

## SIXTY-FOURTH SESSION

### ***In re* WILSON**

#### **Judgment 897**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Christel Gertrud Leif Wilson against the European Patent Organisation (EPO) on 22 May 1987, the EPO's reply of 10 August, the complainant's rejoinder of 9 November 1987 and the EPO's surrejoinder of 29 January 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3), 49(11) and (13), 67 and 75 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. The complainant took up duty with the EPO in Munich on 1 September 1980 as a clerk at grade B2, step 6. She is a permanent employee. In 1981 she was granted a language allowance under Article 75 of the Service Regulations:

"(1) A language allowance may be granted by the President of the Office, whenever he deems this to be in the interests of the Organisation, to permanent employees in Grades B1, B2 and C1 to C4 who are required in the course of their duties to use two or three of the official languages of the Organisation which are not their mother tongue and who have proved that they have a knowledge of those languages ..."

In March 1984 the EPO took a decision of general policy that the language allowance should no longer be treated as part of basic salary.

In December 1984 the complainant was promoted to B3 as from 1 February 1985 and, in accordance with a standard form entitled "Calculation of incremental step on promotion", she was granted step 5. But in B3 she lost entitlement to the allowance, and in a letter of 29 January 1985 to the Principal Director of Personnel she pointed out that if the amount of it was not taken into account in determining her new step her total net pay would fall, in breach of Article 49(13) of the Service Regulations: "In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration". She asked for step 6. In a letter of 1 February 1985 the Director answered that her step in B3 had been correctly reckoned on the strength of her basic salary in B2, which, in keeping with the policy decision of March 1984, did not comprise the language allowance; if need be, "promotion compensation" would be payable under 49(13). On 18 March 1985 she submitted an appeal to the President which was referred to the Appeals Committee. According to a minute of 18 August 1986 from the Personnel Department to the chairman of the Committee her pay after promotion had been lower than before it by some 8 Deutschmarks a month and she was to receive "compensatory payments under Article 49(13)". She was paid such compensation in September 1986. In its report of 24 October 1986 the Committee observed that in Judgment 737 the Tribunal had held in a similar case that if total net pay was to fall on promotion the guarantee in 49(13) might be fulfilled by payment of promotion compensation instead of the award of another step in the new grade. The Committee held that, though payment of compensation equal to the difference in total net pay before and after promotion was a correct way of fulfilling the guarantee, the President should, after consultation of the General Advisory Committee in accordance with Article 38(3), issue rules to give effect to 49(13) before taking his final decision. But by a letter of 26 February 1987, the decision impugned, the Principal Director of Personnel informed the complainant that the President had rejected her appeal.

B. The complainant points out that the guarantee in 49(13) was not respected since her total net pay was in fact lower after her promotion than before it. She seeks to distinguish her case from the one the Tribunal dismissed in

Judgment 737. The decision of March 1984 not to treat the allowance as part of basic salary was flawed in that the President ought first to have consulted the General Advisory Committee, 38(3) requiring him to refer to the Committee any "proposal which concerns the whole or part of the staff". The decision is at odds with former practice, which is binding on the EPO until duly amended.

She seeks the grant of step 6 as from the date of her promotion and 1,000 Deutschmarks in costs.

C. The EPO replies that there was no flaw in the decision of March 1984. Judgment 737 upheld the EPO's plea that the mere correction of a misinterpretation of the rules did not require consultation of the General Advisory Committee, and the issue is *res judicata*. The earlier practice founded on that misinterpretation was duly discontinued in March 1984 and the impugned decision correctly applied the true intent of the rules. The complainant offers no material plea that Judgment 737 has not already rejected.

As for the Appeals Committee's recommendation, there is no need for any rule to give effect to 49(13): the compensation paid in fulfilment of the guarantee is not an allowance or benefit within the meaning of Article 67 of the Service Regulations, but merely a corrective payment *sui generis* which forms part of total net pay.

D. In her rejoinder the complainant again seeks to distinguish her case from the one dismissed in Judgment 737, which she submits was based on mistaken allegations of fact by the EPO. As the Appeals Committee recommended, rules are needed to give effect to 49(13). After all, in her own case the EPO took nearly 18 months to pay compensation, and there are several ways in which the guarantee can be discharged, but of which the present rules say nothing.

E. In its surrejoinder the EPO points out that the Tribunal's reasoning in Judgment 737 applies and that it is not open to the complainant to apply for review. The way in which it now fulfils the guarantee is lawful and adequate and it falls within the scope of the President's discretion, whereas the earlier practice, on which the complainant relies, belied the purpose of the material rules.

#### CONSIDERATIONS:

1. The complainant is employed at General Directorate 1 of the European Patent Office. As from 1 February 1985 she was promoted from grade B2, step 6, to B3, step 5.

In B2 she had been paid a language allowance under Article 75 of the Service Regulations; but someone promoted to B3 is not entitled to the allowance and on getting her first pay-slip after promotion she found that her total net pay had actually dropped. Article 49(13) of the Service Regulations reads: "In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration". Citing that rule and the administrative practice that applied it, she claimed another step in B3, putting her at step 6 on promotion.

The Principal Director of Personnel refused her claim and she appealed. The Appeals Committee did not recommend rejecting it outright and proposed instead that the President wait until a text had been adopted to give effect to 49(13). But the President in fact rejected her appeal.

The EPO submits that 49(13) is clear and calls for no interpretation. Where the effect of promotion is to lower total net pay, the official is entitled to no more than payment of a differential, and the complainant did get it, albeit 18 months late.

2. In Judgment 737 of 17 March 1986 the Tribunal ruled on a similar case. Like the complainant, Mr. Mijnders had been a B2 official, had lost the allowance on promotion to B3 and been paid compensation for the financial loss.

The Tribunal dismissed his case, and the EPO is relying on Judgment 737. For her part, the complainant submits that it was based on errors of fact.

3. The effect of dismissing a complaint is relative, the issue being *res judicata* only between the parties to the complaint. The complainant is free to submit it to the Tribunal again and to put forward any plea she wishes, whether it came up in the earlier case or not.

4. The complainant has two objections to Judgment 737: she says it mistakenly assumes, first, that the President took a general decision not to include the language allowance in basic salary on promotion and, secondly, that the

EPO changed its practice in the matter as to promotion to B3 because of Judgment 460 of 14 May 1981.

5. As the Tribunal ruled in Judgment 737, Article 75 of the Service Regulations, which provides for the grant of the language allowance, does not treat it as part of basic salary and there was no breach of the letter or of the spirit of the article. Further upholding the EPO's arguments, the Tribunal found no breach of 49(13) either, which safeguards against reduction in total net pay on promotion: basic salary is not to be confused with total net pay. It is 49(11) that says how the step in the new grade is to be reckoned.

Those principles are beyond dispute and indeed the complainant is not challenging them.

She observes, and the Organisation admits, that it put a different interpretation on the rules until 1984. But though Judgment 737 said that it had changed its practice following a ruling the Tribunal made in 1981 and the Organisation did take a long time to react, the issues in law remain the same and the complainant's plea is immaterial.

6. The absence of a general decision by the President is again a mere quibble. There was indeed no general decision: all the President did was tell the competent branch to apply a new ruling. In doing so he was exercising his broad administrative authority to give instructions to the staff. Difficulty in construing a rule is no reason for requiring the head of the secretariat to take a formal decision on how to apply it and in particular to consult the General Advisory Committee. The question was how to apply a provision of the Service Regulations, and the President simply told his staff how to do so. Several individual decisions were taken accordingly, one of them being the decision the complainant is impugning. To allow her plea would be tantamount to bestowing the real authority on a collective body and would greatly impair the President's authority.

the main the complainant's case fails. Yet she did have to wait for some eighteen months and the filing of her internal appeal before getting the further sums she was entitled to under 49(13) and so she won partial satisfaction because of her appeal. She is therefore entitled to an award of costs, which, as she asks, the Tribunal sets at 1,000 Deutschmarks.

DECISION:

For the above reasons,

The EPO shall pay the complainant 1,000 Deutschmarks in costs.

Her other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, 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  
E. Razafindralambo  
A.B. Gardner