

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

## FIFTY-SIXTH ORDINARY SESSION

In re METTEN (No. 2)

Judgment No. 667

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the European Patent Organisation (EPO) by Mr. André Metten on 6 September 1984 and corrected on 17 September, the EPO's reply of 3 December, the complainant's rejoinder of 5 March 1985 and the EPO's surrejoinder of 9 May 1985;

Considering the application to intervene filed by Mr. Victor Chaki;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 64(1) and 65(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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. On 8 June 1984 the Administrative Council of the EPO adopted a decision, CA/D.1/84, approving recommendations put to it in a report (No. 196) by the Co-ordinating Committee of Government Budget Experts of the "co-ordinated organisations", of which the EPO is one. The decision related to new salary scales which came into force as from 1 July 1983 (see Judgment 624, under A) and were notified to the staff by circular 131 of 15 June 1984. Another circular, No. 134 of 22 July 1984, explained that by the same decision the Council had approved the salary levies recommended by the Committee in its 191<sup>st</sup> Report. The complainant, a patent examiner in the A category of staff of the EPO in Munich, is impugning the Council's decision, notified to him on 20 June 1984 by circular 131, to make reductions in his salary as from 1 July 1983.

B. The complainant maintains that since no internal appeal will lie against a Council decision like the one he is challenging -- as the Council itself declared at its session of December 1983 -- his complaint is receivable. As to the merits, he cites Article 64(1) of the EPO Service Regulations: " a permanent employee who is duly appointed shall be entitled to the remuneration appropriate to his category, grade and step. He may not waive his entitlement to remuneration", and Article 65(1)(a): "Payment of remuneration to employees shall be made at the end of each month for which it is due." He submits that no article of the Regulations allows the levy on salary. He invites the Tribunal to order the President of the Office to make no such levy; if any is made to pay it back to him with interest at the rate of 7 per cent a year from the date of deduction; and to award him costs.

C. The EPO submits that the complaint is irreceivable for the reasons already given by the Tribunal in Judgments 624 and 626. The new salary scales had not yet been applied to the complainant or indeed to anyone else when the complaint was filed. An appeal will lie to the Tribunal only against an individual decision made by the President in application of a general one, not against a general quasi-legislative act which has not yet been put into effect. The new salary scales and the levy had not yet been applied when the complaint was filed. This is clear from a communication of 20 August 1984 to A and L category staff from the Principal Director of Personnel and the reply of 15 November 1984 from the President of the Office to the complainant's letter of 31 October 1984. The delay was due to the difficulty of working out the amount of the levy for each official. The complainant must therefore await a decision by the President to apply to him the Council's general decision and challenge it first in accordance with the internal appeals procedure. His present complaint is premature and should be dismissed.

D. In his rejoinder the complainant maintains that his complaint is receivable. The decision he is challenging is not, as the EPO contends, a purely quasi-legislative and abstract decision, but one which has already come into effect. It constitutes in itself an individual decision since it determines the precise entitlements of each official concerned, and the Tribunal may therefore already foresee exactly what effect will be given to it. An internal appeal against the actual levy on the complainant's salary would be a mere formality and would have no chance of success, since

the President has no choice in the matter. It would in any event be impossible to find members of the Appeals Committee who were not personally concerned by the decision. The complainant also develops his arguments on the merits, maintaining that the levy is in breach of the Service Regulations and objecting to the EPO's failure to argue the merits.

E. In its surrejoinder the EPO reaffirms its plea that the complaint is irreceivable on the grounds that, in keeping with the case law, the complainant must first challenge an individual decision taken by virtue of the general one he is objecting to. As to his argument about the composition of the Appeals Committee, it is for the members themselves to say whether they may hear an internal appeal. The EPO also puts forward subsidiary arguments on the merits.

#### CONSIDERATIONS:

1. The EPO submits that legislative acts by the Administrative Council may not be directly challenged before the Tribunal.

The 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, paragraph 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.

In this case the scales of basic monthly salary, the dependants' and child allowances and the expatriation allowances are indeed set out in an appendix to the impugned decision. But, though binding on the Administration of the EPO, the appendix does not make it possible to put an exact figure on the entitlements of the individual staff member. For one thing, Article 4 of the decision provides that the refund of sums wrongly paid will not be required: it is by no means clear how that is to be construed, and the Administration will have to make a ruling on the point.

2. The complainant advances two arguments. One is that he is asking the Tribunal to set aside the Council's decision, not in its entirety, but only insofar as it affects himself. The other is that the internal appeal procedure could not now function properly since every member of the Appeals Committee of the EPO would himself have an interest in the outcome of the appeal.

Both arguments fail. Obviously to set the impugned decision aside insofar as it affects the complainant would in fact have much the same consequences as to set it aside erga omnes. And the objection to the membership of the Appeals Committee cannot be entertained in hearing the present complaint. In any event the Committee would be competent to consider allegations of flaws in the individual decision.

3. Challenging as it does a general decision, the present complaint is irreceivable. Before he comes before the Tribunal the complainant must wait until there is an individual decision affecting himself. To declare the complaint irreceivable causes him no prejudice since he may appeal against a future individual decision, first inside the Organisation, and then, if necessary, to the Tribunal.

4. Since the complaint fails, so does Mr. Chaki's application to intervene.

#### DECISION

For the above reasons,

The complaint and the application to intervene are dismissed.

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 signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner