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

**NINETY-FIFTH SESSION**

**Judgment No. 2252**

The Administrative Tribunal,

Considering the sixth complaint filed by Mr A.R.P. R. against the European Patent Organisation (EPO) on 28 March 2002 and corrected on 9 August, the Organisation's reply of 5 November 2002, the complainant's rejoinder of 11 February 2003 and the EPO's surrejoinder of 22 April 2003;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1960, works at Directorate-General 1 of the European Patent Office, the EPO's secretariat, in The Hague.

The procedure for adjusting the remuneration of permanent employees of the Office is set out in the Implementing Rule for Article 64 of the Service Regulations, on the determination of remuneration. According to that Rule, remuneration levels of the Office's staff are adjusted each year. With effect from 1 July of each year, the basic salary scales for Belgium are adjusted by an amount equal to the percentage change over the past 12 months in the international price index as calculated for Belgium. According to Article 4 of the Rule:

"To obtain the basic salary scales applicable on 1 July in a member state other than Belgium, the new basic salary scales applicable in Belgium are multiplied by the coefficient of purchasing power parity calculated with reference to Brussels so as to ensure equality of purchasing power among staff in the same grade and step."

Article 8 of the Rule states that:

"The international price index for Belgium [...] and the coefficients of purchasing power parity [...] are calculated by the Inter-Organisations Section in collaboration with the Statistical Office of the European Union in accordance with the methodology approved by the decision-making bodies of the Union after consulting the national statisticians."

One of the variables used to calculate the coefficients of purchasing power parity is rent levels in different duty stations. The parity between Amsterdam and Brussels is determined by the Statistical Office of the European Communities (Eurostat) and the parity between The Hague and Brussels by the Inter-Organisations Study Section on Salaries and Prices (IOS), a body set up by the Coordinated Organizations.[(1)] In 1998 the IOS introduced "institutional rents" in its calculations for The Hague, that is, the level of rent charged by institutional investors such as banks or insurance companies, with a weighting of 33 per cent, in agreement with the Netherlands Statistical Office (CBS). Eurostat gave institutional rents a weighting of 10 per cent in its calculations for Amsterdam. On 10 December 1998 the EPO's Administrative Council used these figures in its decision on the adjustment of salaries and other items of remuneration for staff members of the Office, with effect from 1 July 1998.

In this case, the complainant challenges the way purchasing power parity coefficients were calculated for the purposes of the salary adjustment effective on 1 July 1998 and, in particular, the calculation of the rent parity

between The Hague and Brussels. On 15 March 1999 he appealed to the President of the Office against his additional payslip of December 1998, which represented the first individual application of the above-mentioned decision by the Administrative Council. He argued that the effect of the decision had been "substantially to diminish" the remuneration to which he considered he was entitled and that the decision had been taken in breach of Articles 4 and 8 of the Implementing Rule for Article 64 of the Service Regulations, insofar as the methodology used by the IOS was different from that used by Eurostat. In its opinion of 10 December 2001 the Appeals Committee recommended that the President dismiss the appeal. By a letter dated 2 January 2002, which constitutes the impugned decision, the Director of Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to reject his appeal.

B. The complainant reiterates before the Tribunal that the provisions of Articles 4 and 8 of the Implementing Rule were breached, because the IOS did not use the methodology approved by the decision-making bodies of the European Union to calculate the purchasing power parity coefficient applicable to The Hague with effect from 1 July 1998. As Eurostat did in the case of Amsterdam, the IOS should have given institutional rents a weighting of 10 per cent in its calculations for The Hague. He accuses the IOS of having supplied "customised" figures for the EPO, a practice which the Tribunal condemned in its Judgment 1663. He considers that the fact that the Netherlands statisticians approved the methodology used by the IOS did not mean that it complied with that approved by the European Union. The decision to apply a much higher percentage than that used by the European Union was intended to hold back the salaries of Office staff serving in The Hague, although the cost of living is increasing there very noticeably. He also points out that there has been discrimination against such staff in comparison with certain officials of the European Union, also serving in The Hague, for whom the purchasing power parity coefficient of Amsterdam applies.

According to the complainant, the Organisation acted in breach of its duty of equity and loyalty towards its staff by adopting a method of calculation which did not comply with the adjustment procedure. In addition, by agreeing to apply the disputed purchasing power parity coefficient, the EPO abused its authority.

The complainant asks the Tribunal to annul the impugned decision and to apply all legal consequences of such annulment. He also seeks an award of costs.

C. The EPO replies that the impugned decision shows no flaw that would justify its annulment. It points out that the Tribunal has only a limited power of review over the lawfulness of the IOS' decision, especially since the remunerations adjustment procedure for 1998 has already been examined in detail by an independent group of experts, who expressly approved the inclusion of institutional rents in the calculations. Such inclusion was moreover entirely justified by the local rent structure. Furthermore, the weighting given to those rents is purely a question of statistics and cannot be challenged unless it appears clearly abusive. The 33 per cent weighting adopted by the IOS for The Hague was approved by the statistical office in the best position to do so, namely the Netherlands Statistical Office (CBS). The Organisation also points out that since there are no European Union or similar officials serving in Amsterdam, an Amsterdam/Brussels parity makes little sense in practice.

According to the EPO, the calculation of the purchasing power parity coefficient complied with the methodology approved by the decision-making bodies of the European Union. The provisions of Article 8 were duly applied. The complainant cannot deduce from that article that the IOS is under any obligation to use the same calculations as Eurostat for a given country. The IOS is guided not by the approach followed by Eurostat for a given town but only by its own observation of the local rental market and the need to adjust calculations and methodology accordingly. Under the terms of Article 4, such adjustment is necessary to ensure equality of purchasing power among staff. Since the statistics experts found in 1998 that rents in The Hague and in Amsterdam were not the same, dealing with the two cases differently was both legitimate and necessary. It is plain from the file that both the national statisticians and Eurostat considered it legitimate that the IOS should apply a different weighting to that chosen by Eurostat for Amsterdam.

The EPO says that it "scrupulously" followed all the stages of the remuneration adjustment procedure. It rejects the allegations regarding a breach of its duty of equity and loyalty, as well as that regarding abuse of authority.

D. In his rejoinder the complainant makes it clear that he is not casting doubt on the principle of taking institutional rents into account; he is only opposed to including them in an "abusive and illegal" proportion in the calculations carried out for 1998. He accuses the IOS and the EPO of having "cooperated" with the Netherlands statisticians to increase the share of institutional rents in the calculations disproportionately, against the wishes of Eurostat. He

again raises the issue of equal treatment between European Union staff serving in The Hague and Office staff. He contends that an Amsterdam/Brussels parity does make sense in practice.

E. In its surrejoinder the EPO submits that in general the accusations levelled against the Organisation, the IOS and the Netherlands statisticians are unfounded. It could not seriously be held that Eurostat would agree to a decision against its wishes. Moreover, there was no statutory provision nor any general principle of law that obliged the EPO to maintain so-called equal treatment between Office staff and European Union staff.

## CONSIDERATIONS

1. The complainant, a staff member of the European Patent Office serving in The Hague, challenged the amount of his salary adjustment at 1 July 1998 and particularly the way the coefficient of purchasing power parity between The Hague and Brussels had been calculated. In its assessment of rents for The Hague, the IOS, in addition to estate agency rents, took into consideration "institutional" rents, which apply to lodgings let - on terms which are more advantageous for tenants - by institutions such as banks or insurance companies, and introduced them in its calculations with a 33 per cent weighting. It is common ground that the choice of this proportion rests with the IOS alone. According to the complainant, EPO staff are, as a result, placed at a disadvantage compared with European Union staff, to whom the purchasing power parity coefficient for Amsterdam has been applied, owing to the fact that in making the latter calculation, Eurostat gave institutional rents a weighting of only 10 per cent.

Having exhausted the internal remedies without success, the complainant asks the Tribunal to set aside the decision by the President of the Office rejecting his appeal and, implicitly, to send the case back to the EPO. He contends that Articles 4 and 8 of the Implementing Rule for Article 64 of the Service Regulations have not been complied with and that he has been discriminated against.

The EPO calls for the complaint to be dismissed as unfounded.

In other respects, the parties' arguments are set out and examined below as necessary.

2. If the level of salary adjustments is set by a body external to an international organisation, the latter must ensure that the figures proposed comply with the law; whilst the figures supplied by that body cannot be challenged *per se*, staff members can appeal against the individual decisions that implement them and in so doing request a review of their legality; inasmuch as these decisions lie within the discretionary authority of the organisation, they cannot be reviewed by the Tribunal unless they show an error of fact or of law, overlook essential facts, show abuse of authority or draw clearly mistaken conclusions from the evidence (see Judgments 1000, 1265, 1356, 1419, 1498, 1499, 1519 and 1979).

3. Article 64(6) of the Service Regulations concerning the determination of remuneration states as follows:

"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."

Articles 4 and 8 of the Implementing Rule for Article 64 are cited under A.

As the Tribunal stated in its Judgment 1663, under 7, the periodic adjustment of salaries of Office staff serves two purposes: one is to make for equality of purchasing power by reference to trends in consumer prices; the other is to have "parallelism" in pay between the EPO and national civil services by applying a weighting factor known as the "specific indicator" so as to adjust upwards or downwards.

As in the cited precedent, the dispute in this case concerns only the method used to calculate the purchasing power parity coefficient, for which Brussels was taken as the reference city.

4. The gist of the complainant's argument is that, by introducing institutional rents with a 33 per cent weighting in its calculations for The Hague, whereas Eurostat had given them a 10 per cent weighting for Amsterdam, the IOS breached Article 8 of the Implementing Rule because it failed to follow the "methodology" adopted by Eurostat and

the European Union.

The EPO argues on the other hand that a distinction needs to be drawn between the "methodology" and the "weighting" of the specific elements used in applying that methodology. In this case, the inclusion of institutional rents was accepted by the European Union; the only difficulty lay in determining the situation of the rental market for the city of The Hague, which would mean subsequently adapting both calculations and methodology to those local conditions. By opting for a weighting of 33 per cent, the IOS, followed by the EPO, did not fail to apply the methodology, considering that differences had been noted between rents in The Hague and in Amsterdam.

This explanation rings true. A distinction does need to be drawn between the choice of methodology and its implementation. While the methodology defines which elements need to be taken into consideration, it is only in its implementation that the value of each individual element will be determined in practice.

In fact there is nothing to say that the Administrative Council, when it adopted Article 8 of the Implementing Rule, considered that for the same country not more than one purchasing power parity coefficient should be determined, regardless of the real state of the market at any given duty station. It follows that it was up to the IOS to determine the actual market conditions in The Hague, without being bound by what Eurostat decided for Amsterdam.

5. The complainant puts forward a number of arguments to show that the 33 per cent weighting is either abusive or inequitable. But not only does he fail to show that this rate did not reflect the actual state of the rental market in The Hague, he even gives some hints to the contrary; thus he mentions that the Netherlands statisticians were in favour of that rate and that, for 1999, the decision-making bodies of the European Union also chose the rate of 33 per cent for the city of Amsterdam.

The complainant suspects that the EPO and the IOS conspired to diminish the pay entitlements of officials serving in The Hague. This suspicion is not backed up by any cogent argument.

He points out that in its Judgment 1663 the Tribunal sanctioned the EPO for using figures supplied by the IOS. However, one need only refer to that judgment to realise that the problem dealt with there is not at all the same as the present one.

The complainant also considers that the impugned measure is arbitrary on the ground that, since the European Union adopted a rate of 33 per cent for Amsterdam for 1999, the situations in The Hague and in Amsterdam must already have been similar in 1998, which would have justified applying the rate of 10 per cent to The Hague for 1998 as the European Union had done for Amsterdam. The Tribunal cannot conclude from the above that in 1998 the lower rate of 10 per cent should have been applied for The Hague.

6. The complainant contends that he has been the victim of an inequitable and discriminatory measure and, in substance, of a breach of the principle of equal treatment.

(a) The principle of the right to equal treatment requires that situations which are the same or similar be governed by the same rules and that dissimilar situations be governed by rules that take account of the dissimilarity (see Judgments 347, under 4; 754, under 6; 1864, under 5; 1990, under 7; and 2194, under 6(a)). In general, this principle cannot prevail over the principle of legality, so that the Organisation cannot allow a complainant to benefit from an unlawful measure applied to another person.

In the case in hand, the authorities who decided the purchasing power parity coefficient for the European Union in Amsterdam and for the EPO in The Hague are not the same and are hierarchically independent. On that ground alone, the IOS and the EPO cannot be deemed to have breached the principle of equal treatment because they chose a rental weighting for The Hague which was different from that chosen for Amsterdam by the European Union.

Furthermore, it is far from established that the condition of the housing market was the same for the two cities concerned.

Lastly, as mentioned above, it is not established either that the estimate arrived at for The Hague is unlawful.

(b) It has also been explained that Article 8 of the Implementing Rule did not require that the EPO should opt for the same solution as the European Union for Amsterdam.

The correct application of the methodology provided for in that rule, which reflects the economic reality, cannot be held to be inequitable.

7. The complaint is unfounded in all respects and must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

*(Signed)*

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

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

Updated by PFR. Approved by CC. Last update: 23 July 2003.