

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

## FIFTY-FIRST ORDINARY SESSION

In re DEVISME and IVERUS (No. 2)

Judgment No. 567

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. François Raymond Devisme and by Mr. Dan Ivan James Iverus on 10 March 1983 and brought into conformity with the Rules of Court on 30 March, the EPO's replies of 20 June, the complainants' rejoinders of 5 September and the EPO's surrejoinders of 4 November 1983;

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

Considering Judgments Nos. 532 and 533;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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. As is stated in Judgments Nos. 532 and 533 under A, a dispute over working hours led to a strike by EPO staff, including the complainants, in March 1981 and to further strikes, usually lasting three days a week, from 12 May to 18 June. By a circular of 20 May the Chief of Personnel announced that salary deductions would be made 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. Mr. Devisme appealed on 19 June and Mr. Iverus on 27 July under Article 107(1) of the Service Regulations. On 30 October the two cases were referred to an Appeals Committee under Article 109. In their first complaints, filed by Mr. Devisme on 17 November and by Mr. Iverus on 19 December 1981, the complainants, having received no decision, challenged the implied rejection of their appeals. By letters of 27 and 28 May 1982 respectively they informed the Chairman of the Appeals Committee that because of the delay they "considered the internal procedure ... to be closed". In Judgments Nos. 532 and 533 of 18 November 1982 the Tribunal dismissed their complaints on the grounds that they had not exhausted the internal means of redress. 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 salary, calculated as prescribed in the circular of 20 May 1981. In a report dated 10 December 1982 all members of the Appeals Committee expressed the view that their appeals should be rejected because they had been abandoned, and in a decision of 15 December the President "took note of the withdrawal of suit". That and the Chief of Personnel's circular are the decisions which the complainants state that they impugn.

B. The complainants submit that are receivable, the President having taken a final decision on 15 December 1982. As they explained in letters of 1 March 1983 to the President, they did not withdraw suit on 27 and 28 May 1982: all they meant was that they no longer saw any point in the internal proceedings, and indeed their consistent and evident intention has been to press their claims. On the merits they repeat the arguments Judgments Nos. 532 and 533 summarised under B and D. They add that in its report, which dealt with similar cases, the majority of the Committee found "a clear basis" for deducing the "thirtieths principle", i.e. docking monthly salary at the rate of one-thirtieth for each day not worked, from the Service Regulations in the light of the general law, and they submit further arguments on the merits. They 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 withheld for the strikes of May and June 1981 up to January 1982, when the sums were repaid, repayment of the sums wrongfully 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 replied that the complaints are irreceivable under Article VII(1) of the Statute because the complainants withdrew their internal appeals on 27 and 28 May 1982. The President's letter of 15 December 1982 merely noted the withdrawal and cannot form the subject of an appeal to the Tribunal. The claim for repayment of sums withheld for strikes in late 1982 is also irreceivable because the President has taken no final decision. The EPO refers to the arguments on the merits which Judgments Nos. 532 and 533 summarised under C and E, and which it develops.

D. In their rejoinders the complainants reaffirm that they never had any intention of withdrawing their internal appeals: their letters of 27 and 28 May 1982 were misconstrued by the Appeals Committee and the President. The President's letter of 15 December 1982 was in fact a decision, it wrongfully deprived them of their right of appeal, and it is therefore challengeable. They submit further arguments on the merits.

E. In its surrejoinders the EPO makes further submissions on receivability. It observes that in the internal proceedings a unilateral declaration sufficed to withdraw the appeals and that no decision by the President was necessary for the withdrawal to take effect. His so-called decision of 15 December was merely an acknowledgment of the withdrawal and had no effect in law. The complainants voluntarily deprived themselves of a means of redress and must bear the consequences. The EPO develops its subsidiary arguments on the merits.

#### CONSIDERATIONS:

1. The complaints raise the same issues and should therefore be joined to form the subject of a single decision.
2. Both complaints challenge a circular of 20 May 1981 in which the Chief of Personnel informed the staff of the EPO that in the event of a strike deductions would be made from salary for each working day on which the staff member had not worked.

Mr. Devisme lodged an internal appeal on 20 June 1981, and Mr. Iverus on 27 July, under Article 107 of the Service Regulations. They claimed repayment of the sums they said had been wrongfully deducted from their salaries. The proceedings went ahead, and in October 1981 the President of the office wrote to inform them that he rejected their claims and was referring their cases to the Appeals Committee in accordance with Article 109 of the Service Regulations.

They filed complaints with the Tribunal, Mr. Devisme on 27 November and Mr. Iverus on 19 December 1981. They took the view that the effect of doing so was to bring to an end the internal proceedings begun in June and July 1981. They therefore wrote to the Chairman of the Appeals Committee on 27 and 28 May 1982 to say that they considered the internal proceedings relating to their claim for the quashing of the circular to be closed. Their letters, which were in identical terms, added that they were at the Committee's disposal should the Committee wish to hear evidence from them as staff representatives on the questions raised by the circular. They concluded by saying that their attendance at such hearings would not imply consent to the resumption of proceedings in their own case and that they would be giving evidence only on behalf of other staff members.

The Appeals Committee reported on 10 December 1982. The President of the Office signed his decision on 15 December. It rejected on the merits the internal appeals lodged by 225 staff members, but as to those of the complainants, it merely noted that they had withdrawn suit.

A few days earlier, however, on 18 November 1982, the Tribunal had dismissed the complaints filed by the complainants on the grounds that they were premature.

3. The complainants' intention of withdrawing their own appeals is beyond doubt. Their letters of 27 and 28 May 1982 allow of no other interpretation. They were addressed to the person authorised to receive them since the EPO had informed the complainants that their case had been referred to the Appeals Committee. The letters are perfectly clear since the complainants state twice that they do not want their own appeals to be heard and that in future they will be acting only as staff representatives. Although the term "withdrawal" does not actually appear, the wording comes to the same thing and there is no doubt about their intention of abandoning the internal proceedings, which is not subject to any qualification. The President of the Office therefore acted correctly in taking note of their position

and in declining to take up their case along with the others.

In an attempt to refute the Organisation's argument the complainants put forward several pleas. Some of these are of no weight whatever. It is true enough that withdrawal of suit may not be presumed, but the complainants expressed their wishes clearly. It is also true that withdrawal may be cancelled at any time until it is accepted; but here it was not cancelled before the President took note of it.

The complainants are also relying on the Tribunal's judgments of 18 November 1982. What the Tribunal said was that they must await the Appeals Committee's report and the President's final decision before coming to the Tribunal again, and indeed they have done so. But the Tribunal did not say whether further complaints would be receivable. A judicial decision relates only to the dispute as it is when the decision is given: it cannot rule on a case of which the circumstances are unknown at the time. The only matter to be settled is whether the President's decision was correct.

Lastly, the complainants plead the mistake which they say they made and submit that their letters of 27 and 28 May 1982 are null and void for lack of consent.

The complainants were mistaken in thinking that the Tribunal would allow their complaints and that there was therefore no purpose in continuing with the internal proceedings. But that was an error of judgment and not the same thing as lack of consent such as will render the withdrawal null and void. The basis in law of relations between organisation and staff must be stable. The complainants are liable for the course of action and the decisions they take. Neither the President nor anyone else in the Organisation induced them to take a course which has proved to their detriment. They must be held responsible for their own actions and bear the consequences.

DECISION:

For the above reasons,

The complaints 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 well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner