation known at the outset what the bonuses and increments amounted to, it would then have altered accordingly the method of reckoning the indicator, as indeed it did as from July 1993. But a plausible assumption cannot displace strict application of the rules. Else the stability of the Organisation's relations with its employees would be at risk in that commonsense decisions taken for want of full data might be belatedly challenged on the grounds that things had since become clearer in fact or even in law. Musing about what the Organisation might have done had it had fuller data is unreliable. The defendant says that one reason why it waived any increase due from counting of the bonuses and increments was that pay might otherwise have proved too high as against national civil services; so it might then have had to consider a revision, and that would have been awkward once the increase had gone through.

The complainants cite earlier cases in which the EPO did apply Article 13. But none of them is comparable: it never resorted to Article 13 to amend retroactively a rule of the adjustment procedure.

The conclusion is that the plea of breach of the article cannot be sustained.

7. If the complainants meant to challenge the indicator that came into effect on 1 July 1992 they should have impugned the first pay slips they got thereafter and thereby the indicator itself which -- or so they argue -- caused them injury by denying an increase in pay.

They made no such appeal in time.

They plead that only later did they discover how far the French bonuses and British increments went. May a

staff member who discovers grounds for appeal after expiry of the time limit expect an extension of the time limit, or does the discovery set off a new one? Those questions are immaterial here. In any event there could be a new time limit only if the staff member had been unable to act wittingly in time. Here the complainants had enough information to enable them to appeal in time since they knew all along that France and the United Kingdom paid their civil servants bonuses and increments that the EPO had discounted in working out the indicator. The staff could have lodged timely appeals and complaints.

The appeals and complaints are irreceivable on that score.

8. Lastly, the complainants plead breach of "parallelism" and of their rightful expectations.

Those pleas go to the decision to discount the British and French increments, viz. the setting of the indicator as at 1 July 1992. The principles they are relying on are irrelevant both to the construction of Article 13 and to the receivability of their belated appeals and complaints against that decision.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
E. Razafindralambo
Egli
A.B. Gardner

1. The system includes the North Atlantic Treaty Orgnization (NATO), the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

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