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

FIFTY-THIRD ORDINARY SESSION

In re KERN

Judgment No. 616

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Gerbert Kern on 15 July 1983 and corrected on 19 August, the EPO's reply of 21 October, the complainant's rejoinder of 16 February 1984 and the EPO's surrejoinder of 19 April 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 63 and 65 and Title VIII of the Service Regulations for permanent employees of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant is an EPO staff member stationed in Munich. As is recounted in Judgment No. 566 under A, EPO staff in Munich refused to work on 21 September, 30 November and 2 December 1982. The complainant was off work on 30 November and 2 December. By a circular of 25 October the President of the Office had announced that salary deductions would be made according to the number of working days not worked in the month, and the complainant had his November salary docked by one twentieth, his December salary by one twenty-third. He was so informed on 26 January 1983, and on 30 March he appealed to the President under Article 107 of the Service Regulations on the grounds that his absence had been authorised. He asked for an inquiry into the facts and a statement of the grounds for the salary deductions. Many staff members had earlier lodged appeals against the method of calculating the deductions. The appeals went to the Appeals Committee, but five members had a personal interest and on 5 April its Chairman informed the President that for want of the quorum it could not meet. By a decision of 7 April, posted up on EPO premises in Munich on 12 April, the President rejected the appeals as unfounded. On 21 April the Principal Director of Personnel wrote the complainant a letter -- the impugned decision -- saying that that decision applied to him as to everyone else.

B. The complainant submits that the decision of 7 April 1983 on other appeals does not answer his own, which raised different issues of fact and law. He was denied a means of redress provided for in Title VIII of the Service Regulations because the Appeals Committee failed to hear his case. Since the decision of 26 January 1983 was a "decision adversely affecting" him within the meaning of Article 106(1) the grounds for it should have been stated. The EPO has not informed him of the legal basis for the salary deductions. The impugned decision rests on the mistaken view that the staff went on strike; on a proper interpretation of the facts he believes they did not. The senior officials approved of the staff's action, which was not intended to compel them -- the purpose of a strike -- to a different course. Most supervisors were off work and only a few high-ranking and security staff were required to work. Accordingly the staff's absence was not unauthorised within the meaning of Article 63 of the Service Regulations ("a permanent employee may not be absent with out Drior permission from his immediate superior") and so no salary deductions at all should have been made. Besides, even supposing their absence was unauthorised, Article 63 should have been applied, and the method of calculating the deductions from his salary was therefore wrong. He asks the Tribunal to set aside the impugned decision and order the EPO to pay him back in full the amounts deducted from his salary or, failing that, order the EPO to communicate to him, personally and directly, the grounds for the decision. He reaffirms the claims in his internal appeal. He seeks costs.

C. The EPO submits that the complaint is devoid of merit. The Appeals Committee could not be constituted, and the President had no choice but to take his decision without benefit of advice from the Committee. That the work stoppages were strikes is beyond doubt. No other staff member who brought an internal appeal or lodged a complaint with the Tribunal, nor any intervener, has ever denied being on strike. That the President required a few senior officials and security staff to work cannot be construed as authorisation of the work stoppage. The

complainant does not allege that he worked, or that he was on leave or on unauthorised absence: the only possible conclusion is that he was on strike. Since he was, the salary deductions were warranted. The method of calculating them was correct for the reasons the EPO has explained in other cases and which are summed up in Judgment No. 566 under C. As to the subsidiary claim, sufficient grounds were given for the impugned decision: the circumstances in which it was taken and the essential facts it was based on were notified to the complainant. The reason for the deductions and the method of calculating them were also explained in a notice attached to his salary notice.

D. In his rejoinder the complainant applies for oral proceedings, with the hearing of a witness, to shed light on issues raised in the reply. He develops his contention that there was no strike in the strict legal sense: there was, in his view, tacit but obvious "permission" for the work stoppages within the meaning of Article 63. Although the EPO has at last given the explanations he asked for, its attempt to justify the method of calculating the deductions is mistaken, as the Tribunal's ruling on earlier cases makes plain.

E. In its surrejoinder the EPO develops its pleas in the light of the rejoinder. No-one else has ever questioned the fact that the work stoppages were strikes. Had the President permitted the stoppages, he would not have had to require any staff to work; he would merely have excluded such staff from the permission.

CONSIDERATIONS:

1. The complainant, a staff member of the EPO, was absent from his usual place of work, together with other staff members, on 30 November and 2 December 1982. The EPO took the view that he had gone on strike and made deductions from his salary for his failure to work during the two days.

2. The complainant's main plea is that he was not on strike on 30 November and 2 December 1982, that his absence was proper and even authorised by his supervisors and that no deductions should have been made from his salary.

He submits that the work stoppages arose out of a difference of opinion between the members of the Administrative Council of the EPO; some of them wanted a policy of salary cuts, others thought it would bring the Organisation to a state of collapse. The staff were not really involved, he says, in the dispute: the stoppages were prompted, not by any body representing the staff, but by the Administration of the Office in a desire to thwart the will of one group of Council delegates.

He adds that, though not at work as usual on the two strike days, he still considered that, as the senior members of the Administration desired, he was on duty and at their disposal at all times.

3. The plea fails. Any concerted work stoppage amounts to a strike. Labour law does acknowledge other forms of collective stoppage, brought about by the employer. In a dispute with staff the employer may, for example, close down the workplace in a lockout or declare compulsory unemployment for a short while to get through a spell of financial stringency.

But such tactics are unknown in international organisations, and what happened in the EPO at the end of 1982 may not be taken as a precedent.

The stoppages were declared by the EPO Staff Union, which called on the staff not to work: there was a strike in the technical meaning of the term. Even on the unproven assumption that the Administration were not altogether opposed to the protest and indeed incited it, the nature of what happened would still be the same in law. A lockout presupposes a direct instruction or some other form of action by the competent authority to stop the staff from being at work, both in law and in fact.

4. When there is a strike and someone stays at home instead of going to work it would, to say the least, be an oddity to treat him as not having gone on strike on his mere assertion that he was at his supervisors' disposal. In fact the complainant was on strike on 30 November and 2 December 1982.

In keeping with the principles embodied in Article 63 of the EPO Service Regulations and the rule that payment is due only for services rendered, a staff member who goes on strike is not entitled to payment for the period of the work stoppage. The Tribunal rejects the complainant's principal claims.

5. The complainant submits that the impugned decision is not properly substantiated and that the grounds for it

ought in any event to have been notified to him personally.

The EPO retorts, quite correctly, that it did substantiate the decision on the complainant's case: it was notified to him together with all the essential facts which had prompted the EPO to take it. He was given a written explanation with the salary notice recording the deduction and thus had clear and sufficient indication of the reasons for the deductions and the method of calculating them.

6. The complainant states that he presses the claim, he put forward in his internal appeal. The EPO does not object, and the Tribunal accepts that his claims relating to the method of calculating the deductions are validly filed.

The claims are not only receivable but well-founded. The Tribunal refers to the judgment it delivered on 20 December 1983 on the similar complaints filed by Mr. Berte and Mr. Beslier and the judgment delivered at the present session on the complaints of Mr. Giroud and Mr. Beyer.

There being no need to allow the complainant's application for oral proceedings, the Tribunal will quash the impugned decision in so far as it made deductions from the complainant's remuneration on grounds of participation in strikes beyond the amounts authorised under Article 65 of the Service Regulations.

7. The complainant is awarded 1,000 Deutschmarks as costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside in so far as it deducts from the complainant's salary on account of the strikes sums in excess of those authorised under Article 65 of the Service Regulations.

2. The complainant is referred back to the EPO for calculation of the sums to be refunded.

3. The complainant shall be paid interest at 10 per cent a year on the sums wrongly withheld with effect from the date of payment of each corresponding monthly salary up to the date of repayment.

4. The complainant is awarded 1,000 DM as costs.

5. His other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

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