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

EIGHTY-EIGHTH SESSION

In re Cervantes (No. 4), Kagermeier (No. 5) and Munnix (No. 2)

Judgment 1897

The Administrative Tribunal,

Considering the fourth complaint filed by Mr Jean-Pierre Cervantes, the fifth complaint filed by Mrs Ingrid Kagermeier and the second complaint filed by Mr Serge Munnix against the European Patent Organisation (EPO) on 14 December 1998, the EPO's single reply of 8 March 1999, the complainants' rejoinder of 1 April and the Organisation's surrejoinder of 11 June 1999;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Paragraph 1 of Article 54 of the Service Regulations of the European Patent Office, the secretariat of the EPO, provides in part that:

"A permanent employee shall be retired

- automatically, on the last day of the month during which he reaches the age of sixty-five years;

..."

The complainants are all officials of the EPO. At the date of the impugned decision, they were members of the Central Staff Committee and the General Advisory Committee.

In a letter to the Administrative Council, dated 5 December 1996, the President of the Office recalled that the age limit of sixty-five years for retirement of employees applied to members of the boards of appeal. He nevertheless proposed to the Council, "on an entirely exceptional basis and for social reasons", to retain in their functions two members of the boards of appeal beyond that age limit on the grounds that, at the retirement age, they would not have completed the minimum of ten years of service required by Article 7 of the Pension Scheme Regulations for entitlement to a retirement pension. At its 65th meeting, held in December 1996, the Council approved this proposal and authorised its Chairman to conclude contracts with the two staff members concerned. This decision also granted them access, after their retirement, to the EPO's health insurance scheme.

By letters of 27 February 1997, the complainants appealed to the Chairman of the Council with a view to having this decision set aside. In a letter dated 4 April 1997, the Chairman informed them that he had transmitted the above appeals to the Council's Appeals Committee. The Committee issued its opinion on 2 September 1998 and recommended that the appeals should be upheld. By a letter of 23 October 1998, which is the impugned decision, the Chairman of the Council informed the complainants that, at its 72nd meeting, the Council had decided to reject their appeals.

B. The complainants argue that the impugned decision is unlawful on several counts. It was taken in violation of Article 54 of the Service Regulations and the Council was not empowered to grant rights which did not correspond to any applicable general conditions of service. The decision is also in breach of the principle of equality of treatment, since the situation of the two persons covered by the impugned decision

does not warrant any difference of treatment. Under the Pension Scheme Regulations, a person who has not completed the required period of service may only be granted a pension in cases which the complainants qualify as "force majeure", such as invalidity. Finally, in accordance with Article 38(3) of the Service Regulations, the Administrative Council should have consulted the General Advisory Committee since the impugned decision, in view of its consequences on the pension and health insurance schemes, concerns the whole of the staff.

By giving the two staff members concerned the possibility to benefit from a retirement pension and the health insurance scheme, even though they could certainly have re-entered national schemes, the Administrative Council prejudiced the interests of the complainants. They say that, if the contribution rates for the two schemes have been reasonable up to now, this is because the great majority of staff members exceed by far the minimum threshold of ten years of contributions. If the Council authorises an artificial rise in the number of staff members just managing to reach this threshold, the whole of the staff will have to bear the cost of a "specific benefit" which is only granted to certain of them. Indeed, the next actuarial study will have to take into account these extraordinary benefits, since contribution rates are reckoned on the basis of all the benefits provided. The additional cost is "far from being negligible" for the two schemes. Even if it is insignificant at the individual level, that does not make the Council's decision lawful. Furthermore, this decision constitutes "a dangerous precedent", since a rise in the number of exceptions, particularly for the contracts of Vice-Presidents, could have a more significant impact on the level of contributions.

The complainants request the Tribunal to set aside the decision of 23 October 1998 or, subsidiarily, they request it to order that the additional cost to the EPO's pension and health insurance schemes caused by this decision be borne wholly by the Organisation's budget, and not co-financed by the contributions of staff members; to grant them 1,000 German marks in moral damages for each month that the Council persists in refusing to revoke its decision, as well as 5,000 marks in costs.

C. In its reply the EPO challenges the receivability of the complaint on several counts. It argues that the impugned decision does not have immediate legal consequences. Only the conclusion of contracts with the two members of the boards of appeal could prejudice the interests of the complainants. Their rights as staff representatives have not been injured, since Article 38(3) of the Service Regulations did not apply in the present case. Moreover, the complainants do not show any real and present cause of action. The impugned decision, which is an exceptional measure, cannot have a "significant" financial impact as it only concerns two staff members out of four thousand and the complainants do not demonstrate any real prejudice.

In subsidiary argument the EPO explains that the beneficiaries of the contracts in question ceased to be employees of the Office on the last day of the month during which they reached the age of sixty-five years, and as of that moment their situation was then subject to the contracts proposed to them. There was, therefore, no breach of Article 54 of the Service Regulations. It says that the Administrative Council is competent to settle all matters relating to the terms and conditions of employment of staff members whether or not they are permanent employees and that, furthermore, the EPO was only fulfilling its duty of care towards its staff members. The principle of equality of treatment has not been breached, since the complainants are not in the same situation of fact and of law as the beneficiaries of the contracts in question.

The EPO says that it did not grant "favourable treatment" to the two staff members, as they had to continue to pay their contributions. The position of the complainants challenges the principle of solidarity on which the pension and health insurance schemes are based. The EPO excluded from the contracts in question the element which could have had a negative impact on contributions, namely entitlement to survivor's and invalidity benefits. The impact on the next actuarial evaluation will be minimal, since one of the two beneficiaries of the contracts left work on 1 October 1997 and only one person is still covered by the impugned decision.

It asserts that, if it had been possible to envisage the reintegration of the two persons concerned into their national insurance schemes, this solution would have been adopted.

The EPO adds that there was no adversarial discussion in the Council's Appeals Committee because only the complainants were heard.

It contends that the criticisms of the contracts of Vice-Presidents are not within the ambit of the present

complaint.

D. In their rejoinder the complainants submit that the EPO did not contest the receivability of the internal appeals *ratione temporis*. Moreover, it was not possible for them to ascertain the date on which the contracts were concluded with the members of the boards of appeal. The reality and extent of the prejudice caused have to be decided on the merits, and are not issues of receivability.

They argue that the Pension Scheme Regulations are not applicable to contract staff. Furthermore, only periods of service as permanent employees of the EPO are taken into account to determine entitlement to pensions, as well as, where appropriate, periods of service in other capacities completed before permanent appointment.

They add that the EPO's reference to its duty of care is not pertinent. By gaining access to the EPO's pension scheme, the beneficiaries of the contracts in question benefit from coverage which is clearly more favourable to them than that of the immense majority of other staff members. For example, for their health insurance, they will benefit from comprehensive coverage in return for very low contributions.

The complainants contend that it is for the EPO to reckon the actuarial deficit, as they do not have the means to do so.

The EPO could have been heard by the Council's Appeals Committee had it so requested. The complainants say that they only learnt from the EPO's reply to their complaint that one of the beneficiaries of the contracts had resigned.

E. In its surrejoinder the EPO presses its arguments and refutes the explanations made by the complainants in their rejoinder.

CONSIDERATIONS

1. Permanent employees of the EPO are automatically retired on the last day of the month during which they reach the age of sixty-five years. They are not entitled to a retirement pension until they have completed at least ten years of actual service with the EPO.

The EPO recruited two staff members when they had already passed the age of fifty-five. At the time the present complaint was lodged, these two employees were members of boards of appeal.

When they were drawing near to the age of sixty-five, the President of the Office requested the Administrative Council to authorise their engagement under contract beyond the age of sixty-five years as an exceptional measure to enable them to complete the ten years of service required for entitlement to a retirement pension.

At its 65th meeting, the Administrative Council, while confirming that the age limit also applied to members of the boards of appeal, authorised the exception and the conclusion of contracts with these staff members. These contracts were to be signed by the Chairman of the Council, who is the person empowered to appoint the members of the boards of appeal.

The complainants, who are staff representatives, lodged internal appeals with the Chairman of the Council against this decision, arguing that it was unlawful, that it breached the principle of equality of treatment and that it prejudiced other staff members participating in the pension scheme by proportionally increasing the cost to them of the pension and health insurance schemes, which is shared according to the principle of solidarity, without taking the risk into account. In their opinion, the General Advisory Committee should have been consulted in view of the importance of the principle involved.

The internal appeals were transmitted to the Council's Appeals Committee, which recommended that they should be upheld for the reasons given by the complainants.

Nevertheless, the Council decided to dismiss the appeals on the grounds which are examined below.

This is the decision which is being impugned. As their principal plea, the complainants seek the quashing of

the Council's decision and the decisions to engage the two persons concerned. Subsidiarily, they request the Tribunal to order that the additional cost to the EPO pension and health insurance schemes caused by the decision be wholly borne by the budget of the Organisation and not co-financed through the contributions of staff members. They also request compensation of 1,000 German marks in moral damages "per month that the Council persists in refusing to rescind its decision" and 5,000 marks in costs.

The EPO requests that the complaint be rejected.

2. The EPO argues that the complainants did not challenge the individual decisions to conclude contracts with the two members of the boards of appeal.

But it is mistaken in qualifying the Council's decision as being of a general nature. The complainants have not formally challenged the contracts concluded with the two persons concerned, but only the authorisation to conclude such contracts. However, the meaning of their challenge was clear and has not escaped the Organisation. The Council took individual decisions concerning these persons, subject to their acceptance.

While the appeals might seem to have been premature, they were, however, perfectly valid once the offers had been accepted. As the Organisation did not contest the receivability of a premature appeal on this score during the internal procedure, the principle of good faith prevents it from doing so subsequently (see, for example, Judgment 1393, *in re* Cook No. 2, under 9).

This argument therefore fails.

3. On 1 October 1997, one of the two persons concerned gave up work earlier than foreseen, for health reasons. He received a severance grant and the reimbursement of the amounts deducted for his pension. He thereby lost all the benefits envisaged in the disputed contract. He will not therefore benefit from a retirement pension, nor from a preferential rate as a retired staff member for his coverage by the health insurance scheme. It is not claimed that he enjoyed any undue benefit by reason of his coverage by the health insurance scheme during the course of his extended service.

In this regard, the internal appeal lost any cause of action on 1 October 1997; the complaint before the Tribunal also shows no cause of action.

4. As for the other person concerned, the period envisaged for the extension of the appointment, 10 April 1998, has elapsed. This circumstance does not necessarily prevent the impugned acts from being set aside with retroactive effect. Allowing the complaint is not, therefore, devoid of all practical interest. On this score, the complaint is not irreceivable. If the reasons invoked are well-founded, it would be an issue of substance as to whether the setting aside of the decision would be an adequate sanction (see 12 and 13 below).

5. In their capacity as the official representatives of the staff, the staff representatives on EPO bodies are able to act not only in their own interests, but also in the interests of the staff, at least when so permitted by the internal rules (see Judgments 1147, *in re* Raths, under 4, and 1618, *in re* Baillet No. 2 and others, under 6).

These conditions are fulfilled in the present case and the complainants may act in this double capacity.

6. The two persons concerned have not been invited to give their views concerning the complaint which seeks to set aside the decisions from which they benefited. A general principle of law has it that the legal situation of someone cannot be modified before they have had an opportunity to be heard. This principle is also valid for international organisations and the Tribunal, particularly where a staff member challenges a decision determining the legal status of a third party.

In the present case, it is not necessary to seek the views of the third parties concerned, as allowing the complaint cannot affect their legal situation. Indeed, the complaint has lost any cause of action insofar as it relates to the person referred to under 3 above. Moreover, setting aside the authorisation made by the Council could not end the contractual relations between the Office and the other person concerned, since the contract has already expired and his good faith must be protected (see 12 below).

7. The EPO argues that the impugned decision will not prejudice the interests of the complainants, who refute this argument.

In short, the complainants contend that the impugned decision is unlawful and that it will have the effect of allowing a form of unequal treatment.

The right to equal treatment is breached when, in like or comparable situations, one person enjoys a benefit which is not granted to another. The impugned decision allowed two staff members reaching the age of sixty-five years, the age of automatic retirement, to obtain an extension of their service beyond that age so that they could complete a total period of service of ten years, thereby allowing them to obtain a retirement pension and to maintain their coverage by the health insurance scheme under favourable conditions. None of the complainants claims to be in the situation of reaching sixty-five years without being able to complete a period of ten years of service with the EPO. They cannot, therefore, personally complain of inequality of treatment on that score. However, they could argue inequality of treatment with regard to the financial impact of the measure, and its basis in law.

They can, nevertheless, challenge the lawfulness of a measure which is prejudicial to them. In this respect, their argument is admissible that, in principle, in view of the system of sharing the costs of the retirement and health insurance schemes, the contributors as a whole may have to pay more than if the two beneficiaries had not been granted the disputed extension, which they say is unlawful. The complainants do indeed contend that the challenged decision would give rise to such additional cost and the EPO does not exclude the possibility of this additional cost, although it asserts that it would in any case be minimal and have an almost insignificant impact on the amount paid by each contributor. But this does not authorise the EPO to adopt an unlawful measure or prevent the staff members from challenging it.

The lawfulness of the proceedings

8. The EPO complains that it did not have the right to be heard by the Appeals Committee, which allowed the complainants to speak without the presence of the Administration and without granting it the same opportunity. It says that this was in breach of the principle of adversarial debate.

However, it rightly does not press this argument, since it cannot appeal against its own decisions.

In any case it was not injured, since in the impugned decision the Council did not follow the recommendation of the Appeals Committee and gave the reasons for its decision.

9. The complainants take the EPO to task for not submitting to the General Advisory Committee the question of principle raised in this case, namely the possibility of granting an extension beyond the age of sixty-five by means of a contract.

The EPO retorts that such consultations were not necessary in view of the exceptional nature of the measure, which it did not intend to repeat in other cases. It did not, therefore, raise an important question of principle for the future.

Article 38(3) of the Service Regulations provides that:

"The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions ..."

In the present case, the proposed measure did not consist of the adoption or amendment of rules concerning the whole of the staff. Furthermore, the impugned measure concerned two individual decisions presented as being exceptional and non-renewable. In view of their minor impact on the situation of staff members and their exceptional nature, the EPO did not abuse its latitude by refraining from consulting the General Advisory Committee.

The merits

10. The text of Article 54 of the Service Regulations clearly provides that "a permanent employee shall be retired ... automatically, on the last day of the month during which he reaches the age of sixty-five years ..." Nor is it contested that entitlement to a retirement pension is only obtained after a period of ten years service with the Organisation (see Article 7 of the Pension Scheme Regulations).

It is furthermore not contested that, if the rules are applied strictly, the two members of the boards of appeal would not have been entitled to a pension in their capacity as staff members reaching the age of sixty-five without having completed a period of ten years of service.

Nevertheless, the EPO believed that it could authorise the two persons concerned, by permitting an exception to the rules, to continue working beyond the age of sixty-five years in order to complete ten years of service. The complainants challenge the lawfulness of this exception.

The issue raised does not relate to discretionary authority, but solely concerns the lawfulness of the impugned decision, a question which the Tribunal can freely examine.

In accordance with the principle that administrations in their action must abide by the rules of law, the EPO is bound to respect the rules which govern it (the *patere legem* principle). An exception to a general rule is, therefore, possible only when it is provided for by the rules in force.

The possibility of granting an exception may also be derived from the interpretation of a written text. Moreover, rules may have shortcomings which need to be remedied during their implementation, for example when a new situation emerges which the "legislator" did not intend to cover and which requires an appropriate solution (see, for example, Judgments 1679, *in re* Serlooten and 1877, *in re* Serlooten No. 2, under 4(a)).

The EPO does not invoke any explicit rule permitting exceptions in specific cases from retirement at the age envisaged in the Service Regulations. In this respect, this case differs from the others examined by the Tribunal (see Judgments 204, *in re* Silow No. 4, 223, *in re* Gausi, 267, *in re* De, under 1, 358, *in re* Landi, under 9, 1143, *in re* Jones, under 3, and 1816, *in re* Gutiérrez No. 2, under 5).

The only reason given for granting the exception is the consideration that it would be inequitable to deprive the staff members of a retirement pension on the grounds that, having been appointed after the age of fifty-five, they could not fulfil the requirement of ten years service.

Nor is any evidence produced to show that there are any real shortcomings in the rules. The rules appear to have contemplated a situation such as that of the two persons concerned, which was not of an exceptional nature and which was not unforeseeable by the legislator. It was also clear at the time of their recruitment that, when they reached retirement age, they would not fulfil the conditions for entitlement to a retirement pension.

The EPO's observation that in future no further exceptions of this nature would be granted also shows that it was not faced with a new situation which had not been envisaged by the legislator or requiring a remedy for a shortcoming in the form of a new rule of general application.

If the rule is not satisfactory, it is for its author to change it.

11. The EPO puts forward other arguments which, in its view, show that there was no breach of Article 54 of the Service Regulations.

(a) In the first place, it argues that the legal basis for the decision lies in the fact that the Council is also the legislator, or the body which is competent to adopt or amend the Service Regulations (see Article 33 of the European Patent Convention). It says that it can, therefore, allow exceptions to its own rules.

This argument cannot stand. A general principle has it that an authority is bound to respect the rules which it has itself set.

Furthermore, in keeping with the rule that similar acts require similar procedures, the modification of a rule - including allowing an exception - must respect the same process which was used for its adoption.

It therefore follows that, in the context of a decision respecting their application, the Council could not amend the rules governing the age of retirement and the conditions of entitlement to a retirement pension without following the procedure used for the adoption of such rules. It did not do so in the present case.

(b) The EPO also contends that, having reached the age of sixty-five years, the two persons concerned ceased to be employees. However, they could be engaged as contract staff and a teleological interpretation of Article 33(2)(b) of the Convention would have it that "the Council is competent to regulate all the issues relating to the conditions of service of its staff, whether or not they are permanent employees". On these grounds, it argues that the Council was competent to convert the status of the two persons concerned from staff members to contract staff under conditions which constitute exceptions to the Service Regulations, in terms of the duration of service and the conditions for entitlement to a retirement pension.

This argument cannot stand. One of the purposes of Article 33 of the Convention is to allow the Council to issue general rules relating to the conditions of service applicable to all staff members. Under Article 33 the Council is not authorised to evade the rules set out in the Convention, in the absence of a provision authorising exceptions, by means of individual decisions which are contrary to the letter and purpose of the Service Regulations.

It is not necessary to examine the rules governing the conditions of service of staff members other than permanent employees, within the meaning of Article 33(2)(b) of the Convention. Even if such rules allowed the Office to take individual decisions which are not based on the general conditions of service of this category of staff, they would certainly not authorise it to exempt employees from essential rules determining their conditions of service, such as the age limit or the number of years of service required for entitlement to a retirement pension.

It follows that the Council's decision to authorise an extension of service beyond the age of sixty-five years was not lawful and must be set aside.

As the principal claim succeeds, the subsidiary claim shows no further cause of action.

12. The two staff members concerned have already completed the service envisaged during their extension (one of them for only five months) and the recompense due from the Organisation cannot be denied to them. They accepted the extension in good faith and the EPO must protect them from any prejudice. There are, therefore, no grounds for setting aside *a posteriori* the contracts concluded for the extension of their service.

13. The conditions for granting compensation for moral damages have not been met.

Moreover, the request to impose a penalty on the Organisation for failing to revoke the decision is at the very least premature. In the light of this judgment, it has become devoid of all object.

DECISION

For the above reasons,

1. The decision of the Administrative Council of the EPO, taken at its 65th meeting, to maintain in service two members of the boards of appeal beyond the age of sixty-five years is set aside for the reasons set out above.

2. The Organisation shall pay the complainants the global sum of 2,000 euros in costs.

3. Their other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, 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 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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