

EIGHTY-EIGHTH SESSION

***In re* Cervantes (No. 3), De Lucia, Luckett and Munnix**

Judgment 1896

The Administrative Tribunal,

Considering the third complaint filed by Mr Jean-Pierre Cervantes, as well as those lodged by Mr Gennaro De Lucia, Mr Paul Luckett and Mr Serge Munnix against the European Patent Organisation (EPO) on 14 December 1998, the EPO's single reply of 8 March 1999, the complainants' rejoinder of 1 April and the Organisation's surrejoinder of 11 June 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. According to Article 37(c) of the Service Regulations for Permanent Employees of the European Patent Office, secretariat of the EPO, the staff shall be represented on the Appeals Committees.

Article 110 of the Service Regulations reads:

"(1) The Appeals Committee shall consist of a Chairman and four full members.

...

(3) In respect of appeals against decisions of the Administrative Council, the Chairman and full members of the Committee shall be appointed by the Administrative Council each year.

(4) In respect of appeals against decisions of the President of the Office, the President shall each year after consulting the General Advisory Committee, appoint a Chairman and two full members of the Committee. The Staff Committee shall at the same time appoint two full members of the Committee. Two deputy Chairmen and four alternate members shall also be appointed under the same conditions and shall take part in the proceedings of the Committee if the Chairman or full members are not able to act."

The complainants are all permanent employees of the EPO. At the time the decision was challenged, they were members of the Central Staff Committee and the General Advisory Committee.

The first Appeals Committee against decisions of the Administrative Council, hereinafter the Council's Appeals Committee, was not set up until 1996. There were no staff members represented on this Committee. At the Council's 63rd session in October 1996, the members of the Central Staff Committee expressed the wish to be represented on the Council's Appeals Committee. By a note to the Council on 27 November 1996, they reiterated their request which was rejected by the Council at its 65th session in December 1996.

By letters of 27 February 1997, the complainants lodged appeals with the Administrative Council Chairman to obtain staff representation on the Council's Appeals Committee. By a letter of 4 April 1997, the Council Chairman informed them that he had forwarded their appeals to the Council's Appeals Committee. It delivered its opinion on 2 September 1998 and recommended that the appeals be rejected. By a letter of 23 October 1998, the impugned decision, the Administrative Council Chairman advised the complainants that the Council had, at its 72nd session, decided to reject their appeals.

B. The complainants plead breach of Article 37(c) of the Service Regulations, recognizing the right of the staff to be represented on the appeals committees [emphasis added]. The Service Regulations only mention

two appeals committees, that of the Council and that of the President of the Office, provided for in paragraphs 3 and 4, respectively, of Article 110.

In contrast to paragraph 4 of Article 110, paragraph 3 does not specify the composition of the Council's Appeals Committee. However, paragraph 3 should not be considered contradictory to the general principle contained in Article 37(c) because to exclude all staff representation from the relevant Appeals Committee would go against the principle whereby exceptions made to a general principle by a specific provision should be strictly interpreted.

Depriving staff members appointed by a Council decision of the right to be represented on the Council's Appeals Committee, basically responsible for reviewing disputes relating to staff, would amount to unequal treatment of employees.

The two appeals committees discussed in Article 110 of the Service Regulations must deal with individual decisions whose only difference lies in the category of the employees concerned. There is, therefore, no reason for different rules to be applied.

The complainants deduce from the case law that the intent to preserve the independence of the Council's Appeals Committee does not warrant the exclusion of staff representatives. Further, they contend that the current Committee is "unbalanced" because it chiefly comprises former Council members and the staff is not represented.

The complainants ask the Tribunal to quash the decision of 23 October 1998 and to award them moral damages of 1,000 German marks for each month the Council refuses to accept staff representation on the Council's Appeals Committee and 5,000 marks in costs.

C. The Organisation quotes Article 34(1) of the Service Regulations in its reply: "The Staff Committee ... shall maintain suitable contacts between the competent administrative authorities and the staff". Article 33 of the European Patent Convention states that the Administrative Council is the legislative body of the EPO. The Organisation deduces that the Staff Committee does not participate directly in the Council's decision-making process. It is, therefore, excluded from the Council's Appeals Committee which does take an active part in the Council's decision-making process.

