

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

FIFTY-THIRD ORDINARY SESSION

In re GIROUD and BEYER

Judgment No. 615

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Gérard Giroud on 7 July 1983 and corrected on 18 July and the complaint filed against the EPO by Mr. Fritz Beyer on 13 July and corrected on 9 August, the EPO's reply of 10 October to Mr. Giroud's complaint and its reply of 13 October to Mr. Beyer's complaint, and Mr. Giroud's letter of 10 January 1984 and Mr. Beyer's of 13 January to the Registrar stating that they did not wish to file rejoinders;

Considering the applications to intervene in Mr. Giroud's complaint filed by:

K.W. Adams,

J.W. Ainscow,

P. Albert,

A. Alders-Meewis,

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J.W. Arbouw,

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A.M. Bachleitner,

T.R. Bakker,

A. Bauer,  
M.T. Beer,  
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A.J.G. Blondeau,  
C.T. Bonvin,  
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L. Boudebouda,  
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G.M. Braehler,  
J. Braun,  
L.E. Brighenti,  
G.L. Bruendl,  
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A. Bürkhart,  
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M.R. Bywater,  
G.D. Carruthers,  
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R. Cecchini,  
F.E. Centmayer,  
M.C. Ceyte,  
V. Chaki,  
D. Chalret,  
B.E. Chambers,

F.E.C. Chevallier,  
G. Chiste,  
M. Chomentowski,  
G. Churcher,  
A.S. Clelland,  
Y.R.J. Cleuziou,  
E. Colonnella,  
V. Commare,  
C.A. Consee,  
J. Coquelin,  
G. Costabile,  
J.J. Courtens,  
E.A.C. Crab,  
S. Crane,  
M.C. Dainese,  
M.A. Dancer,  
E.P. De Haan,  
G.M.A. De Luca,  
M.L. De Rijke,  
A.S.G. Decroix,  
G. Del Piero,  
A. Denantes,  
S. Dessena,  
M. Di Cerbo,  
C. Dobler,  
P. Dropmann,  
J. du Pouget de Nadaillac,  
H.J. Duyfjes,  
H. Eckart,  
H. Eckert,

S.M.M. Egensperger,  
H.A. Eichinger,  
F.A. Eiden,  
R.P. Eliot,  
F.H. Engelhardt,  
S. Esterhammer,  
S. Fabiani,  
P. Feidt,  
L.A. Feiler,  
H. Fein,  
J.B. Felber,  
M.L. Ferranti,  
H.H.R. Fessel,  
G. Filser,  
S.A.M. Foglia,  
J. Fonck,  
J.M.J. Fontaine,  
J.A.A. Fouchy,  
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M.A. Freehede,  
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G.A. Friedenberger,  
K.O. Friesecke,  
M. Gagliardi,  
G.O.J. Gall,  
B.R. Gellie,  
C.R.J.M. Gerardin,  
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R.G. Ghellere,

G. Giovannetti,  
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R. Gramaglia,  
C.M. Grubwinkler,  
L. Gruszow,  
R.E. Gryc,  
C. Gugerell,  
V.J. Habernickel,  
M. Haertle,  
D.D. Harkness,  
P.A. Harkness,  
I.R. Harris,  
P.A.A. Haslauer,  
M.G. Hatherly,  
H.F. Hausmann,  
J. Heberger,  
F.G. Heinlein,  
M.C. Held,  
I. Hieber,  
U.K.R. Hild,  
K. Hiltner,  
C.G.B. Hjelm,  
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W.W.G. Hofmann,  
I.A. Holliday,  
A.S. Holzwarth,  
G.J. Hughes,  
E.E. Hunter,  
S. Hussing,  
D.S. Jacobs,

S.N. Jacobus,

K.A. Jaik,

G. Janc,

N.P. Jeger,

B.A.K. Johansson,

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E.F. Jonas,

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M.A. Jouvray,

S.O. Kalling,

B.C.L. Karet,

S.M. Kasseckert,

G.M. Kellner,

A.J. Klaassen,

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S.R. Knowles,

M.F. Koch,

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P. Kyriakides,

J.J. Lausenmeyer,

L.R.L. Lavoue,

B.C.C. Lefevre,  
C.G. Leif,  
A.L. Leonard,  
P.J.B. Lesniak,  
L. Li Voti,  
P. Lorenz,  
A. Lovrecich,  
P.R. Lockett,  
E.H. Lukas,  
K.D. Mader,  
J.B.M.M. Manton,  
M. Marandon,  
A. Maroscia,  
M. Marston,  
L. Martinuzzi,  
P. Martorana,  
M.P. Mastroianni,  
M. Mastropietro,  
E. Mathys,  
C.P.A. Maugain,  
B. McGinley,  
J. Mellado y Mellado,  
M.W.G. Mercier,  
M. Mergoni,  
J.P.J. Meyer,  
P.J.F. Mieszkowski,  
H.M.J. Moerderdorfer,  
E.C. Moser,  
O.R. Muench,  
J. Myers,

R.M. Nasser,  
G.P.J. Natus,  
K. Naumann,  
H.E. Nentwich,  
K.M. Neumeier,  
E.L. Nilsson,  
A.J. Nuss,  
P.A. O'Reilly,  
W.B. Oettinger,  
O.L. Olsson,  
H.P. Ostertag,  
M.S. Parup,  
A. Pasqualetti,  
H.J. Payer,  
J.A. Pereira,  
U.F. Peters,  
B.L. Petit,  
F. Pfannerer,  
C. Philpott  
W.M.G. Piepenbrink,  
C.J. Pilsl,  
G.H. Pischtiak,  
M.A. Posl,  
A. Price,  
F.J. Proels,  
M. Quirin,  
I.A. Rabbetts,  
W.J.W. Raeuschl,  
M.G. Rauffer,  
N.H. Reeves,  
H.J. Reich,

G.A. Reiner,  
E.C. Reisinger,  
M. Repinski,  
A. Ricciardi,  
C.W. Robinson,  
D. Roedl,  
J.D. Roscoe,  
J.F. Rueckerl,  
H.L. Ruppachter,  
M. Ryan,  
A.J. Samtmann,  
M . Samuel,  
V.Y.M.M. Santschi,  
A. Scattone,  
W. Schaller,  
F.P.H. Scherer,  
H.P. Schmid,  
M . L. Schnauder,  
P. Schoon,  
W. Schroeder,  
S.S.W. Schroepfel,  
A. Schulz,  
W.R. Schuster-Kaechele,  
K.B. Schwab,  
H.J. Seidenschwarz,  
H. Semmler,  
R.K. Shukla,  
D. Sieber,  
J.W. Sinnamon,  
L. Smetankine,

P.L. Smith,  
W.T. Snell,  
K.G. Soella,  
R.K. Spangenberg,  
H. Staber,  
L. M . Stone,  
J.A. Strebel,  
E.K. Stuerzenberger,  
W. Sussbauer,  
A. Tannerfeldt,  
A.V. Taylor,  
F. Telari,  
R.E. Teschemacher,  
R.A. Thomann,  
D.X. Thomas,  
L.M.V. Tissot,  
L. Toti,  
E. Turrini,  
C.A. Van Der Zee,  
W.O. Van Eeckhout,  
Y. Van Henden,  
.J.S.J. Van Laarhoven,  
R. Van Voorst Tot Voorst,  
P.J.C.C. Vermeesch,  
M.R.N. Villemin,  
C. Vullo,  
E. Waar,  
D.A. Wagner,  
I.B. Wallinder,  
G.J. Wassenaar,  
P.E.H. Watz,

R.M. Weber,  
R. Weber,  
G.O. Weidmann,  
G.A. Wells,  
W.J.L. Wheeler,  
G.V. Williams,  
C.T. Wilson,  
H.O. Winkler,  
E.A. Winzinger,  
C.D. Witt,  
J.H. Youle,  
R.J. Young,  
R. Zottman.

Considering the applications to intervene in Mr. Beyer's complaint filed by:

M. Arendt,  
K.J. Botterill,  
S. Brooks,  
D. Brooks,  
E. Burrows,  
A. Caillet,  
B. Cannici,  
I. Diallo,  
S. Erkingen,  
M.L. Fiedler,  
W. Giese,  
E. Gessner,  
C.S. Gibbs,  
G. Hahn,  
H. Halffter,  
G. Hebel,

H. Hebel,  
S. Hildebrandt,  
C. Idez,  
H. Kapteyn,  
W. Kesten,  
G. Klitsch,  
G. Kökn,  
E Kohlmann,  
Y. Lemblé,  
J. Lemmerich,  
H.J. Ludwig,  
H. Malchow,  
A. Mertingkat,  
R. Merz,  
H. Nardzinski,  
T. Nathanson,  
H. Nickel,  
G. Nitschke,  
N. Phillips,  
H. Rietzdorf,  
H. Rochlitz,  
M. Rognoni,  
J. Rother,  
I. Schneider,  
K. Schwartz,  
G. Sehling,  
J. Simon,  
J.G. Stroud,  
B. Watzke,  
R. Whiteley,  
M. Wisboreit,

H. von Wittken,

K. Zopf.

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3), 65, 107 to 109 and 111 of the Service Regulations for permanent employees of the European Patent Office, the secretariat of the EPO;

Considering that the complaints raise the same issues and should be joined to form the subject of a single decision;

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. At the material time the complainants and the interveners were members of the staff stationed in Munich or Berlin. Mr. Giroud was the Chairman of the EPO Staff Union and Mr. Beyer, Vice-Chairman. To protest against what they saw as a threat to the purchasing power of their salaries, most of the staff in Munich, including Mr. Giroud and many of the interveners in his complaint, went on strike on 21 September 1982. The strike lasted half a day. A half-day strike was held in Berlin on 23 September, and Mr. Beyer and many of the interveners in his complaint stopped work. By a circular of 25 October the President of the Office announced that deductions would be made from salary according to the number of working days not worked in the month, and at the end of November one forty-fourth (there being 22 working days in September 1982) was accordingly deducted from the salaries of those who had stopped work. One-day strikes took place on 30 November and 2 December 1982 in Munich and on 1 and 3 December in Berlin. All who had stopped work had their salaries docked according to the method prescribed in the circular. At dates from late January to early March 1983 the two complainants and other staff filed internal appeals under Article 107 of the Service Regulations protesting against the method. On 29 March the President referred all the appeals to the Appeals Committee. On 5 April its Chairman announced that five members were unable to hear the case, having a "personal interest" within the meaning of Article 111, and that there was no quorum. Accordingly, by a decision dated 7 April 1983, posted up on EPO premises in Munich on 12 April and in Berlin on 14 April, and now impugned in the two complaints, the President rejected the appeals as unfounded.

B. The complainants put forward arguments that were advanced in earlier cases about the method of calculating salary deductions made for taking part in a strike at the EPO and were recapitulated in Judgment No. 566, under B. They ask the Tribunal to quash the decision of 7 April and declare unlawful the method of calculation prescribed in the circular of 25 October 1982. They seek repayment of the sums wrongfully withheld from their salary for their having taken part in strikes -- Mr. Giroud on 21 September, 30 November and 2 December 1982, and Mr. Beyer on 23 September and 1 and 3 December -- plus interest at 10 per cent a year from the dates on which they were withheld; payment to each of them of 1,000 Deutschmarks, plus interest, in damages for interference with the right to strike; and costs. Each of the interveners stopped work on all or on some of the strike days.

C. The EPO's arguments in reply to the two complainants are similar to those it advanced in earlier cases and appear in summary form in Judgment No. 566, under C. It further contends that the complaints are receivable only inasmuch as the complainants are staff members, not inasmuch as they are officers of the Staff Union, It invites the Tribunal to dismiss the complaints as devoid of merit.

#### CONSIDERATIONS:

1. The complaints challenge similar decisions by the European Patent Organisation and raise similar issues. They may therefore be joined to form the subject of a single judgment.

2. On 21 September, 30 November and 2 December 1982 Mr. Giroud, the Chairman of the EPO Staff Union, took part in strikes held in Munich by the staff of the Organisation. Mr. Beyer, the Vice-Chairman of the Union, took part in similar strikes held in Berlin on 23 September and on 1 and 3 December 1982. The Administration decided that deductions would be made from the salary of the staff by a method which consisted in dividing the number of strike days by the number of working days in the month in which the strike took place. To determine the amount of the deduction the figure thus obtained was multiplied by the amount of basic salary. Salary allowances were not deducted and therefore did not count.

3. The EPO comments on the receivability of the complaints.

The complainants observe that they were Chairman and Vice-Chairman of the Staff Union and in their brief they claim as such an award of damages. The EPO retorts that in so far as they are appealing as such their complaints are irreceivable by virtue of Article 13 of the European Patent Convention.

The Tribunal will not rule on the plea. What the complainants seek is repayment of the sums they believe were unlawfully deducted from their salary as staff members, and they are therefore acting in their own name.

They do not state in what capacity they make their claim to damages for impediment of the right to strike. The Tribunal holds, as it states in 8 below, that the claim is devoid of merit and, that being so, there is no need to rule on the receivability of the claim.

4. It is common ground between the parties that a staff member who goes on strike is not entitled to payment for the period during which he has ceased to work. This is a corollary of the principle which says that remuneration is due only for services rendered.

The only matter in dispute is the method of calculating the deductions.

The rules on remuneration are in Article 65 of the Service Regulations. The article says that "Payment of remuneration to employees shall be made at the end of each month for which it is due". "Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths and:

-- where the actual number of days for which pay is due is fifteen or less, the number of thirtieths payable shall equal the actual number of days for which pay is due;

-- where the actual number of days for which pay is due is more than fifteen the number of thirtieths payable shall equal the difference between the actual number of days for which pay is not due and thirty."

5. The complainants contend that for want of any other provision in the Regulations the EPO is bound to comply with Article 65, which applies the so-called "thirtieths" rule when a staff member is off work.

To this the EPO replies that since the right to strike is not governed by the Regulations neither is the matter of salary deductions. It submits there is no parallel in law between the position of a staff member who willingly joins others in a work stoppage and that of a staff member who is off work for some fortuitous reason which is invariably peculiar to himself. When there is a strike -- the argument runs -- the employment relationship is suspended for the duration and rights and duties arising under it do not directly apply; a new relationship comes into being, with rights and duties other than those prescribed in the Service Regulations and founded on the general principles of law governing strikes; and, lastly, when there is a concerted work stoppage, the Administration may decide whatever it thinks best for the proper running of the Organisation.

6. The EPO's notion of the right to strike is out of date. As a matter of principle a strike is lawful. It does not break the contract of employment or the administrative link between an organisation and its staff. The employee continues to be a member of the staff and the only provisions of the staff regulations to be suspended are those which are incompatible with the work stoppage. Salary is withheld by virtue of a provision in the regulations, the requirement of payment for services rendered, and any provision which is not incompatible with the existence of a strike remains in force.

Article 65 is therefore applicable whatever the reason for the official's absence, since it does not provide for any exception. If the strike involved the breach of obligations under the rules or contractual obligations or led to unlawful acts, it would be admissible for the Administration to take special measures, but in that event there would not be a strike in the proper sense, and the measures would be disciplinary. The strike was not of such a kind in this case.

Even where a strike is not an abuse of right an organisation would of course be entitled to make special rules on salary deductions different from the rules on absence from duty for other reasons. But such rules must be incorporated into the staff regulations in accordance with the prescribed procedure for the making and approval of rules. The executive head is not competent to adopt such rules, let alone such rules which are retroactive. To accept

the EPO's submissions would be to allow the imposition of a covert disciplinary sanction. The EPO staff exercised an acknowledged right and did not commit any misconduct. The impugned decisions are therefore unlawful and must be set aside.

7. The complainants invite the Tribunal to order in consequence that they be paid the sums wrongfully deducted from salary. The claim succeeds, and the EPO shall pay them the sums withheld in excess of the amount of the deduction authorised under the "thirtieths" rule.

8. The complainants also claim an award of 1,000 Deutschmarks as damages for interference with the right to strike.

The claim fails. A dispute over the calculation of deductions to be made in the event of a strike is not tantamount to impediment of the right to strike. There will be such impediment only where some act is committed that is of such gravity as to disturb the proper balance between the rights and duties of the parties.

9. The complainants are entitled to the payment of interest at 10 per cent a year on the sums wrongfully withheld with effect from the date of payment of each corresponding monthly salary up to the date of repayment.

10. The Tribunal awards 1,000 DM to each of the complainants as costs.

11. Many EPO officials have filed applications to intervene. According to Article 17(2) of the Rules of Court they are entitled to intervene in the present cases in so far as their legal position is identical or at least similar to that of the complainants.

The interveners may not, however, submit claims different from the complainants'. The Tribunal therefore dismisses as irreceivable their claim that the EPO be ordered to pay costs to the EPO Staff Union. In any event they furnish no evidence of any mandate from the Staff Union to act on its behalf.

#### DECISION:

For the above reasons,

1. The impugned decisions are set aside insofar as they deduct from the complainants' salaries on account of the strikes sums in excess of those authorised under Article 65 of the Service Regulations.
2. The complainants are referred back to the EPO for calculation of the sums to be refunded.
3. The complainants shall be paid interest at 10 per cent a year on the sums wrongfully withheld with effect from the date of payment of each corresponding monthly salary up to the date of repayment.
4. The interveners are referred back to the EPO for a decision in accordance with paragraph 11 above.
5. Each complainant is awarded 1,000 Deutschmarks as costs.

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 hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

