

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

FIFTY-SIXTH ORDINARY SESSION

In re KERN (Nos. 2, 3, 4 and 5)

Judgment No. 663

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the European Patent Organisation (EPO) by Mr. Gerbert Kern on 16 April 1984 and corrected on 4 May, the EPO's reply of 23 July, the complainant's rejoinder of 21 November and the supplement thereto dated 10 December 1984 and the EPO's surrejoinder of 11 February 1985;

Considering the third complaint filed against the EPO by Mr. Kern on 19 April 1984 as amended on 4 May and corrected on 21 May, the EPO's reply of 23 July, the complainant's rejoinder of 21 November and the supplement thereto dated 10 December 1984 and the EPO's surrejoinder of 11 February 1985;

Considering the fourth complaint filed against the EPO by Mr. Kern on 4 July 1984 and corrected on 3 August, the EPO's reply of 22 October, the complainant's rejoinder of 21 November and the supplement thereto dated 10 December 1984 and the EPO's surrejoinder of 11 February 1985;

Considering the fifth complaint filed against the EPO by Mr. Kern on 5 September 1984, the EPO's reply of 26 November, the complainant's rejoinder of 4 March 1985 and the EPO's surrejoinder of 6 May 1985;

Considering Article II, paragraph S, of the Statute of the Tribunal and Articles 4, 28, 80, 84, 106, 108, 109, 110 and 112 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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

A. The complainant, a Swiss citizen, is employed as a patent examiner by the EPO in Munich. Article 84 of the EPO Service Regulations relates to benefits payable in the event of invalidity. As is recorded in Judgment 626, under A, the Administrative Council of the EPO amended the conditions for the award of lump-sum benefits under Article 84 by its decision CA/D.7/83 of 10 June 1983. On 6 September 1983 the complainant submitted an appeal against that decision to the Council. At a meeting held from 6 to 9 December 1983 the Council decided that the Service Regulations did not offer any internal means of redress against its quasi-legislative acts. That is the decision which the complainant is challenging in his second complaint.

B. By its decision CA/D.1/83 of 17 March 1983 the Council approved the introduction of a levy on the pay of all EPO staff, increasing from 1.5 to 4.5 per cent over a period of three years, and a permanent reduction of 4.5 per cent at the end of three years. On 10 June 1983 the complainant submitted an appeal against that decision to the Council. As stated in A above, the Council decided in December 1983 that the Service Regulations afforded no internal means of redress against its quasi-legislative acts. The rejection of his appeal against the Council's decision of 17 March is the subject of the complainant's third complaint.

C. By its decisions CA/D.10/83 and CA/D.11/83, which the Council took at its session held from 6 to 9 December 1983, it adopted a new text of Article 4 of the Service Regulations, which relates to the filling of vacant posts, and amended Article 80(3)(1), which relates to the reimbursement of the travel expenses of the spouse and dependent children for the return journey from the duty station to the official's home. On 5 March 1984 the complainant submitted an appeal against those decisions to the Council. By a letter of 5 April 1984, the decision which the complainant is challenging in his fourth complaint, the Secretary of the Council reminded him that in December 1983 the Council had decided that no internal appeal lay against its quasi-legislative acts, and informed him that his appeal was therefore rejected.

D. By its decision CA/D.1/84 of 8 June 1984 the Council approved detailed arrangements for safeguarding the basic salary of EPO staff affected by the introduction of the three-year levy mentioned in B above. That is the decision challenged in the fifth complaint. Apparently the complainant also made various claims in a letter which he addressed to the Administration on 2 August 1984 but which is not appended to his fifth complaint. In a letter to

him of 10 August the Principal Director of Personnel said that he was "far from clear about what it is you want", but added that he could not be allowed to prepare his appeals during working hours. If he needed more time he could apply for unpaid leave for the purpose. On 7 September 1984 -- two days after filing his fifth complaint -- he submitted an internal appeal against the Council's decision to the Council and to the President of the Office.

E. The complainant observes that the Council decisions at issue in his four complaints alter his rights as an individual staff member. He alleges formal flaws in those decisions and the infringement of his acquired rights. His claims for relief are couched in similar terms in his second, third and fourth complaints. He asks the Tribunal to declare that any decision affecting the rights of individuals should be communicated at once in writing to each of the staff members concerned, together with a statement of the grounds for the decision, as required by Article 106(1) of the Service Regulations; that certain safeguards and arrangements, which he sets out in detail, be introduced for that purpose; that they be applied retroactively to the decisions he is challenging in the three complaints; that the Council appoint at once the chairman and full members of the Appeals Committee as required by Article 110(3); that the Council refer his appeals to the Committee (Article 109(1)); and that the Committee's reports be communicated to him (Article 112(1) and (5)). In his fifth complaint the complainant again invites the Tribunal to allow the claims for relief in his third complaint, to which the fifth is a sequel. He further asks the Tribunal to declare that the EPO has failed to allow him time to prepare his appeals and complaints, and he claims "assistance" by virtue of Article 28 of the Service Regulations.

