

FORTY-SIXTH ORDINARY SESSION

***In re* ROMBACH**

Judgment No. 460

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Patent Organisation (EPO) by Mr. Martin Rombach on 29 February 1980, the EPO's reply of 6 June, the complainant's rejoinder of 4 August, the EPO's surrejoinder of 7 October 1980, the memorandum dated 24 February 1981 supplied by the EPO in response to the request addressed to it by the Tribunal on 5 December 1980, the correction to that memorandum dated 4 March, and the complainant's further memorandum dated 23 March 1981;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 9 of the Agreement on the Integration of the International Patent Institute into the European Patent Office, the secretariat of the EPO, and articles 10, 12, 13, 49, 64, 67 and 88 of the Staff Regulations of the European Patent Office;

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

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

A. The complainant holds a post in the European Patent Office as a library clerk at grade B2, step 11, but since 1 May 1979 has been acting as an administrative library clerk at grade B3 and receiving the special allowance prescribed by article 12.4 of the Staff Regulations in such cases. On 13 September 1979 he was promoted with retroactive effect from 1 August 1979 to the post of administrative library clerk at grade B3, step 11. The complainant had been paid at the Institute the basic salary pertaining to grade B2, step 11, plus a compensatory allowance in accordance with Article 9.3 of the Agreement on the Integration of the Institute into the EPO. He was paid, after the integration on 1 January 1980, the basic salary pertaining to grade B3, step 11, plus a residual compensatory allowance. The sum of the salary and allowance at the EPO was equal to that of the basic salary pertaining to B2, step 11, and the compensatory allowance at the Institute. From September 1979 the complainant's total net remuneration was reduced by an amount corresponding to the special allowance. At the same time his remuneration was reduced by an amount corresponding to the allowance for the month of August 1979. On 22 October 1979 the complainant appealed to the President of the EPO and, having received no answer, appealed to the Tribunal against the implied decision to reject his appeal.

B. The complainant contends that the EPO's deduction of the amount of the allowance for August 1979 is in breach of article 88 of the Staff Regulations and of the principle whereby adverse decisions should not be retroactive. As regards the reduction in his total net remuneration, he cites article 49.13, which provides that in no case shall total net remuneration be reduced as the result of advancement to a higher grade. Article 9.5 of the integration agreement provides that promotion may not lead to the payment of total net remuneration lower than that to which the staff member would have been entitled had he not been promoted. According to article 64.2 of the Staff Regulations remuneration includes basic salary and such allowances and benefits as are payable. Some of those allowances and benefits are set out in article 67.1 but the list is not exhaustive. Accordingly the allowance provided for in article 12.4 of the Staff Regulations also forms part of remuneration.

C. In his claims for relief the complainant asks the Tribunal to quash the President's implied decision rejecting his appeal, to declare that the reduction in his total net salary is in breach of the EPO Staff Regulations and to award him 500 guilders as costs.

D. In its reply the EPO admits that the deduction of the amount of the special allowance for August 1979 was not in accordance with article 88 of the Staff Regulations but points out that the error was acknowledged by a decision dated 4 March 1980. The complainant's claim for payment of the amount deducted therefore has no substance to it. As regards the claim for continuing payment of the allowance after promotion, the EPO contends that in the

absence of any formal legal definition of "total net remuneration" article 64 of the Staff Regulations suggests that the term should be taken to mean basic salary and such allowances and benefits as are payable after deduction of internal tax. The list of allowances and benefits appears in article 67. All others mentioned in the Staff Regulations, such as the special duty allowance and remuneration for overtime and shift work, are distinct from those listed in article 67.1. Moreover, although article 49.13 precludes reduction in pay on promotion, it plainly does not apply to allowances which are payable only if the staff member is performing special duties different from those normally pertaining to his post (temporary performance of duties at a higher grade, shift work and overtime). The compensatory allowance mentioned in Article 9 of the integration agreement does not form part of the net remuneration to which the protection of acquired rights applies. The complainant is mistaken in drawing an analogy between the special allowance and other allowances such as the secretary allowance or the special allowance payable to staff members stationed in Berlin, which are quite different. The EPO therefore asks the Tribunal to dismiss the complaint.

E. In his rejoinder the complainant withdraws his claim for payment of the special allowance for August 1979. In his view the allowances and benefits which, being part of total net remuneration, may be taken into account in applying article 49.13 are not merely those listed in article 67.1. This provision states that in no case shall net remuneration be reduced by reason of promotion to a higher grade. The words "in no case" preclude any restrictive construction. Moreover, the distinction which the EPO draws between the allowances listed in article 67.1 and other special allowances is not sound since one special allowance which is paid only once, namely installation allowance, appears in article 67.1. The wording of the German and English versions of article 64.2 also makes it clear that the article does not set any limit on the allowances in question. Subsidiarily, the complainant refers to the Staff Regulations of the European Space Agency, the North Atlantic Treaty Organization and the Organization for Economic Co-operation and Development, which provide that the special duty allowance forms part of remuneration. He therefore presses his two claims for relief. He amends the first to take account of the cancellation of the deduction of the special allowance for August 1979, and asks the Tribunal to grant his second claim, even if the first is rejected, as compensation for the prejudice which he has suffered by reason of the EPO's negligence in failing to reply promptly to his appeal claiming payment of the allowance for August 1979.

F. In its surrejoinder the EPO contends that in the absence of a formal definition "total net remuneration" should be construed in the light of the meaning and intent of the rule. So construed, the term includes emoluments which the staff member may expect to receive regularly and does not include occasional payments such as installation allowance. The duty allowance is an occasional payment. Moreover, if the complainant continued to receive the duty allowance after promotion the result would be that he would be receiving two increases on account of the same promotion, the duty allowance being additional to the increment granted on promotion on which the complainant relies, is not material to the present case, and the rules of other organisations, on which he also relies, are not binding on the EPO.

CONSIDERATIONS:

1. In his complaint, which is dated 29 February 1980, the complainant invites the Tribunal to quash the decision of the President of the European Patent Office dismissing his appeal and reducing his total net remuneration on the grounds that the decision is in breach of the EPO Staff Regulations, and to award him 500 guilders in costs.
2. The complaint is receivable under Article VII, paragraph 3, of the Statute of the Tribunal since the President failed to reply within the sixty-day time limit to the complainant's appeal dated 22 October 1979.
3. The matter of the complainant's claim for repayment of the duty allowance for August 1979 has been settled. By a letter dated 4 March 1980 the Administration indicated that his claim for repayment of the allowance had no foundation, and indeed in his rejoinder he withdraws his claim on this point.

4. In his submissions the complainant cites article 12, paragraph 4, of the Staff Regulations, which reads: ⁽¹⁾

"The staff member may be required to perform temporarily duties corresponding to a higher grade."

Under article 12, paragraph 4(2), any staff member who performs such duties is paid a duty allowance.

The complainant is contending that he has an acquired right to continue to be paid the duty allowance after 1 August 1979, the date of his promotion, and that his acquired right is safeguarded under article 49, paragraph 13, of

the Staff Regulations, which reads:

"In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration."

5. In reply to a request which the Tribunal addressed to it on 5 December 1980 the EPO has supplied further information consisting mainly in details of the complainant's emoluments before and after promotion based on pay slips. It shows:

- (a) an increase in his basic salary;
- (b) cancellation of the special duty allowance;
- (c) cancellation of almost the full amount of the compensatory allowance.

6. Thus the complainant's remuneration after promotion is lower by 141.58 guilders, i.e. exactly the amount of the special duty allowance he was paid in May, June and July 1979.

7. The fundamental question in this case is the construction to be put on the term "total net remuneration" in article 49, paragraph 13. The Staff Regulations do not define the term. It appears from article 64, paragraphs 2 and 4, that it must be taken to mean basic salary and any benefits and allowances.

8. By virtue of his promotion, which came into effect on 1 August 1979, the complainant was given duties which he had formerly performed on a temporary basis. The effect of this promotion was to give him the salary pertaining to his new grade. In his claim for relief he is seeking continued payment of the duty allowance over and above his salary increase. In other words, he is asking for two increases in remuneration in respect of a single promotion. To grant his claim would be to discriminate in his favour against staff members who were being paid no duty allowance before promotion. The Tribunal cannot allow that such discrimination is authorised under the Staff Regulations. Indeed the whole purpose of the rules on remuneration is to make arrangements for equitable remuneration and prevent unwarranted discrimination in favour of or against any staff member.

9. The balance of those arrangements will be upset if the Tribunal puts a broad construction on article 49, paragraph 13, and takes "total net remuneration" to include all benefits and allowances, without distinction as to their nature and purpose and the terms on which they are payable. The purpose of the safeguard in article 49, paragraph 13, is to preserve mutual trust. The staff member should be in a position to know what remuneration he may expect over the long term. The list of benefits and allowances in article 67, paragraph 1, is not exhaustive. Other provisions of the Staff Regulations confer entitlement to benefits and allowances in other circumstances. They appear to fall into two groups:

- (a) benefits and allowances which are permanent or at least payable over a fairly lengthy period, such as the residence allowance, allowance for dependants, education benefit, expatriation allowance and language allowance;
- (b) temporary benefits and allowances, payable for a limited period, such as the installation benefit, overtime pay (article 57) and pay for shift work (article 58).

The preservation of mutual trust and, consequently, the safeguard provided in article 49, paragraph 13, are applicable only to allowances which are permanent or payable over a certain period of time. To depart from that principle would be to create unacceptable anomalies in the structure of remuneration at the EPO. The duty allowance is a temporary one. The staff member who receives it knows that he will continue to do so only as long as he is performing duties pertaining to a higher grade. If, like the complainant, he is assigned the duties of a higher grade because of promotion, there are no grounds for payment of the duty allowance and there is no legal basis for it in article 49, paragraph 13.

10. As is stated in paragraph 6 above, however, the complainant has been receiving since the date of his promotion lower remuneration than before. This anomaly is unacceptable. It is quite unfair to reduce remuneration when responsibility is increased. To correct this anomaly the Tribunal will apply the principle of Article 9, paragraph 5, of the integration agreement:

"In no event may the application of paragraphs 3 and 4 above result in the payment to a promoted official of a total

net remuneration lower than that to which he would have been entitled if he had not been promoted."

The purpose of that provision is to prevent injustice in the amount of total net remuneration payable to the official.

DECISION:

For the above reasons,

1. The EPO's decision reducing, after promotion, the complainant's total net remuneration as interpreted above is quashed.
2. The case is remitted to the President of the EPO to enable him to make such special arrangements as may be appropriate to ensure that the complainant's total net remuneration is not lower than the sums he was receiving before promotion.
3. The complainant is awarded 500 guilders as costs.

In witness of this judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

(Signed)

André Grisel
Devlin
H. Armbruster

A.B. Gardner

1. Registry translation.