

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

FIFTY-NINTH ORDINARY SESSION

In re ANDRES (Nos. 4 and 5) and CHAKI (No. 2)

Judgment No. 760

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Florian Andres against the European Patent Organisation (EPO) on 21 December 1984, as supplemented on 29 January 1985, the EPO's reply of 22 April, the complainant's rejoinder of 26 July and the EPO's surrejoinder of 11 October 1985;

Considering the fifth complaint filed by Mr. Andres against the EPO on 22 February 1985, the EPO's reply of 7 May, the complainant's rejoinder of 9 August and the EPO's surrejoinder of 28 October 1985;

Considering the second complaint filed by Mr. Victor Chaki against the EPO on 20 December 1984, the EPO's reply of 22 March 1985, the complainant's rejoinder of 10 October and the EPO's surrejoinder of 20 December 1985;

Considering the applications to intervene filed in Mr. Andres' fourth complaint by:

H. Andrä

R. Assogna

W. Ast

T. Bakker

J. Barthl

S. Barlett

A. Bauer

G. Beaven

S. Bergdahl

H. Berger

M. Bergzoll

M. Bichi

C. Biggio

A. Blondeau

C. Boletti

C. Bournot

L. Brighenti

B. Cannici

G. Carruthers

B. Cinquantini

A. Clelland

P. Clot

O. Consée

J. Coquelin

J. Courtens

S. Crane

M. Dancer

P. Fanti

W. Felgel-Farnholz

M. Ferranti

S. Flintoff

R. Gemmel

C. Gerardin

A. Goggins

P. Grasselli

J. Grötzinger

H. Guldner

F. Gumbel

P. Harkness

J. Harms

I. Harris

F. Heinlein

O. Henrikson

K. Hiltner

I. Holliday

A. Hunt

K. Jaik

B. Johansson

A. Kadavy

L. Karlsson
R. Keller
P. Kitzmantel
G. Knesch
R. Knöpfle
J. Kollar
B. Lefevre
D. Leipelt
P. Lesniak
R. Lettström
P. Lorenz
M. Marston
M. Mergoni
A. Metten
E. Militzer
E. Nilsson
R. O'Connell
U. Peters
P. Petti
I. Pielka
W. Piepenbrink
M. Prüssen
R. Rath
G. Raths
M. Rayner
N. Reeves
P. Rohr
H. Rudolph
M. Rugglu
H. Ruth
P. Sala

S. Sandri

K. Sarre

K. Schertler

T. Schibli

F. Schmidl

W. Seifridsberger

R. Spiegel

K. Stamm

W. Stöckle

W. Tatus

L. Tissot

G. Waern

G. Wassenaar

R. Weber

A. Wenzel

H. Wetzel

C. White

R. Zecha; Considering the application to intervene filed in Mr. Chaki's second complaint by Mr. André Metten;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles 64(6), 108 and 109(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 cases and the pleadings may be summed up as follows:

A. The system of adjusting staff pay in the EPO has been described in Judgment 624, under A. Article 7 of the rules appended to the 159th Report of the Co-ordinating Committee of Government Budget Experts of the Co-ordinated Organisations, which the EPO Council has approved, reads: "In the case of both annual and triennial reviews the basic salaries applicable in countries other than Belgium shall be obtained by multiplying the new basic salaries applicable to staff serving in Belgium by coefficients which ensure parity of purchasing power for all staff in the same grade and within-grade step". In June 1984 the Council examined proposals in the Co-ordinating Committee's 196th Report. By decision CA/D 2/84 of 8 June it approved, as from 1 July 1983, revised salary scales for EPO staff in exercise of its authority under Article 64(6) of the EPO Service Regulations. Article 2 of that decision approved paragraph 17 of the report, of which clause (a) invited the Council "to approve the new purchasing power parity applicable to Germany".

The correction of the factor of purchasing power parity to be applied to the salaries of staff in the Federal Republic of Germany was the outcome of a survey of consumer prices the Inter-Organisation Section of the Co-ordinating Committee had carried out at the end of January 1982. At the material time Mr. Andres and Mr. Chaki were members of the EPO staff stationed in Munich. Mr. Andres lodged an internal appeal under Article 108 of the

Service Regulations on 6 August 1984, and Mr. Chaki one on 7 September, challenging decision CA/D 2/84 on the grounds that the survey showed that since January 1982 the purchasing power of salaries of EPO staff stationed in the Federal Republic had been lower than that of salaries of EPO staff in other countries and that the correction should have been applied as from the end of January 1982, not as from 1 July 1983.

B. Mr. Andres submits that his complaints, both of which challenge the Council's decision, CA/D 2/84, are receivable. His fourth complaint is receivable because no decision was taken on his internal appeal within the time limit of two months and it is therefore deemed to be rejected in accordance with Article 109(2) of the Service Regulations.

As to his fifth complaint he contends that, although CA/D 2/84 is a general decision in that it applies to several categories of staff, it is also an individual one. He may therefore challenge it before the Tribunal, because it is complete in itself and leaves no discretion to the President of the Office to determine how it is to be applied to individual staff members. He believes that he has exhausted the internal means of redress because the Council held that no internal appeal would lie against decisions it took in the exercise of its law-making authority, and the secretary of the Council so informed him by a letter of 11 December 1984.

Mr. Chaki submits that his complaint is receivable under Article VII(3) of the Statute of the Tribunal because he has received no reply to his internal appeal.

As to the merits, the complainants observe that the survey established that the purchasing power of salaries of staff in the Federal Republic had been too low since the end of January 1982. To correct the factor of parity only as from 1 July 1983 was in breach of Article 7 of the rules appended to the Committee's 159th Report.

Mr. Andres in his fourth complaint and Mr. Chaki in his second invite the Tribunal to order (1) that the correction take effect as from 1 February 1982 and (2) that the EPO pay each of them a lump sum equivalent to 1.16 per cent of basic salary for the period from 31 January 1982 to 30 June 1983 and a further lump sum corresponding to the consequently higher rates of the expatriation and household allowances. They further ask (3) that the President of the Office take action to incorporate the correction in the salary guaranteed on the introduction of the levy which formed the subject of Mr. Andres' second complaint and Mr. Chaki's first and on which the Tribunal ruled in Judgment 726. Mr. Chaki claims payment of interest at 7 per cent a year on the sums due and an award of 2,500 Deutschmarks in costs.

In his fifth complaint Mr. Andres invites the Tribunal to declare (1) that the impugned decision is not a legislative act and (2) that CA/D 2/84 is in breach of the prescribed procedure. He claims (3) the lump sums he claims in his fourth complaint. He seeks an award of 2,000 Swiss francs in costs.

C. In its replies to Mr. Andres' fourth complaint and to Mr. Chaki's the EPO does not object to their receivability. It submits, however, that they are devoid of merit. It observes that, as is clear from the records of the Co-ordinating Committee's meetings, which it supplies, the findings of the survey had to be submitted to the competent office of statistics and to the national delegation of the Federal Republic before they could serve as a basis for the proposal to correct the factor of purchasing power parity in that country. Accordingly the correction could not be proposed until the first annual review of salaries was made after those national authorities gave their approval. They did not do so until August 1983 and the first annual review to be made thereafter was the one that took effect as from 1 July 1983. The date of the correction was therefore properly determined in accordance with the prescribed procedure.

In its reply to Mr. Andres' fifth complaint the EPO submits that it is clearly irreceivable because the cause of action is the same as that of his fourth and claim (3) of the fifth is the same as claim (2) of the fourth. Claim (1) is unsound because CA/D 2/84 is in fact a general decision which does not have any effect until there are individual decisions taken in pursuance of it to pay specific amounts in salary to EPO staff workers. Nor does the letter of 11 December 1984 constitute a challengeable individual decision.

D. In their rejoinders the complainants reaffirm their view that the legal basis for correction of the purchasing power parity is Article 7 and that the wording leaves no room for doubt: at each annual review the salaries of all EPO staff should have the same purchasing power for the same grade and step. That that is also the Co-ordinating Committee's own view is clear from the records of its recent discussions. If the EPO's plea were sound a correction could be improperly and unfairly held up until the national authorities gave their approval.

Mr. Andres answers the EPO's objections to the receivability of his fifth complaint.

E. In its surrejoinders the EPO repeats its explanation of its view that the date of the correction was correctly determined. It points out that the view expressed by the Co-ordinating Committee which the complainants cite in their rejoinders relates to a possible change of practice in the future and does not imply that the practice followed in determining the date of correction in 1983 was wrong. It observes that Article 7 does not set any time limit for correcting the factor of parity.

It develops its objections to the receivability of Mr. Andres' fifth complaint.

CONSIDERATIONS:

Joinder

1. Mr. Andres' fourth and fifth complaints and Mr. Chaki's second one relate to the date from which a correction of the factor of "purchasing power parity" is to apply to the salaries of EPO staff stationed in the Federal Republic. The Tribunal accordingly joins them.

Applications to intervene

2. Mr. André Metten has applied to intervene in Mr. Andres' fourth complaint and in Mr. Chaki's, and many other EPO officials in the former. The applications are receivable and the Tribunal will rule on them as on the complaints themselves.

The date from which the factor of purchasing power parity applies to staff in the Federal Republic

3. By a circular of 15 June 1984, issued further to a decision the Administrative Council of the EPO had taken on 8 June the Principal Director of Personnel informed the complainants of new salary scales which applied as from 1 July 1983. The complainants' objection is that the factor of purchasing power parity applicable to the salaries of staff in the Federal Republic is corrected only as from 1 July 1983. They submit that the date should be 31 January 1982.

4. The system of remuneration of EPO staff is governed by Title V of the Service Regulations and in particular by Article 64, which is headed "Determination of remuneration". Remuneration comprises basic salary and, where appropriate, any allowances. It is paid in the currency of the country and at the place where the employee mainly performs his duties, and it is expressed in that currency. The material rule in this case is Article 64(6), which reads: "The remuneration of the permanent employees shall be subject to periodic review and shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee of government budget experts of the Co-ordinated Organisations."

Those organisations established the Co-ordinating Committee from a desire to have a common system of pay in Europe, or at least some degree of uniformity, and so remove disparity in pay policy. Although the EPO is not represented on the Committee it has observer status and Article 64(6) commits it to observance of the Committee's recommendations. In law it preserves full autonomy, subject to what is said in 8 below. In any event the Committee's recommendations have force in law only insofar as the EPO Council so decides.

5. By a decision of 8 June 1984 the Council brought new salary scales into force in accordance with recommendations in the Committee's 196th Report. As the Tribunal held in Judgment 726 on previous complaints by Mr. Andres and Mr. Chaki among others, the scales do clearly form part of EPO rules.

But as to the factor of purchasing power parity it is not possible to be quite so categorical. In Article 2 of its decision of 8 June 1984 the Council merely affirms its approval of paragraph 17 of the 196th Report. The paragraph is long and deals with various matters, but it does contain, in clause (e), a recommendation "to approve the new purchasing power parity applicable to Germany". The Council was not required to take a decision on paragraph 16, which states that "a new purchasing power parity had been calculated for Germany because of the increased number of staff serving in that country. The new purchasing power parity had been calculated by the Inter-Organisations Section and approved by the German Federal Statistical Office and by the German Delegation. The Co-ordinating Committee has therefore also been able to give its agreement to this new parity".

According to Article 6 the Council's decision takes effect as from 1 July 1983.

6. It appears that the Council did decide to give binding force to the recommendations in paragraph 17 of the report, and the Tribunal concludes that the factor of purchasing power parity is part of the Organisation's rules.

The parties make no submissions on the rate of the factor.

7. The only issue is the date from which the correction of the factor is to take effect.

In taking 1 July 1983 as the date the Council made a reasonable exercise of its lawmaking authority. The Organisation observes that not until August 1983 did the competent office of statistics in the Federal Republic agree to the amount of the correction and submits that there was nothing unlawful about picking 1 July 1983 rather than the date of publication of the findings of the survey on prices.

8. The Service Regulations do say that pay shall be adjusted "taking account of the recommendations of the Co-ordinating Committee". But that phrase does not oblige the Council to adopt those recommendations: all it means is that the EPO undertakes to take account of them.

The phrase might warrant quashing a Council decision which for no proper reason made an obvious break with the Committee's recommendations. But there is no such decision here. There is a record of discussion about the date in the Committee. But, as the Tribunal has said, the Committee's reports are not directly addressed to the EPO and the Tribunal finds no statement in them to support the complainants' contention. In any event no recommendation on the point appears anywhere in the material before the Tribunal, and certainly not paragraph 16 of the 196th Report, which is too vaguely worded to serve the purpose.

9. The Tribunal concludes that the complainants' principal claims must fail. There is therefore no point in entertaining the EPO's plea that Mr. Andres' fifth complaint is irreceivable.

The other claims

10. Since the principal claims are dismissed so too are the subsidiary ones.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William Douglas, 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

William Douglas

A.B. Gardner