

SEVENTY-FIRST SESSION

***In re* VAN DER PEET (No. 16)**

Judgment 1102

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 16 August 1990, the EPO's reply of 14 December 1990, the complainant's rejoinder of 7 January 1991 and the Organisation's surrejoinder of 12 February 1991;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal, Article 7 and Appendix II of the Rules of Court, Article 113(1) of the European Patent Convention and Article 106 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant is employed at EPO headquarters in Munich as a grade A3 substantive examiner. His sixteenth complaint concerns payments made in execution of Judgment 936 (in re Geisler No. 2 and Wenzel No. 3), which ordered the EPO to reimburse sums deducted from net pay for the so-called Dutch levy, known as the "Inhouding". In communiqué 107 of 24 January 1989 the Administration announced that it would make good the sums deducted between July 1981 and June 1988 by means of lump-sum payments based on the salary scales in force on 30 June 1988. For anyone stationed in more than one country during that period the refund would take account of the salary scale at each duty station in proportion to length of service there.

In February 1989 the complainant was paid the lump-sum adjustment but he objected to the fact that arrears due to him for his period of service at The Hague had been reckoned on the basis of the salary scale applicable to the Netherlands rather than the one applicable to the Federal Republic of Germany, where he had been serving on 30 June 1988. On 27 April 1989 he lodged an appeal, like other staff in a similar position, asking that the sum be recalculated on the basis of the scale in force in the Federal Republic. The President agreed to his request, as he was informed by a notice of 23 May 1990 from the Personnel Department, the decision impugned, and he was paid the difference between the two reckonings, plus interest, that same month. The sum came to 41.62 Deutschmarks. Because of a computer error the Organisation made him a second payment of the same amount in June 1990. It explained the error on his pay slip for July and recovered the second sum by deducting it from his salary for that month.

By a letter of 30 July 1990 to the Principal Director of Personnel the complainant appealed against the recovery of the second payment of 41.62 Deutschmarks. By a letter of 21 August 1990 the Director informed him that the President had provisionally rejected his request and referred it to the Appeals Committee. That appeal is pending.

B. The complainant makes out that the notice of 23 May 1990 was in breach of Article 113(1) of the European Patent Convention and Article 106 of the Service Regulations because it failed to state clearly the grounds on which it rejected the Appeals Committee's recommendation concerning his internal appeal of 27 April 1989.

Having refunded the amount he had claimed, not as salary, but as an allowance, the Organisation made him a gift within the meaning of section 516 of the Civil Code of the Federal Republic. Not only did it fail to state the legal basis for the payment but, gifts being irrevocable, the amount paid in June 1990 was not recoverable.

As in previous complaints he asks the Tribunal to declare that it is not competent and refer the case to the Bavarian courts or, failing that, to order the EPO to pay him the difference between his German and Dutch salaries on 30 June 1988 for the duration of his service at The Hague, plus interest. He wants his staff reports to acknowledge that

the litigation has harmed his performance and he seeks an award of 3,000 Deutschmarks in moral damages.

C. Having applied for and obtained from the President of the Tribunal permission to address only the issue of receivability, the EPO submits that the complaint is irreceivable on several counts.

First, it is a flagrant abuse of the right of appeal.

Secondly, insofar as the complainant claims payment of the difference between his German and Dutch salaries for service at The Hague his complaint shows no cause of action since he received that amount in May 1990. The decision under challenge clearly identified the sum, and its mistaken recurrence on his pay slip for June 1990 and the correction in July, of which he was informed, had no effect on the actual payment. His ancillary claims are unsound for the same reason.

Thirdly, since the internal appeal which he filed on 30 July 1990 is still before the Appeals Committee he has failed to exhaust the internal means of redress.

D. In his rejoinder the complainant contends that he did exhaust the internal means of appeal since the Personnel Department's notice of 23 May 1990 stated the President's belief that his appeal of 27 April 1989 had to be rejected. He points out that the amount the EPO finally paid him failed to take account of the national tax to be levied on it. He presses his claims.

E. In its surrejoinder the Organisation submits that there is nothing in the complainant's rejoinder to make it change its view of the case. The impugned decision was a gesture made ex gratia that was not to his detriment. The amount he got back was clearly an item of salary and as such exempt from national tax.

CONSIDERATIONS:

1. This case arises over action the defendant took on Judgments 899 of 30 June 1988 and 936 of 8 December 1988 (in re Geisler No. 2 and Wenzel No. 3). In Judgment 936 the Tribunal declared EPO pay scales flawed in that, contrary to the material rules, salary had been arbitrarily reduced by taking account of a levy on the income of Dutch civil servants (Inhouding).

2. After consulting the staff representatives the EPO paid the staff, in execution of Judgment 936, lump-sum compensation covering the period in which it had taken account of the Dutch levy in reckoning their salary. The complainant is not objecting to the settlement as such. The only matter in dispute is a tiny lump-sum payment - 41.62 Deutschmarks - that was made to him and to others who had been transferred from the Netherlands to the Federal Republic of Germany in the course of the material period and that was intended to take account of a difference in pay scales between the two countries. The complainant got the amount with his salary for May 1990. But because of a computer error he was paid another 41.62 Deutschmarks in June, and the EPO deducted the sum from his salary for July, explaining at the same time why it was doing so.

3. The complainant thereupon submitted an internal appeal, on 30 July 1990, to the Principal Director of Personnel. The President of the Office referred it to the internal Appeals Committee, but instead of waiting for the Committee's report he filed this complaint on 16 August 1990.

4. He has four claims. He wants the Tribunal:

(a) to declare that it has no competence and refer the case to the Bavarian courts;

(b) failing that, to order the EPO to pay him in Deutschmarks "the difference between the German and Dutch salaries on 30 June 1988 for my period of service at The Hague plus compound interest at an annual rate of 10%" (he does not state the exact sum);

(c) to declare that allowance should be made in his staff reports for "the time spent on the vexatiously provoked litigation";

(d) to award him 3,000 Deutschmarks in damages for "aggravated" moral injury and 2,500 DM in costs.

5. There is no telling from his brief what the reasons are for his complaint, or the purpose of it, or his arguments in

support of it. He raises preliminary objections to the Tribunal's competence and asks it to defer to the German courts in Munich, his duty station. As for the merits of his case, he seems to think that the additional payment in May 1990 was miscalculated and that the second one, which was a mistake, was tantamount to a gift under section 516 of the Civil Code of the Federal Republic and the Organisation may not reclaim it.

6. In its reply the EPO observes that the complainant, though he has filed fifteen cases already, is wont to challenge the Tribunal's competence. It says that as to the first additional payment the dispute is about just how much should have been paid in compensation to staff who were stationed in the Federal Republic for part of the material period and in the Netherlands for the rest and that on that point, which is what his internal appeal is about, the complainant has failed to exhaust the internal means of redress. The payment in June 1990 was just a mistake, it was put right in July, and there is no cause of action.

7. The Organisation concludes that the complaint is irreceivable and a flagrant breach of the right of appeal. It asks the Tribunal to rule on receivability and not on the merits.

8. The Tribunal agrees to do so, holding the complaint to offend against at least two basic rules of receivability in the Statute and Rules of Court.

9. One point - the parties do not address it - is that according to Article 7 and Appendix II of the Rules of Court the complainant must make clear in the statement of his claims what his case is about and submit a brief setting out the facts and his arguments in support of those claims. The complainant has failed to explain in comprehensible terms what it is he wants or to file any legal plea in support, and the only intelligible guidance is in the EPO's reply.

10. As the Organisation points out, he has also failed to exhaust the internal means of redress as to what seems to be his main purpose and so to meet the condition of receivability in Article VII(1) of the Tribunal's Statute.

11. His complaint is therefore clearly irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 3 July 1991.

(Signed)

Jacques Ducoux
Mohamed Suffian
P. Pescatore
A.B. Gardner