

SEVENTY-THIRD SESSION

***In re* BAEUMER, CLAUS
and HANSSON**

(Interlocutory order)

Judgment 1197

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ludwig Baeumer against the World Intellectual Property Organization (WIPO) on 26 July 1991 and WIPO's reply of 12 August 1991;

Considering the complaints filed by Mr. Paul Claus and Mr. Bo Hansson against WIPO on 31 July 1991 and the Organization's replies of 12 August 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and former Regulation 3.1 bis and Regulation 12.1 of the Staff Regulations of the International Bureau of WIPO;

Having examined the written evidence and decided not to order oral proceedings, which none of the parties has applied for;

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

A. The complainants are employed by WIPO at its International Bureau in Geneva. The background to their dispute with WIPO is as recounted in Judgment 1087 (in re Andrews and others) under A. The material facts of the case are summed up in 3 to 8 below.

B. The complainants contend that the reductions in their monthly pay between July 1990 and January 1991 are in breach of Regulation 12.1(b) of the Staff Regulations, which reads:

"Amendments shall be without prejudice to any condition of service specified in the letter of appointment or contract of a staff member, neither shall any amendment affect the application to a staff member of the provisions of the Staff Regulations in force up to the effective date of the amendment ..."

In the complainants' submission the repeal of Regulation 3.1 bis was in breach of an acquired right and was therefore unlawful under 12.1(b). They acknowledge that the transitional provision introduced on repeal of 3.1 bis had no adverse effect on take-home pay, though they object to it on other grounds. Paragraph 4 of circular 78 of 1988 said that the provision was to hold good pending the adoption of "permanent measures regarding exchange rate fluctuations under the common system" of the United Nations. But the arrangements brought in on 1 July 1990 may not be deemed permanent: the fall in take-home pay that has since occurred shows them to be inappropriate.

As to monthly pay from June 1991 onwards, the complainants submit that 3.1 bis afforded better protection against the fluctuations than the new arrangements, which are arbitrary in that reductions are decided on secretly according to unknown criteria and become known to staff only on the actual day of payment. That is not only in breach of the staff's acquired rights but unfair in that they have seen a drastic fall in real pay over the last ten years.

The complainants ask the Tribunal to order WIPO to continue applying to them 3.1 bis as in force at 30 September 1988 and grant each of them the amounts that would have been due had 3.1 bis continued to apply beyond 1 July 1990. At the date of filing the amounts came to 1,335.35 Swiss francs for Mr. Baeumer, 1,462.85 francs for Mr. Claus and 713.40 francs for Mr. Hansson. They claim interest and 2,000 francs each in costs.

C. In its reply WIPO repeats the arguments in its submissions in answer to the complaints the Tribunal ruled on in Judgment 1087 and rules on this day in Judgment 1196 (in re Andrews and others).

CONSIDERATIONS:

1. The complainants, who are on the staff of the World Intellectual Property Organization at Geneva (WIPO), object to the Organization's repealing a provision of the Staff Regulations. That provision, Regulation 3.1 bis, used to grant them a "take-home pay differential" to offset any fall in the value of the United States dollar against the Swiss franc.
2. This case has the same background as the complaints which Mr. Patrick Andrews and others have filed against the Organization and on which the Tribunal ruled in Judgment 1087 of 29 January 1991 and rules this day in Judgment 1196. But it may be distinguished in that the periods of pay at issue and the complainants' pleas are not the same. The present three complaints raise the same issues and may therefore themselves be joined to form the subject of a single ruling.
3. The material facts are summed up below:
 - (a) At its session in September 1972 the Organization's Coordination Committee approved, with retroactive effect as from 1 October 1971, the adoption of a new Regulation, 3.1 bis, in the Staff Regulations. That provision is the one now at issue and read:

"Where, for any given month, the take-home pay, expressed in Swiss francs, of any staff member is, as a result of a variation in the exchange rate between the Swiss and United States currencies, less than for the preceding month, the difference ('take-home pay differential') shall be paid by WIPO to the said staff member until the month for which, for any reason, the amount of the take-home pay reaches the amount paid prior to the said variation."
 - (b) On 3 October 1988 the Coordination Committee repealed 3.1 bis and adopted the following transitional provision in its stead:

"Where, for any given month, the take-home pay, expressed in Swiss francs, of any staff member in service as of October 1, 1988, is, as a result of a variation in the exchange rate between the Swiss and United States currencies, less than for the month of October 1988, the difference ('take-home pay differential') shall be paid by WIPO to the said staff member until the month for which, for any reason, the amount of the take-home pay reaches the amount paid prior to the said variation."
 - (c) Those decisions were announced to the staff in a circular, No. 78 of 31 October 1988. The circular explained that, according to the Coordination Committee's decision, the transitional provision would "terminate upon adoption of permanent measures regarding exchange rate fluctuations under the common system" of the United Nations.
4. WIPO took the view that that condition was met on 21 December 1989, when the General Assembly of the United Nations adopted resolution 44/198. By another circular, No. 48 of 18 July 1990, the Director General announced to the staff a set of amendments to the Staff Regulations that had been made on account of that resolution as from 1 July. Though the amendments did not actually refer to the "differential", it is not in dispute that as from 1 July 1990 WIPO applied the common system's rules to the reckoning of staff pay and thereby brought the period of transition to an end.
5. Finding that the new rules made a difference to their pay, the complainants submitted to the Director General in August 1990 requests for the reckoning of their pay in line with the transitional provision that had replaced 3.1 bis. In support they argued that resolution 44/198 was not to be treated as meeting the condition in circular 78/1988, namely the "adoption of permanent measures".
6. The Director General's reply was that the resolution did contain "permanent measures regarding exchange rate fluctuations under the common system" and that the condition in the circular had therefore been met.
7. The complainants thereupon went to the Appeal Board provided for in the Staff Regulations. In support of their appeal they argued that the pay cuts made in keeping with the rules in force since 1 July 1990 were due to the repeal of 3.1 bis, which formed part of their conditions of service, and that in any event the transitional provision that had superseded it should continue to apply until permanent measures had been adopted in the context of the common system. In his reply to the Appeal Board the Director General merely iterated his objections on grounds of principle to the Coordination Committee's decisions and confirmed his stand, which is that resolution 44/198

brought in permanent measures to offset the effects of currency fluctuations in the common system.

8. The Appeal Board reported on 12 April 1991. Its report is a purely formal text. It observed that the case was the same as that of other officials, including those on whose complaints Judgment 1087 had ruled. Without entertaining the complainants' new pleas the Board recommended rejecting their appeal, merely citing its conclusions on the earlier case. On the Board's recommendation the Director General confirmed on 2 May 1991 the rejection of their claims.

9. In the statement of their claims the complainants ask the Tribunal:

(a) to order WIPO to continue to apply to their pay the text of 3.1 bis as in force up to the date of its repeal;

(b) to restore the amount of their pay as from July 1990 by paying them the differential due under 3.1 bis plus interest thereon; and

(c) to pay each of them 2,000 Swiss francs in costs.

They update their claims to June 1991.

10. They contend that what worked to their detriment was not the transitional provision but the replacement of WIPO's own rules with those of the common system of the United Nations. They have two main pleas. One is that the rules introduced by resolution 44/198 were merely provisional, not the "permanent" ones that have to be adopted before the transitional arrangements in the Staff Regulations may come to an end. The other is that both because the common system's rules may not be reviewed and because they are inadequate WIPO staff do not have the same degree of protection as they used to have under the Organization's own rules. For those reasons the replacement of the latter with the common system's rules is, in the complainants' submission, in breach of their acquired rights, which Regulation 12.1(b) acknowledges.

11. WIPO does not answer those pleas but merely holds to its earlier stand: the transitional provision expired on the adoption of resolution 44/198 because the resolution prescribes permanent measures on variations in exchange rates in the common system. The Organization says nothing of the nature of those measures.

12. For the reasons set out in Judgment 1196 of this day on the issues of law raised by Mr. Andrews' and others' complaints the present complaints are devoid of merit insofar as they claim the continued application of former Regulation 3.1 bis. That judgment explains why it was right to repeal 3.1 bis and why in point of principle the transitional rule is fair in its respect for the interests of both sides.

13. But the complainants have new pleas comparing the merits of the Organization's former rules and of the rules applied since the end of the transitional arrangements, and the Tribunal has not yet had the occasion to address those pleas. For all the complainants' urging their pleas were not taken in the context of their requests for administrative review or of their internal appeal, and have not been taken before the Tribunal, or indeed at any point in the proceedings. Though they have spelt out their objections in detail, all the Organization does is repeat its views. It is silent on the content of the common system's rules and on the action it has taken to apply them under its own Regulations.

14. Being yet again prevented from ruling on the issues before it the Tribunal adjourns review of the merits of the case pending further information and argument.

15. The Organization shall within 30 days of the notification of this judgment submit a further brief:

(a) incorporating the official texts, in English and French, of WIPO's decision repealing Regulation 3.1 bis and adopting the transitional provision set out in paragraph 3(b) above and of resolution 44/198 of the United Nations General Assembly; and

(b) explaining -

(i) how resolution 44/198 takes account of variations in the exchange rate;

(ii) why it may be treated as constituting "permanent measures regarding exchange rate fluctuations under the

common system"; and

(iii) how the Organization has incorporated the effect of resolution 44/198 into its own Staff Regulations in accordance with Regulation 12.1 (it shall provide any relevant documents).

16. The complainants shall file their observations on the Organization's submissions within 30 days of receipt thereof and the Organization may make further submissions within 15 days of receipt of the complainants' observations.

17. The conclusion is that the complainants fail insofar as they seek to have Regulation 3.1 bis continue to apply. But a ruling on the other material issues is reserved.

DECISION:

For the above reasons:

1. The complaints are dismissed insofar as they seek the continued application of former Regulation 3.1 bis of the Staff Regulations.

2. There shall be further submissions as set out in 15 and 16 above.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

(Signed)

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