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

FIFTY-NINTH ORDINARY SESSION

In re GERMANO

Judgment No. 753

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alessandro Giovanni Martino Germano against the European Patent Organisation (EPO) on 9 September 1985 and corrected on 23 September, the EPO's reply of 20 December, the complainant's rejoinder of 7 February 1986 and the EPO's surrejoinder of 15 April 1986;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal and Articles 55, 57 and 108(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, an Italian, joined the EPO on 5 May 1980 and is a search examiner stationed at The Hague. Article 55(2) of the EPO Service Regulations provides that "the normal working week shall not exceed forty hours", and the complainant and other search examiners at The Hague do have a forty-hour week. Examiners who were once at the International Patent Institute, which was merged into the EPO under the Agreement of 1978 on integration, and whom the EPO continues to employ at The Hague, have a working week of only thirty-five hours. The complainant filed an internal appeal on 8 January 1985 seeking reduction of his working week to 35 hours or a corresponding increase in annual leave or in salary. Ten other search examiners filed similar appeals. In its report of 2 April the Appeals Committee recommended rejecting the appeals as time-barred and, subsidiarily, as devoid of merit. By a letter of 7 June 1985, which is the final decision impugned and was notified to the complainant on 17 June, the President of the Office endorsed the Committee's recommendation.

B. The complainant says that he is not challenging the President's right to require him and other examiners to work 40 hours a week, as Article 55 of the Service Regulations allows; but he is objecting to the President's exercise of his discretion in this instance on the grounds of breach of equality of treatment. Examiners recruited directly by the EPO and examiners transferred from the old Institute perform the same duties and should have the same working hours. Article 57 does allow overtime "in cases of urgency or exceptional pressure of work", but may be relied on only for short spells to warrant the difference in working hours between the two groups of officials. Besides, that difference should be reflected in different scales of pay. The complainant asks the Tribunal to order the EPO to reduce his working week from 40 to 35 hours or grant him a 14.29 per cent increase in pay or else compensatory annual leave.

C. The EPO submits in its reply that the complaint is irreceivable because the complainant failed to file his internal appeal within the three-month time limit set in Article 108(2) of the Service Regulations and so to exhaust the internal means of redress as required by Article VII(1) of the Statute of the Tribunal. When he joined the EPO at The Hague in May 1980 working hours were different for examiners transferred from the Institute and for examiners, like the complainant, who had been directly recruited. When he took up duty he must have been aware of the difference. Since it was the letter of appointment that determined his working hours and other terms of employment, by January 1985 it was far too late for him to appeal. Nor may he get round the time bar by pleading that he is challenging subsequent decisions on his monthly pay: he should have challenged the first of those decisions, the later one being merely confirmatory.

Subsidiarily, the EPO contends that the complaint is devoid of merit. There is no breach of equality because the two groups of officials at The Hague are not in the same position in fact and in law. In June 1981 the Administrative Council of the EPO, while refusing to cut the working week in general to 35 hours, endorsed the President's decision to allow the former Institute examiners to continue to work a 35-hour week (CA/35/81). The fact that they perform the same duties as others at The Hague is immaterial: their position in law is different. Nor is there

inequality between them and former Institute officials transferred to Munich, because the latter are no longer performing the duties of search examiners. Article 57 is irrelevant because the complainant is not working overtime but the 40-hour week authorised, as he acknowledges, under Article 55(2). His salary is not challengeable since it corresponds to the 40-hour week, which is the norm at the EPO, a 35-hour week being an exception made for only a few. The consequences of allowing the complaint would be financially serious for the whole Organisation.

D. The complainant submits in his rejoinder that his complaint is receivable: acting unlawfully for years cannot justify continuing to do so. As to the merits, he develops his pleas and seeks to refute those put forward in the reply. He adds that allowing the complaint would not have the serious financial consequences the EPO alleges since only the search examiners at The Hague would be entitled to the 35-hour week, not the whole staff, and relations between staff and management would improve to the EPO's own benefit.

E. In its surrejoinder the EPO submits that there is nothing in the rejoinder that casts any doubt on the cogency of its reply, and it observes that the complainant is basing his claims not on legal argument but on considerations of expediency, which the Tribunal is not competent to entertain.

CONSIDERATIONS:

Receivability

1. In its reply the EPO pleads that the internal appeal was irreceivable.

If the plea succeeds the complaint too will be irreceivable and the Tribunal need not rule on the merits.

According to Article VII(1) of the Statute of the Tribunal "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

If the complainant failed to exhaust the internal means of redress provided under the EPO Service Regulations his complaint will be irreceivable. And the internal means of redress will not have been exhausted if the internal appeal was lodged out of time.

The Tribunal will determine not only whether the complaint was filed within the time limit in VII(2) but also whether the internal appeal was in time, that being the criterion of exhaustion of the internal remedies in this case.

2. Since the President's decision of 7 June 1985 was notified to the complainant on 17 June, the complaint was filed within the time limit in VII(2).

But the decision rejected the complainant's and others' internal appeals as "clearly irreceivable": in its report of 2 April 1985 the Appeals Committee had taken the unanimous view that the appeals were irreceivable because the time limits in the Service Regulations had not been observed.

The complainant joined the EPO on 5 May 1980. At the time there were different working hours for new recruits and staff taken over from the old International Patent Institute.

If the complainant believed there to be breach of his rights under the Service Regulations and of the principle of equal treatment he should have lodged an internal appeal not later than three months after 5 May 1980 as required by Article 108(2). He failed to do so.

He might alternatively have challenged the earliest decision on his pay, which covered payment for the 40-hour week. There again, he failed to observe the time limit in Article 108. Though his pay has altered since, later monthly payments, like the first one, have been reckoned on the basis of the 40-hour week and therefore set off no new time limit for internal appeal.

Merits

3. The complaint being irreceivable, the Tribunal will not rule on the merits.

DECISION:

For the above reasons,

The complaint is 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 signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

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