

SIXTY-FIFTH SESSION

***In re* GEISLER (No. 2) and WENZEL (No. 3)**

Judgment 936

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Joseph Geisler against the European Patent Organisation (EPO) on 3 June 1987 and the third complaint filed by Mr. Alfred Wenzel against the EPO on 27 May 1987;

Considering Judgment 899 of 30 June 1988;

Considering the EPO's further submissions of 11 August 1988, the complainants' comments thereon of 16 September and the EPO's further comments of 6 October 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 64(6) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Considering that the further pleadings may be summed up as follows: A. The EPO's submissions are summed up in 4 below.

B. The complainants further comments are summed up in 5 below.

C. In final comments the EPO says that it does not want to submit further pleas but merely to maintain its objections to any statement of the complainants' that does not coincide with its own.

CONSIDERATIONS:

1. On 30 June 1988 the Tribunal made an interlocutory ruling in Judgment 899. What the complainants are challenging is criteria the Administrative Council of the EPO applied in approving new pay scales. They are impugning a decision by the President of the Office to reject internal appeals which they had lodged on 11 and 13 June 1985 after receiving a payment of arrears on 26 March 1985. They want their pay to be increased accordingly.
2. The Tribunal held that, though one head of complaint was irreceivable, taking account of the so-called "Dutch levy" might offend against Article 6(c) of the annex to the 159th Report of the Co-ordinating Committee of Government Budget Experts of the Co-ordinated Organisations.
3. Since the Council had stated no reasons for its decision - the legal basis of the individual decisions impugned - the Tribunal ordered further submissions: for its part the Organisation was to "file a brief stating in detail the purport of the impugned decisions, their legal basis - with special reference to the application of 6(c) to the EPO - and the reasons for them".
4. The EPO filed its submissions on 11 August 1988. Evasive though its language is, it does make out that it has never undertaken to comply with 6(c); that the Council has sovereign authority over pay scales under Article 64 of the Service Regulations; and that 64(6), which is about co-ordination with the other European organisations, does not restrict the Council's freedom. As for the Dutch levy, "the Council, on which the member States of the Organisation are represented, could not but fall in with the Co-ordinating Committee's conclusions and its unanimous recommendation in favour of accepting the views of one member State, the Netherlands".
5. In their further rejoinder the complainants point out that on 17 March 1983 the Council formally endorsed the 159th Report, including its annex, and the 191st Report by the decision identified as CA/D 1/83, which is in the papers, and that it is dishonest on the Organisation's part to deny it. As for the Council's alleged "sovereign authority", they submit that since the EPO remains bound by its own decisions the Dutch levy ought to have been discounted so long as 6(c) applied.

6. The Tribunal has the following remarks on the EPO's submissions.

7. One is a general observation. The submissions are inconsistent in that the EPO says that 6(c) does not apply, yet that it was bound to take account of the Dutch levy, even though only by virtue of 6(c) can the levy be material. Moreover, the EPO has failed to answer the Tribunal's questions about the purport and legal basis of the Council's decision and the reasons for it. Its mere assertion of the Council's sovereignty and its utter disregard of the material legal issues are in breach of its duty, affirmed in Judgment 899, under 19, to comply with the rules in its dealings with the staff.

8. It therefore falls to the Tribunal itself to identify the material legal issues.

9. Article 64(6) of the Service Regulations reads:

"The remuneration of the permanent employees shall be subject to periodic review and shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee of Government Budget experts of the Co-ordinated Organisations".

Though the definition puts the EPO under no specific obligation it does reflect an intention of not letting EPO pay get out of line with the broad trend in national civil services, and that is the rule of thumb followed by the Co-ordinating Committee.

10. The purpose of the Co-ordinating Committee's 159th and 191st Reports is to lay down a procedure for adjusting staff pay. The Council's decision CA/D 1/83 of 17 March 1983 approved part of the 191st Report, which refers back to the 159th, including the annex. It also applied the provisions of the reports to EPO pay scales. Thus, contrary to what the Organisation says in its further submissions, some of the Co-ordinating Committee's prescriptions have been imported into EPO rules.

11. Those prescriptions include Article 6 of the annex to the 159th Report, which says how to compare pay in the civil service in selected countries with pay in the Co-ordinated Organisations. Of particular relevance to this case is 6(c), which defines as follows the "net pay" to be taken into account in determining pay in the Co-ordinated Organisations:

"... the arithmetic mean of gross minimum and maximum salaries to which are added all the other elements normally making up the remuneration of unmarried officials in the grade in question, but with the deduction of the amount of compulsory contributions to Social Security, and also income tax levied by the central authority on unmarried officials and calculated without taking into account non-automatic personal allowances".

12. There later arose in the Co-ordinating Committee the question as to whether the levy on the income of Dutch civil servants, introduced in 1981 by the law known as the Inhoudingswet, should be subtracted from net pay as defined in 6(c). According to evidence submitted by the complainants it was generally acknowledged that the levy did not qualify under 6(c) as an amount to be deducted. The Co-ordinating Committee nevertheless took it into account at the urging of the Dutch delegation, which the others eventually fell in with.

13. The EPO says that the Administrative Council applied the deduction to staff pay, albeit reluctantly, even though at the time the Organisation did not consider itself bound by any decision of the Co-ordinating Committee's.

14. Though the legal position is not clear the material issues appear to be as set out below.

15. For all the EPO's latest denials it is beyond doubt that the prescriptions of the Co-ordinating Committee's 159th and 191st Reports were duly put into effect in the EPO in keeping with Article 64(6), and they remain in force until the EPO replaces them with others.

16. The rule of law, the stability of legal relations and the legitimate expectations of EPO staff demand that as long as 6(c) is in force the Organisation abide by the method prescribed therein for altering staff pay. The Dutch levy is a deduction made as a token of "solidarity" and, as the EPO has acknowledged, does not come under any of the categories in 6(c). To take account of it is therefore in flagrant breach of 6(c).

17. The conclusion is that the Council's approval of the new scales is null and void for two reasons: because no reasons for it are stated, and because it takes into account a factor, the Dutch levy, that the rules in force in the

Organisation do not provide for.

18. The decisions determining the complainants' pay are therefore void because they rest on an invalid general decision of the Council's.

19. The decisions being quashed, the complainants' claim to costs is allowed and the Organisation shall pay each of them 2,000 Deutschmarks.

DECISION:

For the above reasons,

1. The decisions determining the complainants' pay in accordance with the Administrative Council's decision are set aside.
2. The cases are sent back to the EPO for execution of this judgment.
3. The EPO shall pay each of the complainants 2,000 Deutschmarks in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner