

**SEVENTY-FIFTH SESSION**

***In re* FARNESE (No. 2)**

**Judgment 1283**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Giuseppe Pasquale Farnese against the European Patent Organisation (EPO) on 25 November 1992, the EPO's reply of 15 February 1993, the complainant's rejoinder of 17 March and the Organisation's surrejoinder of 23 April 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 54(2), 62, 84(1)(b) and 92(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Articles 14, 17(1) and 34(1) of the Office's Pension Scheme Regulations;

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

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

A. Most of the relevant facts of this case are set out under A in Judgment 1282, also delivered this day, on the complainant's first complaint. This complaint is about the reckoning of the invalidity pension he is getting under Article 54(2) of the Service Regulations of the European Patent Office.

In a report dated 8 March 1991 the EPO's Invalidation Committee found him unfit for service on the grounds of permanent disability. In a letter of 8 April 1991 the Principal Director of Personnel informed him that the President of the Office would grant him an invalidity pension as from 1 April 1991, and by a letter of the same date an officer of the Remuneration and Pensions Department explained that his pension was reckoned on the strength of step 4 in grade A3.

The complainant objected to the reckoning in a letter of 14 May on the grounds that on 1 April 1991 he had reached step 5 in that grade. He also claimed entitlement to expatriation and education allowances.

In a letter of 20 June the officer replied that although the Pension Scheme Regulations did entitle pensioners to education allowance they made no provision for expatriation allowance. The officer also said that the Legal Service had confirmed that the disputed reckoning was in line with Articles 14(3) and 17(1) of the Pension Scheme Regulations.>(\*Article 14(3) says: "The salary used as a basis for the calculation of the invalidity pension ... shall be the salary for the grade and step held by the employee in accordance with the scales in force on the date laid down in Article 17, paragraph 1." Article 17(1) reads: "Entitlement to invalidity pension shall commence on the first day of the month following that in which the employee is recognised to be permanently incapable of performing his duties.")

The complainant appealed on 1 July 1991. In its report of 8 July 1992 the Appeals Committee recommended unanimously that the President reject the appeal.

In an official notice of 23 July 1991 the President decided to relieve the complainant of his duties and grant him an invalidity pension as from 1 April 1991. The Organisation posted the decision on 12 August and the complainant received it on 17 August 1991.

The Director of Staff Policy in a letter of 25 August 1992, the decision under challenge, notified the President's endorsement of the Committee's recommendation.

B. The complainant submits that under Article 17(1) of the Pension Scheme Regulations an employee's entitlement to an invalidity pension takes effect on the first day after recognition of his condition. Article 14(3) says that the reckoning shall be based on the employee's situation on the first day of the month following certification of his

condition. The Invalidity Committee declared him unfit in a document dated 8 March 1991. But since the President's decision of 23 July to grant him an invalidity pension as from 1 April 1991 took until 17 August to reach him, his pension entitlement should run from 1 September 1991, and by then he was at step 5 in grade A3.

He seeks the review of his "administrative and remunerative situation" as from 1 April 1991 with due regard to Article 84(1)(b) of the Service Regulations and to the fact that his pension entitlement runs from 1 September 1991; payment of interest on the sums due to him from 1 April 1991; evidence of "recalculation of his remunerative situation" from 1 April 1991; and moral damages and costs in the amount of 10,000 Swiss francs.

C. In its reply the EPO observes that the complainant failed in his letter of 1 July 1991 to challenge the lawfulness of the decision of 8 April 1991, which set the date from which his entitlement to an invalidity pension ran. He merely challenged the reckoning of the pension on the grounds that it should have been based on step 5 in grade A3. Not until he filed his brief of 19 May 1992 did he challenge the lawfulness of the decision, and since he submitted his new claim after expiry of the time limit it is irreceivable.

By alleging that the letter of 8 April 1991 did not contain any decision to grant him a pension, that no such decision was taken until the official document of 23 July 1991 and that his entitlement did not begin until 1 September 1991 the complainant has framed not another plea but a new claim altogether. Coming as it did after expiry of the time limit set for appeals, it is irreceivable. The letter of 8 April 1991 said that the President had decided to grant him an invalidity pension and its authority and content are unimpeachable. The official document of 23 July 1991 is mere confirmation of the earlier decision and in any event gives 1 April 1991 as the date from which his entitlement ran. The EPO observes that the complainant did not appeal against that document.

The EPO reckoned his pension by reference to his last month in service, namely March 1991, when he had 11 months' seniority at step 4 in grade A3. Under Article 17(1) of the Pension Scheme Regulations entitlement to an invalidity pension begins on the first day of the month after the official is declared unfit for work. Since he ceases to perform his duties at that time he then becomes ineligible for advancement. As required under Article 14(3) of those Regulations the relevant grade and step are those the beneficiary held on the last day of service.

Article 62(7) of the Service Regulations says that after an official has exhausted sick leave entitlement by taking twelve months within a three-year period he shall "cease to be entitled to advancement". The complainant does not deny having been on sick leave between 8 March 1991 and 1 April 1991 without entitlement to advancement. He then came under Article 62(11), which reads as follows:

"Where a permanent employee is recognised by the Invalidity Committee to be permanently incapable of performing his duties, his sick leave shall be extended until the first day of the month following the decision of the Invalidity Committee and paragraphs 7 to 10 shall continue to apply until that date. Thereafter, the provisions of the Pension Scheme Regulations regarding invalidity pension shall apply to him."

D. In his rejoinder the complainant maintains that he was a serving official on 1 April 1991. From 27 December 1990 to 8 April 1991 the EPO considered him to be on unauthorised leave - medical certificates notwithstanding - suspended his salary up to the end of April 1991 and threatened him with disciplinary action.

He is relying on Article 34(1) of the Pension Scheme Regulations:

"Pensions may be re-assessed at any time in the event of error or omission of any kind."

and on Article 92(2) of the Service Regulations:

"The Invalidity Committee's decision shall be transmitted to the President of the Office and to the employee."

He submits that the letter of 8 April 1991 was merely the announcement of an impending decision by the President, not of an actual one. Besides, if it had contained a decision there would have been no need to give him further written notice signed by the President himself some months later. The President's final decision is that of 12 August 1991.

E. In its surrejoinder the EPO observes that there is no new argument in the rejoinder to make it change its earlier pleas.

## CONSIDERATIONS:

1. The complainant used to be on the staff of the European Patent Organisation and at the end of his career was to serve at its sub-office in Berlin. He was retired on an invalidity pension as from 1 April 1991. This case turns on whether at the material date the rate of benefit should have corresponded to step 4, as the Organisation contends, or to step 5, as the complainant wants, in grade A3. He maintains that since his step would have risen from 4 to 5 at 1 April 1991, the starting date of his retirement, it was the higher step that should have counted in reckoning his pension.
2. Just before retirement he was on sick leave in his own country, Italy. He was at the time in dispute with the EPO over several matters that are ruled on in Judgment 1282 of this day. By a letter of 8 November 1990 the sub-office in Berlin warned him that by 13 November he would have used up the sick leave entitlement allowed under Article 62(6) of the Service Regulations, the Organisation had decided to convene an invalidity committee, and unless he went back to work he would cease at that date to acquire further step increments in pay.
3. At the same time the Organisation appointed Dr. Pietro De Luca, a medical consultant of the European Space Agency who practised at Frascati, in Italy, to ascertain the state of his health. In his report of 28 November 1990 Dr. De Luca said that he was medically fit to perform his duties and that his trouble was not physical but psychological. On 9 December 1990 the sub-office told him by telegram to take up duty on 27 December. His answer was to send in a medical certificate made out on the same day by Dr. Cesare Colluci d'Amato, professor of the semeiology of nervous diseases at the University of Naples. The certificate said that he was suffering from chronic depression and recommended admitting him to a psychiatric clinic for confirmation of the diagnosis.
4. By a letter of 17 January 1991 the sub-office ordered him to go back to work, observing that he had been in dereliction of duty since 27 December 1990; any further absence would be charged to his leave entitlements and once he had used them up his pay would be suspended. On 18 February 1991 the sub-office informed him that his leave entitlements had expired at 6 February and his pay was therefore stopped. He did not respond. Meanwhile the Invalidity Committee had been set up in accordance with the Service Regulations, and he turned up briefly in Berlin on 7 and 8 March 1991 to attend its meeting.
5. On 8 March the Invalidity Committee recommended retiring him on grounds of disablement. The Organisation forthwith set the rate of his pension under Article 14 of the Pension Scheme Regulations and in accordance with the usual rules based its reckoning on step 4 in grade A3. On 8 April the complainant was told of the decision by the President of the Office to relieve him of duty and grant him an invalidity pension as from 1 April.
6. On 1 July 1991 he filed an internal appeal, No. 34/91, asking the Organisation to take step 5 in grade A3 as the basis for reckoning his pension. His arguments in that appeal, which were about how to construe the Pension Scheme Regulations, were obscure and in any event irrelevant to his case.
7. The nature of his case became clear only in the proceedings before the Appeals Committee, to which the President had referred the case. He seems to be contending that he reached step 5 on 1 April 1991, the very day on which he began retirement, and so the Organisation may not reckon his pension as at 31 March 1991, the last day on which he was supposed to be still at work. He also objects that the Organisation's decision was retroactive because the determination of his pension was not notified to him until 8 April.
8. In its report of 8 July 1992 the Appeals Committee made two main points. First, it observed that the complainant's entitlement to advancement in step had ceased at 13 November 1990 in accordance with Article 62(7) of the Service Regulations and might have resumed under 62(8) only if he had returned to active service. Secondly, the Committee held that there had been no retroactive decision since the date of notification of his retirement was irrelevant to the determination of the step, which had been blocked at step 4 on the expiry of his sick leave entitlement. The Committee unanimously recommended rejecting his appeal.
9. Endorsing that recommendation, the President told the complainant on 25 August 1992 of the final rejection of his claims, and that is the decision now under challenge.
10. There is no need to go into the detail of the complainant's argument, which the Appeals Committee duly entertained. The sole material point is that according to the above provisions of Article 62 his step increments ceased automatically at 13 November 1990 on the expiry of his sick leave entitlement. Only if he had resumed

active service might they too have resumed. So plainly it is his own attitude that caused the "freezing" of his status at that date and his arguments about accrual of step 5 at 1 April 1991 and belated notification of retirement are therefore quite irrelevant. The Organisation was right to reckon his invalidity pension on the strength of step 4 in accordance with Article 14 of the Pension Scheme Regulations, and his objections are devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice- President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda  
William Douglas  
P. Pescatore  
A.B. Gardner