

**SIXTY-FOURTH ORDINARY SESSION**

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

**Judgment 899**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Joseph Geisler against the European Patent Organisation (EPO) on 3 June 1987, the EPO's reply of 20 August, the complainant's rejoinder of 16 December 1987 and the EPO's surrejoinder of 23 March 1988;

Considering the third complaint filed by Mr. Alfred Wenzel against the EPO on 27 May 1987, the EPO's reply of 20 August, the complainant's rejoinder of 22 December 1987 and the EPO's surrejoinder of 23 March 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 64(6) and 106 to 108 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. Article 64(6) of the EPO 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 Coordinating Committee of Government budget experts of the Coordinating Organisations."

In 1979 the Co-ordinating Committee adopted in its 159th report a new system of adjusting staff pay, which is aligned with national civil service pay in seven chosen countries, including the Netherlands. The rules appear in the annex to that report, and Article 6(c) of the annex defines "net pay" as:

"... 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".

Since 1981 account has been taken, in working out pay rates, of a levy imposed on the income of Dutch civil servants under a law known as the "Inhoudingswet". Since 1985 account has also been taken of the definition of an unmarried official under Dutch tax law as an unmarried person under the age of 27 and still living with his family, i.e. with no independent address. New pay rates were issued in March 1985.

The complainants are members of the staff of the EPO. At the end of March 1985 they found that their pay had been reckoned according to the new scale, the amount of the levy having been subtracted in working out that scale. Mr. Geisler lodged an internal appeal on 11 June and Mr. Wenzel on 13 June under Articles 106 to 108 of the Service Regulations seeking correction of the pay scale as from the date of the subtraction of the amount of the levy and asking that they be paid the difference with interest. The President of the Office referred their appeals to the Appeals Committee, which said that it could not report because its Chairman and members took the view that they might not be impartial.

By letters dated 5 March 1987, the decisions they impugn, the Principal Director of Personnel told the complainants that the President had rejected their appeals.

B. The complainants maintain that the material rules on pay, which are in the Co-ordinating Committee's 159th

report, have been misapplied since 1 July 1981. The levy is neither a compulsory contribution to social security nor a form of income tax and so, according to Article 6(c) of the annex to the report, ought not to have been taken into account in determining pay in the Co-ordinated Organisations.

The EPO has made a further mistake in that the definition of an unmarried official it has been applying since 1 July 1985 is not typical of EPO staff, who are usually university graduates, have already had several years' employment and are therefore about thirty when they join the Organisation.

The complainants ask the Tribunal to order the payment to them of the sums wrongfully withheld since the salary review of 1 July 1981 because of the subtraction of the levy and of the further sums withheld because of the mistaken definition of the term "unmarried official" that the EPO has applied since the review of 1 July 1985. They claim 2,000 Deutschmarks each in costs.

C. In its replies the EPO says that the claims relating to the definition of an unmarried official under Dutch law are irreceivable because they did not form part of the internal appeals.

As to the matter of the Dutch levy, although the EPO is not one of the co-ordinated organisations and is not bound by the Co-ordinating Committee's recommendations, the levy may indeed not be treated as a compulsory contribution to social security or as income tax under Article 6(c) of the annex to its 159th report and therefore should not be subtracted in reckoning pay. International organisations, whether co-ordinated or not, cannot require the government of a sovereign State like the Netherlands to change the way of reckoning pay in its civil service. Such were the difficulties that prompted the President of the Office to propose to the Administrative Council of the EPO a solution "adapted" to the EPO's own needs, but the Council postponed study of the matter.

The Organisation invites the Tribunal to reject the complainants' claims.

D. The complainants develop their case in rejoinders. They maintain that they have no intention of requiring the Dutch Government to follow any new method of reckoning pay in the Dutch civil service. What they object to is the Council's applying to EPO pay a deduction that is made from Dutch civil service pay.

E. In its surrejoinders the EPO enlarges on the pleas in its replies. It observes that at a meeting on 11 April 1986 the Co-ordinating Committee approved the position of the Dutch Government as to the levy on salary.

#### CONSIDERATIONS:

1. The complainants, who are employees of the European Patent Office, are objecting to criteria that were applied in reckoning a change the Administrative Council approved on 14 June 1985 in EPO pay. They want the amount of their pay to be altered with retroactive effect from some earlier date.

2. Since their complaints have the same purpose and rest on the same pleas the Tribunal joins them for the purpose of making a single judgment.

3. Insofar as the Tribunal gathers from the evidence before it, the pay of EPO staff is, according to Article 64(6) of the Service Regulations, subject to periodic review and the Council adjusts it on the recommendation of the Co-ordinating Committee of Government Budget Experts of the Co-ordinated Organisations. Although the EPO is not formally represented on the Committee, its practice at the material time was to follow suit and adapt EPO pay to national civil service pay in several countries. In Judgments 726 (in re Andres No. 2 and others) of 17 March 1986, 785 (in re Andres No. 8) of 12 December 1986 and 859 (in re Andres No. 9) of 10 December 1987 the Tribunal explained the importance of the Committee's work to the EPO.

4. The procedure for the review of pay is set out in an annex to the Committee's 159th Report, and Article 6(c) defines as follows the net remuneration that counts in determining the national civil service pay to be taken as the basis of pay in the 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".

5. According to the information supplied by the complainants there was discussion in the Committee in late 1985 about two "elements" notified by the Government of the Netherlands. One was a levy on Dutch civil service pay under a law known as the "Inhoudingswet", there being doubt about whether it was an item to be deducted under 6(c). The other was the amount levied on an unmarried official under Dutch tax law, the difficulty being that the law gave the term more than one meaning.
6. The complainants' case is that according to the scale for the co-ordinated organisations pay is lower in the EPO because of those two items.
7. Evidence filed by the complainants includes a communiqué of 10 November 1986 in which the President of the Office voiced strong objections to taking account of the two items, said the staff were understandably "disgruntled" and made a "firm commitment" to finding a better solution, which he described as "adapted co-ordination". He concluded: "This result - the only reasonable one there is - is something I shall pursue with the utmost vigour on behalf of us all".
8. The same view underlies a proposal the President made to the Administrative Council, but in the end the Council seemingly adopted a scale that followed the Co-ordinating Committee's recommendations: the Dutch levy was thus subtracted and a compromise struck over the definition of an unmarried official in Dutch tax law.
9. The new scale had been published on 18 March 1985 and pay altered accordingly at the end of that month. In letters of 11 and 13 June 1985 which were alike in substance the complainants objected to the effect on their pay of deducting the Dutch levy and asked the President to amend the scale with retroactive effect from the date of such deduction and make up the difference with interest. If he refused, their letters were to be treated as internal appeals under Articles 106 to 108 of the Service Regulations.
10. The President passed on their appeals to the Appeals Committee, but the Committee's answer was that it could not report because its chairman and members had an interest in the outcome. Letters of 5 March 1987 informed the complainants that the President had rejected their appeals, and those are the decisions they are impugning.
11. The complainants make two distinct claims. One is that the EPO ought not to have deducted the Dutch levy in working out the scale: in their view it is neither a contribution to social security nor income tax within the meaning of 6(c). Their other claim is that the Co-ordinating Committee was wrong to apply the definition of an unmarried official under Dutch tax law - someone under the age of 27 still living in the family home - because EPO officials have to live independently and even at the outset of their career are over 27.
12. The EPO submits that the complaints are irreceivable insofar as they are challenging the definition of an unmarried official in Dutch tax law because the claim is made for the first time and was not in the internal appeals.
13. The Organisation argues that, though in its own view neither the nature nor the purpose of the Dutch levy makes it a social security contribution or income tax, a different view is tenable, at least in theory. Doubt on that score, it says, made the President propose that the Council "adapt" pay to the EPO's own requirements. But it maintains that, inasmuch as its member States are sovereign, an international body, whether it is one of the "co-ordinated" organisations or not, can scarcely require the Netherlands to change its way of reckoning the net pay of its civil servants. It observes that the Council, which is also a sovereign body, turned down the President's proposal and adjourned the matter for further study. In its surrejoinders it points out that in the end the other delegates accepted the Dutch Government's position at a meeting of the Co-ordinating Committee on 11 April 1986.

#### The Tribunal's decision

14. To begin with, the Tribunal will not review criteria laid down in any national law. The only rules it will apply are those that govern the international civil service and in this case they are the EPO Service Regulations and the criteria in 6(c) - assuming of course that 6(c) does apply by Council decision to the EPO, an issue the parties do not address.
15. The EPO's objections to receivability are sound. The claim relating to the definition of an "unmarried official" in 6(c) did not form part of the internal appeals - because the change came later - and may not be put forward for the first time in complaints to the Tribunal. It fails because it is irreceivable.
16. The only material issue in the internal appeals was the Dutch levy.

Since no reasons were given for the impugned decisions there was breach of Article 106(1) of the Service Regulations, which requires that the decision "state the grounds on which it was based".

17. Besides safeguarding the staff member's interests the requirement enables the Tribunal to review, something it cannot do properly when the purpose and legal basis of the decision and the reasons underlying it are unexplained.

18. A proper explanation was especially necessary in this case for three reasons. One is that the Appeals Committee could not report. Another is that the Organisation's position was inconsistent in that, after vehemently asserting its independence of the Co-ordinating Committee and finding serious fault with the rules of the co-ordinated organisations, it went ahead and applied them. The third reason is that what the complainants were objecting to was, as the Appeals Committee's reaction made plain, a matter everyone on the staff had a stake in.

19. Again, the EPO's replies to the complaints are perfunctory. It merely cites the policy of one of the seven chosen countries and the Council's posture without actually addressing the objective criteria applied in reckoning pay and working out the scale. Not by submissions of that kind may it avoid compliance with the rules in dealings with staff. It is preventing the Tribunal from determining the ambit of the dispute and exercising its power of review.

20. The Tribunal requires the following further submissions before ruling on the merits:

(a) within one month of the date of this judgment the Organisation shall 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.

(b) The complainants may file comments on the Organisation's brief within one month of receiving it.

(c) The Organisation may file further comments within fifteen days.

#### DECISION:

For the above reasons,

1. The complaints are dismissed as irreceivable insofar as they relate to the definition of "unmarried officials" in Article 6(c) of the annex to the 159th report of the Co-ordinating Committee of Government Budget Experts of the Co-ordinated Organisations. 2. As to the effect of the subtraction of the Dutch levy in working out pay scales, there shall be the further submissions set out in 20 above.

3. The matter of costs is reserved.

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 30 June 1988.

(Signed)

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