Article 110(3) of the Service Regulations is a *lex specialis* which takes precedence over the *lex generalis*, Article 37(c). If the drafters of the Service Regulations had intended that the staff be represented on the committee concerned, they would have clearly specified it as they did for the President's Appeals Committee. The Organisation, therefore, strictly interpreted Article 110(3) of the Service Regulations. As to the use of the plural in Article 37(c), it can be explained by the fact that the EPO could have set up several committees, since the staff was assigned to four different duty stations.

The decision of 23 October 1998 does not affect the rights of "senior employees", i.e. appointed by Council decision, in keeping with the rule that similar acts require similar procedures: staff representatives not involved in the decision-making process within the Council cannot take part in reviewing these decisions. Nevertheless, the staff is not necessarily excluded from the review process of an appeal put to the Council's Appeals Committee: Article 113(3) of the Service Regulations states that the appellant can be assisted by the person of his choice, possibly a staff representative.

D. In their rejoinder the complainants point out that the appeals committees do not participate directly in the decision-making process because they only give an advisory opinion. Moreover, the Council has sometimes applied to its appeals committee provisions of Article 110(4) by appointing, for example, a deputy chairman and alternate members.

The absence of senior staff representatives on the Council's Appeals Committee "is compensated only very inadequately by the right to be assisted when being brought before this Committee".

E. The EPO submits in its surrejoinder that the opinions of the Council's Appeals Committee have a "direct impact" on the Council's decisions; this is why the complainants wish to be represented.

The two appeals committees are responsible for reviewing decisions delivered by two bodies, the President of

the Office and the Administrative Council, the "specific level and nature" of which justify the different composition of the aforementioned committees.

To ensure that its Appeals Committee ran smoothly, the Administrative Council had to appoint a deputy chairman and alternate members.

Most of the decisions regarding senior employees are made by the President of the Office and any complaints are lodged with the President's Appeals Committee.

CONSIDERATIONS

1. At the EPO Administrative Council's 63rd session, the complainants, in their capacity as staff representatives and basing their plea on Article 37(c) of the Service Regulations, asked that the staff be represented on the Council's Appeals Committee. Though provided for in the Service Regulations, this Committee had been set up for the first time in March 1996, since the need had not been felt before. Shortly before the 65th session, the Central Staff Committee submitted a formal request for staff representation on that Committee.

The Council rejected this request. The complainants, permanent employees sitting on the Central Staff Committee and the General Advisory Committee, each lodged an internal appeal which was rejected by the Council based on the recommendation of the Council's Appeals Committee. That is the impugned decision.

The complainants seek the quashing of the decision as well as an award of 1,000 German marks in moral damages "for each month the Council fails to grant them representation on its Appeals Committee" and 5,000 marks in costs.

The Organisation asks the Tribunal to dismiss the complaint.

2. The complainants cite Article 37(c) of the Service Regulations calling for staff representation on "appeals committees". The plural, they claim, refers to the President's Appeals Committee and the Council's Appeals Committee.

The Organisation sees in Article 37(c) a case of legislative inadvertence. The use of the plural can be explained by the fact that President's Appeals Committees could have been set up in each of the Organisation's duty stations. Not allowing staff membership on the Council's Appeals Committee results, on the contrary, from Article 110 of the Service Regulations, paragraphs 3 and 4. In paragraph 3, the Council appoints the members of the Appeals Committee, with no mention of staff representatives; paragraph 4, however, clearly describes how the staff can be represented on the President's Appeals Committee. It would also be a breach of the EPO's rules if decisions - often of a "legislative" nature - taken by the executive body representing member States could be challenged before an internal body on which the staff is represented.

These arguments are refuted by the complainants.

Receivability

3(a) Staff representatives in the Organisation's bodies can, in addition to their own interests, defend before the Tribunal those interests of the employees they have been appointed to represent, at least when that right is recognized by the Organisation's rules (see Judgments 1618, *in re* Baillet No. 2 and others, under 6, and 1147 *in re* Raths, under 4). These conditions are met in the present case and the complainants are empowered to carry out this dual function.

(b) Decisions of a general thrust relating to the attributions of power can be challenged forthwith, without having to wait until the body, whose composition is contested, delivers an unfavourable individual decision to the appellant (see aforementioned Judgment 1618, under 4 and 5).

Such is the case of the decision relating to the composition of the Council's Appeals Committee.

Merits

4. According to Article 1(4) the Service Regulations apply to members of the Boards of Appeal and to the Enlarged Board of Appeal (appointed by the Administrative Council, according to Article 11 of the European Patent Convention) to the extent that their independence is not affected. These provisions, however, apply to the President and Vice-Presidents of the Office only to the extent that their employment agreement expressly stipulates it (see Article 1(5)).

Articles 2 and 37 of the Service Regulations read:

"Article 2

Bodies under the Service Regulations

There shall be set up within the Office:

- a) a Staff Committee,**
- b) joint committees,**
- c) Promotion Boards,**
- d) Disciplinary Committees,**
- e) Appeals Committees,**
- f) Selection Boards,**
- g) an Invalidity Committee,**

which shall perform the functions assigned to them under the Service Regulations."

"Article 37

Other Bodies

The staff shall be represented on the following bodies:

- a) the joint committees,**
- b) the Disciplinary Committees,**
- c) the Appeals Committees,**
- d) the Promotion Boards and**
- e) the Selection Boards."**

(a) The joint committees consist of a General Advisory Committee and Local Advisory Committees (see Article 38(1)). The Chairman is appointed by the President of the Office, whereas the other members are appointed in equal numbers by the President of the Office and the Staff Committee (see Article 38(2)).

(b) There are two disciplinary committees for employees according to whether the appointing authority is the President (see Article 98(1) and (2)) or the Administrative Council (see Article 98(3)). In the first instance, joint lists to be used for drawing lots will be established in each case to designate the members to be called upon to serve on the committee (see Article 98(1) and (2)). In the second instance, the Service Regulations state that "the Administrative Council shall appoint the Disciplinary Committee", without stipulating whether this special rule is incompatible only with regard to the appointing authority or also with regard to the joint composition of the committee (the latter appears to be the case, subject to the provisions of Article 37(b)).

(c) Title VIII of the Service Regulations concerns "appeals" in Articles 106 to 113. A distinction is drawn between those decisions taken by the President of the Office and those taken by the Administrative Council (see Article 106(2)). The Service Regulations, of which Article 110 relating to the composition of the Appeals Committee is quoted under A above, does not provide for other appeals committees; neither does it allude to the possibility of setting up local appeals committees. Separate rules govern the activities of both committees.

(d) Article 49 of the Service Regulations, which concerns promotion, refers to the Promotion Board. "Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board" (Article 49(4)). The composition of the Board apparently varies according to the promotions envisaged, since it is composed jointly of "a Chairman and four members belonging to a grade equal to or higher than the grade to be assigned" (Article 49(5)).

(e) Rules governing competitions are included in Annex II of the Service Regulations. The bottom line is that the appointing authority draws up a list of candidates fulfilling the conditions laid down and sends it to the Chairman of the Selection Board (see Article 4). According to Article 7(1) of the Service Regulations, the rules governing recruitment and the selection board also apply in principle to senior employees appointed by the Council, in application of Article 11 of the European Patent Convention. However, the appointing authority can also adopt another recruitment procedure. An ad hoc selection board is designated for each competition (see Article 7(2) of the Service Regulations).

5. The issue of staff representation on the Council's Appeals Committee is settled in Article 37(c) of the Service Regulations - according to the complainants - and in Article 110 of the Service Regulations - according to the Organisation.

These provisions are apparently contradictory. Indeed, Article 37(c) sets forth the principle of representation on the appeals committees, which necessarily includes the two appeals committees provided for in the Service Regulations, i.e. also the Council's Appeals Committee. In contrast, Article 110 of the Service Regulations governing the composition of the two appeals committees expressly stipulates the manner in which the staff is represented on the President's Appeals Committee, whereas for the other committee it states only that it is appointed by the Council, without any reference to staff representation. This could lead one to believe that such representation is not provided for in this body.

The Service Regulations should be interpreted according to the general legal principles relating to the interpretation of laws.

(a) If interpreted literally, staff representation can be admitted. Indeed, Article 37(c) of the Service Regulations is applicable to the two appeals committees provided for in the Service Regulations. Article 110 is not incompatible with the conditions set forth in Article 37(c). As these are rules governing only two committees, it would be meaningless to draft a "general rule" which would only be applied to one of these committees. Indeed, if that were the lawmaker's intention, he could and should have expressed it in Article 37 of the Service Regulations.

(b) An interpretation *contra legem* would imply that the lawmaker had not expressed himself correctly and had given another meaning to the rule than the one he intended. That cannot be presumed.

The Organisation provides no proof that the authorities may have envisaged, during the work preceding the adoption of the rule, the exclusion of staff representatives from the Council's Appeals Committee.

Nor has the rule been applied over an extensive period of time, which would help define its scope, the Council's Appeals Committee not being set up until the spring of 1996.

(c) A careful review of the Service Regulations reveals that the Organisation's interpretation does not stand either.

In contrast with Article 2 of the Service Regulations listing the bodies whose composition and tasks are described in it, Article 37 does not appear to be a mere outline or list without its own scope. It does indeed have a legislative content, that is to say, the representation of employees in the various bodies mentioned.

If one then compares the use of the plural in Article 37(c) with the one used for the other bodies, these bodies do have two or several committees, which can be accepted in particular for ad hoc committees. Likewise, Article 37(c) can be understood to cover both appeals committees.

In comparison with Article 37(c), Article 110 no doubt raises questions since it specifies the manner in which the President's Appeals Committee should be composed, i.e. jointly. As for the other committee, the only indication is that its members are appointed by the Council. This problem - a real one - does not allow one to

conclude that Article 37(c) should not be applied in the latter case. The two rules are not, however, totally incompatible, even if a gap must be filled to reconcile the two.

The Organisation points out that it would go against its rules if it were possible to submit the Council's decisions to an appeals committee comprising staff representatives: the Council is the supreme power composed of delegates of member States and many Council decisions are supposedly of a legislative nature. This line of reasoning is not wholly convincing. The Council's decisions and legislative acts can be challenged by employees according to the conditions fixed by the Organisation's rules and the Statute of the Tribunal. Further, one of the President's duties is to enact legislative acts in addition to the individual decisions he takes. Lastly, disputes relating to staff members appointed by the Council come mainly under the Council's jurisdiction. According to Article 1(4) of the Service Regulations, these employees, in principle, have the same rights and obligations as other staff. They can thus hope that their disputes may, if necessary, be presented before an appeals committee on which the staff is represented, which is the case for other employees. With regard to equality between the two staff categories, the Tribunal ruled that there was no reason why an employee appointed by the Council could not sit on a promotion board as a staff representative in matters regarding decisions taken by the President of the Office (see aforementioned Judgment 1147 under 5). Finally, staff representation on the Council's Appeals Committee does not undermine the Council's authority since the Committee's role is purely advisory and decisions on appeals belong, in any event, to the Council. Staff representation on the committee allows the staff to voice its opinion on matters arising in a particular case.

(d) For similar reasons, one could not hold that the aim of the rule requires that the Organisation's interpretation be respected. This aim stems from the method chosen by the lawmaker. The advantages of having staff representatives on the relevant appeals committee to examine the appeals filed against the President's decisions are consistent with those of having employee representation on the relevant appeals committee to deal with the appeals lodged against the Council's decisions.

For all practical purposes, no method of interpretation allows one to conclude that the rule in Article 37(c) of the Service Regulations - applied to the Council's Appeals Committee - is flawed. The written law must, therefore, be applied, in particular by the authority having enacted it, as long as it has not been repealed or modified for the sake of the principle that similar acts require similar rules.

The complaint must, therefore, be allowed. Since the Service Regulations do not state how staff representation must be ensured, it is up to the Organisation to find a solution. It would be hasty to rule on this point since the complainants claim they are willing to consult with the Organisation.

The conditions for awarding moral damages have not been met. The complainants' claims relating to this point must be disallowed. At this stage, the order to pay a penalty would be, at the very least, premature.

DECISION

For the above reasons,

1. The challenged decision is set aside and the case sent back to the Organisation for ruling by the Administrative Council as set forth in 5(d).
2. The Organisation shall pay the complainants the global sum of 2,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 17 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.