F. The EPO replies that the second, third and fourth complaints are irreceivable because they challenge quasi-legislative acts by the Council and claim internal means of redress which the Service Regulations do not provide for in such cases. The Council's quasi-legislative decisions do not directly affect the legal position of the individual staff member: only decisions by the President of the Office may do so and may be challenged before the Tribunal. The Statute of the Tribunal does not allow direct and abstract challenge to the lawfulness of quasi-legislative acts. Nor was the complainant entitled to have the Council refer his internal appeals to the Appeals Committee. According to Articles 106, 108 and 109 internal appeal will not lie to the Council from any EPO staff member but only from one for whom the Council is the "appointing authority" and whose legal position an individual decision by the Council directly affects. The complainant does not satisfy either of those conditions. The EPO puts forward subsidiary arguments on the merits, observing that Article 106(1) does not require the Council to communicate individual decisions and the reasons for them to those concerned. As to the fifth complaint, the EPO observes that the complainant submitted his internal appeal against the Council's decision of 8 June 1984 two days after he had filed his complaint. The challenge to that decision is therefore clearly irreceivable on the grounds of failure to exhaust the internal means of redress. If that plea is not upheld, the EPO repeats the pleas on receivability and the merits it put forward as to the third complaint. As to the claim for assistance from the EPO, the complainant filed an internal appeal with the President on 26 and 27 August 1984 challenging the letter of 10 August from the Principal Director of Personnel. On 24 September the President wrote to inform the complainant that his appeal was being referred to the Appeals Committee. The claim is therefore again irreceivable on the grounds of failure to exhaust the internal means of redress.

G. In his rejoinders the complainant seeks to refute the EPO's submissions on the issue of receivability, alleging that it has misread the relevant provisions of the Service Regulations and enlarging on his original contentions. He presses his claims in all four complaints.

H. The EPO states in its surrejoinders that it finds nothing in the rejoinders to weaken the force of the arguments in its replies and it again invites the Tribunal to dismiss the four complaints.

CONSIDERATIONS:

Joinder

1. The EPO asks in its replies that the four complaints be joined. Before the Tribunal will join complaints and deal with them in a single judgment two conditions must be fulfilled.

The first is that the substance of the claims must be the same. Whether they are stated differently is of no account: what matters is that the Tribunal should be able to rule on them in a single decision.

The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto, should be the same.

The complaints need not all contain the same arguments and rest on the same legal reasoning. The Tribunal rules as it sees fit and is not constrained by the parties' submissions.

The complainant's second complaint, dated 16 April 1984, impugns a decision taken by the Administrative Council of the EPO on 9 December 1983. By that decision it rejected his internal appeal of 6 September 1983 against its decision at its 16th Session to amend Article 84 of the Service Regulations (CA/D.7/83).

The decision he impugns in his third complaint, dated 19 April 1984, is the same one, which he submits also rejected his internal appeal of 10 June 1983 against the Council's decision of 17 March 1983 (CA/D.1/83).

In his fourth complaint, dated 4 July 1984, he challenges a decision of 5 April 1984 rejecting his internal appeal of 5 March 1984 against decisions taken by the Council at its 17th Session (6-9 December 1983) (CA/D.10/83 and CA/D.11/83).

The fifth complaint, dated 5 September 1984, contests a Council decision of 8 June 1984 (CA/D.1/84) taken in pursuance of the decision of 17 March 1983 (CA/D.1/83).

Although there are some differences between the four complaints, which impugn different decisions and put forward not quite identical claims, the decisions do form a single pattern of which each complaint challenges different elements, all four being closely and indeed inextricably linked by an identity of substance. They all raise the same preliminary issue, and one on which the Tribunal may give a single ruling, namely the receivability of a complaint challenging a general decision by the Council.

Besides their identity of substance all four rely on the same facts and put forward the same pleas, challenging as they do decisions taken by the Council on one particular subject over a period of a few months, in keeping with a general policy of financial and administrative reform.

The Tribunal therefore allows the application for joinder.

The application for oral proceedings

2. The Tribunal will not order oral proceedings under Article 12 of its Rules of Court. The material issues are dealt with by the EPO in its replies and further discussed in the subsequent briefs. Since the evidence before the Tribunal is adequate, oral proceedings would serve no purpose.

Receivability

3. Before it may go into the merits the Tribunal must determine whether the complainant may challenge general decisions of the Council and whether his complaints are therefore receivable.

4. For the reasons given below the Tribunal holds that they are not.

The mere fact that the impugned decision affects several categories of staff and is therefore general in character is not in itself sufficient to make the complaints irreceivable. Decisions which may be challenged before the Tribunal do not have to be individual in nature. That they may also be general is plain from Article VII (2) of the Statute of the Tribunal, which sets the time limit for filing a complaint against a "decision affecting a class of officials", that is to say, a general decision. But a complaint against a general decision will not perforce on that account be receivable. There is also the rule in Article VII(1) of the Statute that the internal means of redress must have been exhausted.

Article VII(1) reads: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". The rule does of course cover mainly cases in which direct appeal lay against the decision within the organisation. But it also means that the Tribunal will declare irreceivable a complaint impugning a general decision against which there can be no direct internal appeal, but which must ordinarily be followed by individual decisions against which such appeal does lie. There are two reasons for so construing Article VII. The first is that the Tribunal is relieved of ruling on the validity of a general decision to which it may be unable to foresee exactly how effect will be given. The second is that the Tribunal will not be acting on an application from a single complainant

to set aside a general decision which other staff may not object to.

Before coming before the Tribunal the complainant must wait until the Administration has taken individual decisions concerning him and he has exhausted the internal means of redress. To declare his complaints irreceivable causes him no prejudice since he may appeal against future individual decisions, first inside the Organisation, and then, if necessary, to the Tribunal.

5. Since the complaints are irreceivable the Tribunal will not rule on the merits.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable the Lord Devlin, Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner