

FIFTY-EIGHTH ORDINARY SESSION

In re MIJNDERS

Judgment No. 737

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Alexander Renatus Mijnders on 27 March 1985 and corrected on 10 April, the EPO's reply of 26 June, the complainant's rejoinder of 16 August and the EPO's surrejoinder of 6 November 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3), 49(11) and (13), 67(1)(e), 75, 108(1) and 109(2) 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 facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman employed by the EPO in its office at The Hague, used to be paid a language allowance under Article 75 of the EPO Service Regulations, which reads:

"(1) A language allowance may be granted by the President of the Office ... to permanent employees in Grades B1, B2 and C1 to C4 who are required in the course of their duties to use two or three of the official languages of the Office which are not their mother tongue and who have proved that they have a knowledge of those languages.

...

(3) For each second and third language other than the mother tongue, the amount of the allowance shall be equal to an increase in incremental step in Grade B2, in the case of permanent employees in Grades B1 and B2..."

The complainant held grade B2, step 9, with 14 months' seniority and the language allowance was worth an additional step in grade B2. On 1 September 1984 he was promoted to B3. A standard form entitled "Calculation of incremental step on promotion" and dated 28 August 1984 informed him that he would have step 6 in B3, with two months' seniority, and that his language allowance ceased on the date of promotion, but that "promotion compensation" would "become applicable". He got that form on 29 September 1984. By a letter dated 28 November and notified on 3 December to the President of the Office he lodged an appeal under Article 108(1) of the Service Regulations against the decision not to incorporate the language allowance into his salary on his promotion, and he asked for step 8 in B3 as from 1 September 1984. Having got no answer, he is impugning what he takes to be the rejection of his claims implied under Article 109(2) of the Service Regulations.

B. The complainant submits that the decision of general policy not to incorporate language allowances into basic salary on promotion to B3 is subject to two formal flaws: (1) it has never been formally communicated to him, and (2) it was not submitted beforehand, as Article 38(3) of the Regulations requires, to the General Advisory Committee, a joint staff-management committee of the EPO. The decision also suffers from substantive flaws. (1) It is contrary to the spirit of Article 75, of guidelines dated 26 November 1980 on the grant of the allowance, and of a staff circular on the same subject, No. 83 of 31 March 1981, in all of which it is implicit that those who qualify for the allowance should continue to receive it. (2) There is breach of an acquired right recognised in Article 49(13) of the Regulations: "In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration". According to Article 67(1)(e) the language allowance forms part of such remuneration. There was no need for "promotion compensation" since the rules prescribe a method of determining step on promotion. He asks that the calculation of his step be set aside, that the allowance be incorporated into his B3 salary, that he be granted step 8 in B3 as from 1 September 1984, that his seniority be calculated accordingly and that he be awarded the compensation due.

C. The EPO replies that the complaint is devoid of merit. The allegations of formal flaws are based on the mistaken assumption that the President has taken a general decision not to include the language allowance in basic salary on

promotion. The decision was an individual one and as such did not need to be referred to the General Advisory Committee. As to his allegations of substantive flaws, there was no breach of the letter or the spirit of Article 75 since B3 staff members do not qualify for a language allowance under that article, which, moreover, says nothing about incorporating the allowance in basic salary. Nor was there breach of Article 49(13), which safeguards against reduction in total net remuneration on promotion: the complainant is confusing basic salary and total net remuneration. Article 49(11) says how the step in the new grade is calculated, essentially by reference to the basic salary figures before and after promotion, and the calculation has to be made before total net remuneration is worked out. Whether the guarantee in 49(13) comes into play can be determined only when the basic salary is known. If it does the total net remuneration is raised, but the figure for basic pay holds good.

D. In his rejoinder the complainant again observes that the Service Regulations make it plain that total net remuneration is to be safeguarded by the award of steps, not by payment of a promotion allowance, and he submits that by improvising such an allowance without consulting the staff the President acted in breach of Article 38(3). He enlarges on his main submissions that there is breach of an acquired right to the language allowance and that his case is being dealt with arbitrarily. For example, when, in November 1984, he started to receive a rent allowance, the promotion allowance unaccountably vanished. He discusses the interpretation to be put on 49(11) and (13).

E. The EPO points out in its surrejoinder that what the complainant received was "promotion compensation", viz. an amount paid over and above other components of total net remuneration because the guarantee in 49(13) had come into play. That guarantee is not fulfilled by the grant of additional steps in the new grade. The EPO's former practice was to include the language allowance in basic salary when applying Article 49(11) on the mistaken assumption that it formed part of such salary. Following the Tribunal's ruling in re Rombach (Judgment 460) the Organisation altered that practice so as to disregard the language allowance in determining basic salary, a mere change of interpretation which required no referral under Article 38(3). If the staff member receives any benefit which removes the difference between total net remuneration before promotion and that after it, the promotion compensation will be cancelled. That is why it was cancelled when the complainant qualified for rent allowance.

CONSIDERATIONS:

1. Article 75(1) of the Service Regulations provides for the grant of a language allowance to employees in grades B1 and B2. In practice the allowance is worth an additional step in grade and is given in that form. There is no similar provision for grade B3, but Article 49(13) provides: "In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration".
2. The complainant was told that on 1 September 1984 he would be promoted from B2 to B3, that his language allowance would cease, but that "promotion compensation" would become applicable. The decision was communicated to him on 29 September in the form of a "Calculation of incremental step on promotion", which is the decision impugned. It places him in step 6 of B3, whereas he claims that with the language allowance he should be in step 8.
3. His claim is based upon the misconception that the President had taken a decision that there should be no language allowance for grade B3, whereas in truth the regulations do not provide for any but only for compensation, where appropriate, under Article 49. This point is fully developed in the submissions of both parties in the dossier, in which the nature of the misconception is explained. They are summarised in paragraphs A to E above. For the reasons given in paragraphs C and E the complainant's submission fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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