

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

FIFTY-FOURTH ORDINARY SESSION

In re GIROUD (No. 2) and LOVRECICH

Judgment No. 624

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. Gérard Giroud and Mr. Albino Lovrecich on 2 March 1984, the EPO's replies of 8 May, the complainants' rejoinders of 17 July and the EPO's surrejoinders of 5 October 1984;

Considering the applications to intervene in Mr. Giroud's complaint filed by:

J. Ainscow,

F. Andres,

R.W. Andrews,

C.A.J. Andries,

H. Auer,

H. Bandelin,

J. Barthl,

G.L. Beaven,

A. Bergentall,

C. Biggio,

C. Black,

J.N. Blancard,

C. Bournot,

A. Burkhart,

G.D. Carruthers,

P.E. Catchlove,

R. Cecchini,

M. Ceyte,

F. Chevallier,

A. Clelland,

O. Consée,

J. Coquelin,

E. Crab,  
S. Crane,  
M. Dancer,  
E.P. De Haan,  
D.W. Drummond,  
R.P. Eliot,  
M.J. Fouchy,  
L. Galligani  
B. Gellie,  
C. Gerardin,  
C. Germinario,  
M. Haertle,  
I. Harris,  
R. Hartinger,  
F. Heinlein,  
O. Henrikson,  
U. Hild,  
K.P. Hiltner,  
B. Hjelm,  
W. Hofmann,  
I.A. Holliday,  
G. Janc,  
H. Kadavy,  
B. Karet,  
L. Karlsson,  
M. Kellner,  
E. Kirschbaum,  
G. Knesch,  
R. Knöpfle,  
G. Krail,  
A. Kronester-Frei,

B. Lefevre,  
A.M. Leonard,  
M.J. Loades,  
J.B. Manton,  
M. Marandon,  
A. Maroscia,  
M. Marston,  
E. Mathys,  
C. Maugain,  
R. Nasser,  
G. Natus,  
R. O'Connell,  
E.K. Östling,  
W. Oettinger,  
N. Phillips,  
W. Piepenbrink,  
R. Randes,  
R. Rath,  
N. Sabinine,  
J. Salmonson,  
A. Samtmann,  
S. Sandri,  
T.E. Schibli,  
S. Schôdel,  
P. Schoon,  
F. Searle,  
J.W. Sinnamon,  
L. Smétankine,  
R. Spangenberg,  
L.M. Stone,

A. Stoos,  
J. Straker,  
B. Stübner,  
K. Stürzenberger,  
A. Tangocci,  
A. Tannerfeldt,  
D.X. Thomas,  
L. Tissot,  
E. Turrini,  
H. van der Peet  
R. van Voorst tot Voorst,  
P. Vermeesch,  
B. Waar,  
I.B. Wallinder,  
G. Weidmann,  
A. Wells,  
A. Wenzel,  
W. Wheeler,  
C.T. Wilson,  
W.G. Woods,  
R. Zottmann;

Considering the applications to intervene in Mr. Lovrecich's complaint filed by:

A. Alders-Meewis,  
M. Attfield,  
H. Betz,  
S. Brett,  
A. Cadeddu,  
D. Chalret,  
B.E. Chambers,  
F.H. Chavonand,  
E. Colonnella,

G. Costabile,  
P. Ehrenreich,  
H. Eichinger,  
S. Fabiani,  
G. Fornfischer,  
M. Freundl,  
G. Friedenberger,  
M. Graham,  
B. Grant,  
J. Griffiths,  
H. Gruber,  
K. Grundkowski,  
D.S. Jacobs,  
N. Jeger,  
K. Jouliardt,  
F. Klein,  
L. König,  
A. Kozmus,  
F. Leister,  
J. Lortal,  
H. Luitz,  
D. Mader,  
H. Maierl,  
H. Möderndorfer,  
K. Naumann,  
M. Nehls,  
H. Payer,  
H. Pichler,  
H. Prokscha,  
E. Reisinger,

M. Repinski,

E. Rieger,

K. Rippe,

W. Roepstorff,

G. Roosenburg,

B. Rotteveel-Kley,

A. Scattone,

L. Schewior,

W. Schuster-Kachele,

W. Schuster-Kachele,

R. Stempfle,

W. Sussbauer,

F. Telari,

A. Walch-Colling,

J.M. Weckerlé,

N. Werner,

C.D. Witt,

H. Würges,

H.B. Ziegelbauer; Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 38(3), 64(6) and Title VIII of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Considering that the complaints raise the same issues and should be Joined to form the subject of a single decision;

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. In 1979 the EPO and several other organisations, known as the "co-ordinated organisations", adopted a new system of adjusting staff pay. In two years out of three, on 1 July, the pay of staff in categories known as A and L was aligned with that of national civil servants; in the third year there was a general review which took account of the cost-of-living index, pay in other organisations and of national civil servants, recruitment problems, and economic and social conditions in member States. For all staff categories salaries were increased yearly if the cost of living rose by at least 2 per cent. By 1982 several governments found salaries too high and wanted to cut them by from 20 to 30 per cent. The Co-ordinating Committee of Government Budget Experts of the co-ordinated organisations put out a report (No. 191) dated 18 February 1983 on the subject. The report went to the Administrative Council of the EPO. On 17 March 1983, by decision CA/D 1/83, the Council approved the report and thereby amended the system with retroactive effect from 1 July 1982. As proposed in paragraph 34 of the report it decided to impose a levy on basic salaries of staff in categories A and L at a compound rate of 1.5 per cent a year for three years starting on 1 July 1983; the salary scales would then be reviewed by such criteria as economic and social conditions. The Council decided, as proposed in paragraph 36, that yearly salary increases due

on account of a rise in the cost of living should be payable only if the rise was at least 3 per cent, not 2 as before. Pension rights were also altered. The EPO employs the complainants in Munich and they belong to the above-mentioned categories of staff. On 10 June 1983 each of them, along with other staff members in the categories affected, submitted to the Chairman of the Council an internal appeal against decision CA/D 1/83. At a session it held from 6 to 9 December 1983 the Council decided that Article 106 of the EPO Service Regulations, which relates to appeals against individual decisions, did not allow appeal within the Organisation against the Council's own decisions. The President of the Office so informed the staff in writing on 9 December 1983, and that is the decision the complainants are challenging.

B. The complainants submit that the Tribunal is competent to hear appeals against general decisions like those taken by the Council. They also submit that their complaints are receivable. It was reasonable to suppose that internal appeals would lie to the Council, they filed such appeals in good faith, and it would be unfair to say, just because the Council took the mistaken view that the appeals were irreceivable, that the complaints, challenging as they do the decision of 17 March 1983, have not been filed in time. As to the merits, they allege (1) breach of Article 64(6) of the Service Regulations: "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..." Even though the Council has discretion in the matter, it must apply objective criteria. In fact the amendments it made were arbitrary. (2) The reasons for them ought to have been clearly stated: there is no legitimate explanation of them. (3) They are in breach of the complainants' acquired rights, in particular their right to have pay adjusted by objective criteria. (4) The EPO disregarded the dictum *patere legem quam ipse fecisti*. (5) It was in breach of the fundamental rule that pay should keep in step with pay in national civil services. (6) It infringed Article 16 of the Protocol on Privileges and Immunities of EPO staff since the salary cuts are tantamount to taxation. (7) It failed to observe Article 38(3) of the Service Regulations: "The General Advisory Committee shall ... be responsible for giving a reasoned opinion on any proposal which concerns the whole or part of the staff..." The Advisory Committee's opinion was never sought, and the procedural flaw is fatal. The complainants ask the Tribunal to set aside the Council's decision of 17 March 1983 and award them costs amounting to 3,000 Deutschmarks each.

C. In its replies the EPO explains how pay in the co-ordinated organisations is determined and that, though not itself one of those organisations, it seeks to apply the same salary scales. It submits that the complaints are clearly irreceivable inasmuch as they challenge a general decision of the Council which was taken in accordance with Article 64(6) of the Service Regulations and has no effect on the legal position of the complainants or of other A and L staff. It is for the President of the Office to take individual decisions applying to each staff member the salary scales approved by the Council for A and L staff. Only when such individual decisions have been taken are the rights of staff members affected. In fact various difficulties have prevented acting on the Council's decision of 17 March 1983, and for the time being that decision has not affected the rights of the staff or caused them any injury. The salary scales in force since July 1982 still obtain. The complaints are therefore premature.

D. The complainants' rejoinders are confined to rebuttal of the plea of irreceivability. The Administrative Council did take a decision, on 17 March 1983, and its effect was to make paragraphs 34 and 36 of the Co-ordinating Committee's 191st Report directly applicable. The complainants believe they may therefore challenge it. If they do not do so now there is a risk that a complaint against a later decision by the President to give effect to that decision might be declared irreceivable. They invite the Tribunal to dismiss the plea, order submissions on the merits and award costs at an increased figure of 4,000 Deutschmarks against the EPO.

E. In its surrejoinders the EPO contends that the impugned decision is not of a challengeable kind. According to Article 64(6) of the Service Regulations the Co-ordinating Committee is required to draw up recommendations to serve as the basis for the decision which the Administrative Council is to take on salary adjustment. Only when the President of the Office gives effect to that decision will the legal position of the staff be altered and may appeals be brought. The Tribunal will consider the lawfulness of the general decision only incidentally when called upon to review the lawfulness of an individual administrative decision giving effect to it.

## CONSIDERATIONS:

### Joinder

1. The two complaints raise the same issues of fact and of law, at least insofar as they are relevant to the decision. The Tribunal therefore joins the two cases and delivers a single decision.

## Receivability

2. The EPO submits that the complaints are irreceivable on the grounds that the impugned decision, being addressed to the Co-ordinating Committee of Government Budget Experts, is of no legal effect in respect of the complainants and causes them no injury.

The plea fails. Although the impugned decision approves a recommendation by the Co-ordinating Committee, it is not addressed solely to that body. As the text actually says it came into force on 17 March 1983 and is applicable as from 1 July 1982. It accordingly affects from those dates the position in law of the staff concerned, and the fact that it has not yet been put into effect is immaterial.

3. The impugned decision does not give unqualified approval to the Co-ordinating Committee's recommendation. The first clause of Article 5 reads: "Notwithstanding implementation of paragraph 34 of the 191st Report, no permanent employee should receive a nominal basic salary less than he received on the day before the provisions of that paragraph took effect." And the second clause invites the Co-ordinating Committee "to recommend suitable measures to ensure that this guarantee is applied uniformly by the Co-ordinated Organisations and by the European Patent Organisation". That does not mean, however, that the impugned decision is conditional or that its application calls for any further action by the Co-ordinating Committee. As is said, the decision has come into force and takes effect whether or not the Co-ordinating Committee takes further action. Besides, at the Administrative Council's meeting of 17 March 1983 one delegation described the first clause of Article 5 as a "binding rule", and when the President of the Office confirmed that interpretation no objection was raised (CA/PV.15, paragraph 32).

4. 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.

The decision impugned in this case puts no exact figure on the entitlements of each staff member concerned. That will be done only when individual decisions come to be taken, ordinarily by the President of the Office or a subordinate, on the strength of the general decision. Accordingly, the complainants may not yet challenge the validity of the general decision. Before filing a complaint each must await an individual decision.

To declare the complaints irreceivable causes the complainants no prejudice since they may appeal against future individual decisions, first inside the Organisation, and then, if necessary, to the Tribunal.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures, as

have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 December 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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