

## THIRTIETH ORDINARY SESSION

### *In re* MALIC

#### Judgment No. 202

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute (IPI) drawn up by Mr. Kresimir Malic on 21 September 1972, the Institute's reply of 2 November 1972 and the complainant's rejoinder of 8 December 1972;

Considering Article II, paragraph 5, of the Statute of the Tribunal, former IPI Staff Rule 13, paragraph 2, and new IPI Staff Rules 5 and 21, which came into force on 1 January 1971;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On his appointment as an Institute staff member on 1 January 1969 Mr. Malic was granted two "seniority bonuses" under former Staff Rule 13, paragraph 2, which read as follows: "The Administrative Council may, however, on a substantiated proposal by the Director, grant seniority bonuses to take account of experience gained by a staff member in previous service in the public or private sector and of real and direct usefulness in carrying out his duties at the Institute." (Registry translation). Under this system up to two years' bonuses might be granted on recruitment, the payment being confirmed only at the end of the probation period, when an extra bonus might be granted or one granted on recruitment might be withdrawn. On completing his probation Mr. Malic had his two original bonuses confirmed.

B. Staff Rule 21 of the new Staff Rules, which came into force on 1 January 1971 and were formally accepted by serving staff members, provides that up to four seniority bonuses may be granted to a staff member on recruitment. On 20 February 1972 Mr. Malic cited this provision in support of a claim for a third seniority bonus to take account of the considerable scientific experience he had gained before joining the Institute. On 18 May 1972 the Director-General replied that he had been granted his bonuses under the Staff Rules in force at the time of his recruitment and the confirmation of his appointment, that the new Staff Rules did not provide for the review of decision taken before their entry into force, and that the exceptions to that rule authorised by the Administrative Council of the Institute at its 112th Session (27-30 March 1972), which affected staff members who had been granted three bonuses under the old Staff Rules, were irrelevant to the complainant's case.

C. On 5 June 1972 the complainant appealed to the Appeals Committee of the Institute. In his appeal he stated that he was claiming, not the review of decision taken before the entry into force of the new Staff Rules, but the benefits of new Staff Rule 21, since new Staff Rule 5 provided that "staff members in the same category are subject to the same conditions of recruitment and career advancement".\* (Registry translation) He pointed out that under the new Staff Rules bonuses were confirmed on recruitment, not on confirmation of the appointment, and that the maximum number was four instead of two. He claimed the same benefits as were enjoyed by new staff members and pointed out that decisions of the Administrative Council subsequent to the entry into force of the new Staff Rules could not affect his position. The Appeals Committee held that Staff Rule 21 applied on recruitment and did not concern the complainant, who had been recruited several years earlier, and that the exceptions approved by the Administrative Council at its 112th Session affected only staff members in receipt of three bonuses, and not two, like the complainant. On 30 June 1972 it recommended dismissing Mr. Malic's complaint, and the Director-General informed him on 5 July 1972 that he endorsed that recommendation.

D. In his appeal against the decision of 5 July 1972 Mr. Malic prays that the Tribunal order the Institute to take account of the total period of his professional experience prior to his appointment (three years). His arguments are the same as those which he put to the Director-General and the Appeals Committee. The Institute committed an error of law, he contends, in refusing to grant him the benefits of new Staff Rule 21, which does not expressly

apply only to new staff members. The purpose of the principle of acquired rights is to safeguard existing benefits, not to prevent the acquisition of new rights. Thus, the more favourable conditions prescribed in new Staff Rule 41 as to the definition of the breadwinner and family allowances have been applied to all staff members. The Administrative Council's decision at its 112th Session is not a valid argument against him, since it was taken after the entry into force of the new Staff Rules and after the date of submission of his original claim for an extra bonus. The complainant cites once again the general principle of equal treatment whereby new staff members should not enjoy more favourable conditions than serving staff.

E. The Institute replies that Staff Rule 21 has no retroactive effect and obviously applies to new staff members. The grant of seniority bonuses forms an integral part of the conditions of recruitment. The entry into force of the new Staff Rules did not alter the complainant's position or entitle him to an extra bonus. The Institute cannot accept the analogy which the complainant draws with Staff Rule 41 as to the definition of the breadwinner and family allowances, since "that provision does not amend a previous non-retroactive Staff Rule, but provides for the immediate application of the new Staff Rules so as to determine the future consequences of a legal situation existing at the time of their entry into force". Nor can the complainant validly invoke Staff Rule 5, since the principle embodied therein became applicable only on its entry into force, on 1 January 1972. Finally, the Administrative Council's decision at its 112th Session affected only staff members in receipt of the maximum number of bonuses, namely three, who might have been expected to receive four had the maximum been four instead of three. That decision therefore does not affect the complainant, who in any case received only two bonuses on the confirmation of his appointment - a decision which he did not contest at the time. Subsidiarily, the Institute argues that it falls within the Director-General's discretion to decide how many bonuses to grant: should the Tribunal order that the impugned decision be quashed, it should refer the complainant back to the Director-General for reconsideration of the merits of his claim for an extra bonus.

F. In his rejoinder the complainant points out that formerly three bonuses were granted only in exceptional cases and that he refrained from contesting the decision to grant him only two bonuses because at the time they were of little value. The position is quite different since the new Staff Rules came into force. The purpose of new Staff Rule 5 and of the Administrative Council's decision at its 112th Session was to prevent discrimination between staff members. Yet if he had been recruited under the new Staff Rules he would automatically have been granted at least three bonuses.

## CONSIDERATIONS:

### 1. As to the application of new Staff Rule 21:

Under Rule 13, paragraph 2, of the former Staff Rules, a staff member could be granted on recruitment up to two years' seniority bonus to take account of his previous experience; at the end of the probation period the bonus might be maintained, increased, or reduced by one year. In accordance with this system the complainant in 1968 was provisionally granted two bonuses, which were confirmed in 1969.

Rule 21 of the new Staff Rules, which came into force on 1 January 1972, provides that up to four seniority bonuses may be granted on recruitment. Relying on this provision, the complainant unsuccessfully applied for an additional bonus.

It is clear from the foregoing texts that the bonuses form part of the terms of recruitment. It follows that only by retroactive application of new Staff Rule 21, effective on 1 January 1972, could the complainant be granted an additional bonus, since he was appointed to the staff in 1968 and confirmed in 1969. Except for section VI, however, which is retroactive to 1 January 1971, the new Rules, including Rule 21, have no retroactive effect, that is to say that they apply only to situations which have existed since 1 January 1972. The complainant's reliance on Rule 21 is therefore ill-founded.

The rejection of the complainant's application for an extra bonus does not violate the principle of equal treatment. That principle, which is laid down in Rule 5 of the new Staff Rules and which would be applicable even in the absence of a specific provision, is intended to ensure that persons who are in similar circumstances in fact and in law are put on the same legal footing. At the time of his recruitment and of the confirmation of his appointment, however, the complainant was subject to the former Staff Rules and was therefore in a different position from staff members recruited under the new Staff Rules after 1 January 1972. Consequently, the complainant did not suffer unequal treatment in relation to staff members appointed later because he was not in the same position as they

were.

There is no contradiction in the fact that all staff members, whatever the date of their appointment, enjoy the benefits of the family allowances provided under new Staff Rule 41, even though new Staff Rule 21 is applied only to staff members appointed since 1 January 1972. To grant family allowances on the basis of Staff Rule 41 to the whole staff merely means applying that Rule normally to situations existing after it came into force. To grant the complainant an extra bonus under Staff Rule 21, on the other hand, would mean giving retroactive effect to that Rule in preference to the Rules that were applicable at the time.

2. As to the application of the transitional decision of the Administrative Council:

At its 112th Session the Administrative Council decided as a transitional measure to grant a fourth bonus to staff members who had received three under the old Rules and who would have deserved one more if the new Rules had been effective at the time. As the complainant had received only two bonuses on recruitment and on confirmation of his appointment he was not covered by the Administrative Council's decision. He cannot therefore rely on that decision to claim an extra bonus as of right.

Moreover, the Administrative Council's decision does not violate the principle of equal treatment. In the first place it is quite conceivable that a staff member who received three bonuses under the former system might have been in a position to claim a fourth had the new Rules been applicable. Secondly, this possibility was not open to staff members who, like the complainant, had not reached the upper limit of three bonuses at the time of recruitment. It follows that the aforesaid decision did not deal differently with similar situations in violation of the principle of equal treatment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1973.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet