

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

SIXTIETH ORDINARY SESSION

In re ANDRES (No. 8)

Judgment No. 785

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Florian Andres against the European Patent Organisation (EPO) on 20 December 1985 and corrected on 7 February 1986, the EPO's reply of 30 April, the complainant's rejoinder of 5 June and the EPO's surrejoinder of 18 August 1986,

Considering the applications to intervene filed by:

E. Allen

J. Amand

G. Assi

T. Bakker

A. Bauer

G. Beaven

C. Black

M. Boletti-Cremers

A. Boulon

M. Boureau

C. Bournot

W. Bub

F. Centmayer

M. Chomentowski

S. Chowdhury

A. Clelland

O. Consée

C. Cullmann

H. Dauksch

G. Del Piero

B. Deuters

D. Drummond

R. Eliot  
W. Felgel-Farnholz  
E. Fischer  
E. Flink  
J. Fouchy  
L. Galligani  
F. Garnier  
G. Gianni  
G. Giovannetti  
D. Glendinning  
G. Griffith  
J. Grötzinger  
C. Gugerell  
P. Hards  
D. Harkness  
P. Harkness  
P. Haslauer  
M. Haertle  
W. Hellemans  
O. Henrikson  
U. Himmler  
W. Hofmann  
M. Houillon  
A. Hörner  
M. Hubeau  
S. Ismail  
M. Jacquemain  
E. Jonas  
J. Jonk  
H. Kadavy  
B. Karet

H. Kempf  
H. Kempin  
J. Killmister  
A. Klaasen  
A. Klein  
S. Knowles  
P. Krasa  
A. Kurlandczyk  
A. Leonard  
C. Lion  
M. Loades  
C. Lo Conte  
A Marie  
M Marston  
E. Mathys  
B. McGinley  
G. McGinley  
J. Meyer  
P. Mieszkowski  
F. Miot  
E. Munzer  
E. Östling  
A. Pasqualetti  
F. Pfannerer  
N. Phillips  
H. Pratsch  
H. Rahner  
A. Rauter  
M. Rayner  
H. Reich

D. Roedl

P. Rohr

H. Rudolph

M. Rugglu

N. Sabinine

S. Sandri

A. Schulz

N. Seifert

R. Shukla

P. Spiekermann

M. Stange

S. Steinbrener

B. Stübner

A. Tangocci

P. Thomte

L. Tissot

J. Trevetin

J. Turner

E. Turrini

W. van Eeckhout

Y. van Henden

W. van Laarhoven

K. van Reeth

G. Vogt

P. Wacker

C. White

S. Wibergh

W. Woods

R. Young

R. Zilliox

R. Zottmann; Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles

106(2) and 109(2) 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. Facts relevant to this case are recorded in Judgment 726, of 17 March 1986, on the complainant's second complaint and others. That complaint challenged the EPO's decision to impose, as from 1 July 1983 up to 30 June 1986, a levy of 1.5 per cent on the basic salary of staff in categories A and L. The Tribunal held the levy to be lawful and dismissed the complaint. The Council of Europe, one of the "co-ordinated organisations" referred to in Judgment 726, under A, had introduced a similar levy. Appeals by 13 members of the Council's staff (Stevens and others) were referred to its Appeals Board. By a decision of 15 May 1985 the Board allowed the appeals and ordered "the reimbursement of the sums wrongfully levied". On 2 August 1985 the complainant wrote a letter to the President of the Office as the "appointing authority asking him, in accordance with Article 106(2) of the Service Regulations, to take a decision on a claim to repayment of the sums levied on his salary since 1 July 1983. He observed that his salary and those of other EPO staff no longer had the same purchasing power as their counterparts' in the Council of Europe. Having got no answer he filed the complaint on 20 December 1985 challenging the rejection which he takes to be implied under Article 109(2) of the Service Regulations.

B. The complainant submits that since his letter of 2 August 1985 was notified to the President on the same day and since the President did not take a decision on his claim within sixty days, his complaint is receivable under Article VII(3) of the Statute of the Tribunal.

As to the merits he observes that A and L staff in the Council of Europe do not pay the levy and, grade for grade and step for step, their salaries therefore have a higher purchasing power than those of A and L staff, like himself, in the EPO. That is in breach of article 7 of the rules which are appended to the 159th Report of the Co-ordinating Committee of Government Budget Experts of the Co-ordinated Organisations and which the Administrative Council of the EPO has approved. Article 7 reads: "In the case of both annual and triennial reviews the basic salaries applicable in countries other than Belgium shall be obtained by multiplying the new basic salaries applicable to staff serving in Belgium by coefficients which ensure parity of purchasing power for all staff in the same grade and within-grade step".

He asks the Tribunal to order the EPO to repay to him the sums levied on his basic salary under the scales in force from 1 July 1983 and from 1 July 1984 plus interest at 10 per cent a year, to remove the levy and to pay him 2,000 swiss francs in costs.

C. The EPO replies that the complaint is irreceivable. In Judgment 726 the Tribunal upheld the levy, in particular on the complainant's salary, for the full period -- from 1 July 1983 to 30 June 1986 -- in which the Co-ordinating Committee proposed in its 191st Report that the levy remain in force. To challenge the lawfulness of the levy again is to disregard the *res judicata* rule.

Since the complaint was filed on 20 December 1985 it may not be read as seeking review of Judgment 726, which came out later. Even if it might, it offers no admissible grounds for review. The ruling of the Appeals Board of the Council of Europe is not a new fact: the Tribunal knew of it already since the complainant filed the text in the proceedings on his second complaint. Besides, the Board set the Council levy aside not because it was inherently unlawful but because of procedural flaws. Equality in law does not mean equality in the breach of it, and the complainant may not gain from an unlawful act just because others have.

D. The complainant rejoins that his complaint is not *res judicata* and is receivable. The issue is not the lawfulness of the levy but whether the disparity in salaries between the Council of Europe and the EPO breaks a rule the EPO Council has approved. If, as he submits, it does, the only way to remove the disparity is to cancel the levy in the EPO.

E. In its surrejoinder the EPO enlarges on its plea of *res judicata*, which it contends that the complainant has failed to rebut, and develops its subsidiary pleas on the merits.

CONSIDERATIONS:

1. The many applications by EPO staff members to intervene in this case are admissible and they will succeed or fail as does the complaint itself.

2. Several international bodies in Europe, known as the "co-ordinated organisations", have a common system of staff pay, or at least seek a degree of harmony in pay policy, and with that aim in view the Co-ordinating Committee of Government Budget Experts makes proposals to their governing bodies. The EPO is not a member of the Committee, but has observer status and in practice usually accepts its proposals, although, as the Tribunal said in Judgment 760 (Andres (4 and 5) and Chaki (2)), it need not do so.

On the Committee's recommendation, which the other organisations also adopted, the Administrative Council of the EPO introduced as from 1 July 1983 a temporary levy of 1.5 per cent on the basic salary of staff in categories A and L.

The staff understandably objected and not a few lodged internal appeals. Mr. Andres and others later filed complaints, in which there were many interveners, asking the Tribunal to declare the levy null and void. The Tribunal dismissed the complaints in Judgment 726 on 17 March 1985.

3. About the same time there were appeals against the levy before the appeals bodies in the other organisations. The Appeals Board of the Council of Europe was one, and in a judgment of 15 May 1985 it allowed the appeals. It quashed the individual decisions taken by the Secretary-General in pursuance of a decision by the Committee of Ministers imposing the levy and it ordered repayment of the sums wrongfully withheld.

4. On learning of that judgment the complainant lodged an internal appeal under Article 106(2) of the EPO Service Regulations. His appeal being impliedly rejected, he has filed this complaint alleging breach of a rule that staff pay in the co-ordinated organisations should have equal purchasing power.

5. The complaint is not an application for review of Judgment 726, even though, were it allowed, its effect would be to make that judgment a dead letter. The complainant is not challenging that judgment but sees his case as resting on different grounds in law from his earlier complaint.

6. While agreeing that the complaint is not an application for review, the Organisation pleads that it is irreceivable under the rule of *res judicata*.

There are three conditions for sustaining the objection: the parties, the purpose of the suit and the cause of action must be the same as in the earlier case.

7. The present complainant was one of the complainants in the case on which the Tribunal ruled in Judgment 726, and the parties are therefore the same.

8. Identity of purpose means that what the complainant is seeking is what he would have obtained had his earlier suit succeeded. Thus a complainant may not eschew the *res judicata* rule by just prompting a new decision and saying it is not the same as the one he challenged earlier. The criterion is not the substance of the decision but the complainant's true intention.

The complainant's present claim for redress is the same as his earlier one. Then as now, what he wants is the quashing of the levy, and over the same period of time. Being subsidiary, his other claims are immaterial in determining whether his purpose is identical.

The Tribunal holds that the first two conditions are met.

9. The third is identity in the cause of action, and it is a more difficult matter.

What the cause of action means is the foundation of the claim in law. It is not the same thing as the pleas, which are submissions on issues of law or of fact put forward in support of the claim.

The two notions -- cause of action and plea -- are akin and in practice, for want of exact criteria, the distinction between them will turn on an appraisal of the facts of the case.

There is no difficulty where the former claim and the new one have a different foundation in law, but in many

instances the question will be whether the complainant's line of argument does not show some direct link with the earlier case.

In this case the complainant is relying solely on the rule that, grade for grade and step for step, salaries in the Council of Europe should have the same purchasing power as salaries in the EPO, a rule laid down in the Co-ordinating Committee's 159th Report.

In the earlier case, however, the complainant was relying on an internal rule embodied in the EPO Service Regulations. And although Judgment 726 does cite the Committee's reports, its sole purpose in so doing is to determine the bounds of the Council's authority.

10. The cause of action being different in this complaint, the plea of *res judicata* fails.

11. In his submissions on the merits the complainant relies on article 7 of the appendix to the 159th Report: "In the case of both annual and triennial reviews the basic salaries applicable in countries other than Belgium shall be obtained by multiplying the new basic salaries applicable to staff serving in Belgium by coefficients which ensure parity of purchasing power for all staff in the same grade and within grade step". The argument runs that the article prescribes equality in the purchasing power of salaries and that owing to the ruling of the Appeals Board of the Council of Europe there is breach of that equality. Judgment 760 delineated the relationship between the co-ordinated organisations and the EPO. It observed that, as is said in 2 above, the EPO was not represented on the Co-ordinating Committee but had observer status and it held that the EPO was wholly autonomous, the Administrative Council alone being competent to approve proposals by the Committee. Although the service Regulations say that staff pay "shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee", the Council is not bound to follow the Committee in all cases.

The complainant cites no Council decision that applies article 7 to the EPO.

The rule he is relying on is therefore in any event not binding on the EPO because it is not one of the co-ordinated organisations, and there is no need to construe the article.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner