

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

## FIFTY-FIRST ORDINARY SESSION

In re BERTE and BESLIER

Judgment No. 566

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. Michel Berte and by Mr. Louis Beslier on 10 March 1983, the EPO's replies of 31 May, the complainants' rejoinders of 5 July and the EPO's surrejoinders of 23 September 1983;

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

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3), 65 and 107 to 109 of the Service Regulations for permanent employees 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 material facts of the case are as follows:

A. A dispute over working hours led to a series of strikes at The Hague by the complainants and other EPO staff from 12 May to 18 June 1981, usually lasting three days a week. By a circular of 20 May the Chief of Personnel announced that deductions would be made from salary according to the number of working days not worked in a month, i.e. at the rate of a twentieth of monthly salary for each such day. In July 1981 the complainants appealed under Article 107(1) of the Service Regulations, and the cases were referred to an Appeals Committee under Article 109. In January 1982 the EPO refunded the difference between the sums withheld and the lesser sums the complainants said it was entitled to withhold, but it did so *ex gratia* and without payment of interest. Further strikes occurred in Berlin, The Hague and Munich in September, October and December 1982. The complainants took part, and deductions were again made from their salaries, calculated as prescribed in the circular of 20 May 1981. In a report dated 10 December 1982 the majority of the Committee recommended a lowering their claims to interest at the rate of 10 per cent a year for the period for which each sum had been withheld. But on 15 December 1982 the President of the Office rejected the claims, and that and the Chief of Personnel's circular are the decisions which the complainants state that they impugn.

B. The complainants cite Article 65(1) b) of the Service Regulations, which says that "Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths" and the deduction made accordingly. The method prescribed in the circular is less favourable to the staff and is in breach of Article 65. It is, as the majority of the Appeals Committee observed, a decision of policy and has no legal basis. The Committee found "a clear basis" for deducing from the Service Regulations in the light of the general law the principle of docking monthly salary by one-thirtieth for each day not worked. The President is tampering with the exercise of the right to strike. It was wrong to make the circular of 20 May 1981 retroactive. The circular should not have been issued by the Chief of Personnel, who did not have the authority. There is inequality of treatment because public holidays and therefore working days are different at the different duty stations where staff went on strike. The complainants ask the Tribunal to quash the decision of 15 December 1982 and declare unlawful the method of calculating deductions in the circular of 20 May 1981, and to order payment to them of interest at 10 per cent a year on the sums wrongly withheld for the strikes of May and June 1981 up to January 1982, repayment of the sums wrongly withheld for their taking part in the strikes of September, October and December 1982, plus 12 per cent interest from the date of withholding, and costs.

C. The EPO replies that the complaints are devoid of merit. The general principle is that payment is due only for services rendered. Thus pay corresponding the non-working days is included in the monthly salary and may be

deducted to the same extent that no work was done on working days. Although a staff member who is ill may be paid even though he did no work, such more favourable treatment, sometimes warranted for social reasons, is not so when there is a strike, and the President is free to pay just the minimum guaranteed by the principle of payment for services rendered. In this instance he determined the amount of the deduction in legitimate exercise of his discretion. The method of calculating deductions can be properly decided by the President, in the light of all the circumstances and the better to protect the EPO from harm, only when the strike has actually begun, or even ended. The President delegated authority to the Chief of Personnel. There is uniform treatment at all duty stations, and besides, it is absurd to demand equality in insignificant details.

D. In their rejoinders the complainants submit that the President has acted *ultra vires*. Article 65 of the Service Regulations requires the deduction of thirtieths whenever full remuneration is not due and so precludes the application of the alleged general principle permitting the deduction of twentieths. Production targets were met by the staff in 1982 and so, by the EPO's own argument, it could have refunded the sums since the strike did it no harm. The new method of calculation was introduced in breach of the rule against retroactivity. There is no evidence of delegation to the Chief of Personnel. The complainants again allege inequality of treatment: deductions from salary are not an "insignificant detail".

E. The EPO develops its case in its surrejoinders, and in particular its argument that the rules governing employment at the EPO, including the Service Regulations, are suspended during a strike, and Article 65 therefore cannot apply in calculating deductions from salary. It enlarges on the reasons why it believes the method it adopted is sound and in accordance with the general rules that apply.

#### CONSIDERATIONS:

1. Both complaints are challenging the same decisions by the European Patent Organisation and raise the same issues. They may therefore be joined to form the subject of a single judgment.
2. Following strikes by some of its staff in May 1981 the European Patent Office issued a circular on 20 May explaining how the deductions from the salaries of those who had stopped work would be calculated. The number of strike days was to be divided by the number of working days in the month in which the strike had occurred and the resulting figure multiplied by the amount of basic salary plus salary allowances to give the amount of the deduction.
3. The parties are agreed that a staff member who goes on strike is not entitled to payment for the period during which he has ceased to work. This is a corollary of the principle which says that remuneration is due only for services rendered.

The sole point in dispute is the method of calculating the deduction.

The rules on remuneration are in Article 65 of the Service Regulations. The article says that "Payment of remuneration to employees shall be made at the end of each month for which it is due. Where remuneration is not payable in respect of a complete month, the monthly amount shall be divided into thirtieths and

- where the actual number of days for which pay is due fifteen or less, the number of thirtieths payable shall equal the actual number of days for which pay is due;

- where the actual number of days for which pay is due is more than fifteen the number of thirtieths payable shall equal the difference between the actual number of days for which pay is not due and thirty."

4. The complainants contend that for want of any other provision in the Regulations the EPO is bound to comply with Article 65, which applies the so-called "thirtieths" rule when a staff member is off work.

To this the EPO replies that since the right to strike is not governed by the Regulations neither is the matter of salary deductions. It submits there is no parallel in law between the position of a staff member who willingly joins others in a work stoppage and that of a staff member who is off work for some fortuitous reason which is invariably peculiar to himself. When there is a strike - the argument runs - the employment relationship is suspended for the duration and rights and duties arising under it do not directly apply; a new relationship comes into being, with rights and duties other than those prescribed in the Service Regulations and founded on the general principles of law governing strikes; and, lastly, when there is a concerted work stoppage, the Administration may

decide whatever it thinks best for the proper running of the Office.

5. The EPO's notion of the right to strike is out of date. As a matter of principle a strike is lawful. It does not break the contract of employment or the administrative link between an organisation and its staff. The employee continues to be a member of the staff and the only provisions of the staff regulations to be suspended are those which are incompatible with the work stoppage. Salary is withheld by virtue of a provision in the Regulations, the requirement of payment for services rendered, and any provision which is not incompatible with the existence of a strike remains in force.

Article 65 is therefore applicable whatever the reason for the official's absence, since it does not provide for any exception. If the strike involved the breach of obligations under the rules or contractual obligations or led to unlawful acts, it would be admissible for the Administration to take special measures, but in that event there would not be a strike in the proper sense, and the measures would be disciplinary. The strike was not of such a kind in this case.

Even where a strike is not an abuse of right an organisation would of course be entitled to make special rules on salary deductions different from the rules on absence from duty for other reasons. But such rules must be incorporated into the staff regulations in accordance with the prescribed procedure for the making and approval of rules. The executive head is not competent to adopt such rules, let alone such rules which are retroactive. To accept the EPO's submissions would be to allow the imposition of a covert disciplinary sanction. The EPO staff exercised an acknowledged right and did not commit any misconduct. The impugned decisions are therefore unlawful and must be set aside.

6. The complainants invite the Tribunal to order in consequence that they be paid the sums wrongfully deducted from salary. The claim succeeds, and the EPO shall pay them the sums withheld in excess of the amount of the deduction authorised under the "thirtieths" rule.

7. The complainants are entitled to the payment of interest at 10 per cent a year on the sums wrongfully withheld with effect from the date of payment of each corresponding monthly salary up to the date of repayment.

8. The Tribunal awards 1,000 guilders to each of the complainants as costs.

#### DECISION:

For the above reasons,

1. The impugned decisions are set aside in so far as they deduct from the complainants' salaries on account of the strikes sums in excess of those authorised under Article 65 of the Service Regulations.

2. The complainants are referred back to the EPO for calculation of the sums to be refunded.

3. The complainants shall be paid interest at 10 per cent a year on the sums wrongfully withheld with effect from the date of payment of each corresponding monthly salary up to the date of repayment.

4. Each complainant is awarded 1,000 guilders as costs.

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 well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

