

NINETY-FIFTH SESSION

Judgment No. 2227

The Administrative Tribunal,

Considering the ninth complaint filed by Mr K.C. B. against the European Patent Organisation (EPO) on 18 January 2002 and corrected on 30 April, the EPO's reply of 26 July, the complainant's rejoinder of 23 October 2002 and the Organisation's surrejoinder of 4 February 2003;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

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

A. The complainant, a French national born in 1952, joined the European Patent Office, the secretariat of the EPO, in 1985 as an examiner. He currently holds grade A4. At the time of the facts he was Chairman of the Berlin section of the Staff Committee.

On 9 November 1999 that section sent the Office a notice entitled "Appeal for donations", which was to be photocopied and distributed. The document called on staff members to make donations for a colleague who had got into difficulties as a result of illness and, according to the authors of the document, owing to the fact that the Office had failed in its duty of care and assistance with regard to the said colleague.

By an e-mail of 11 November the complainant asked the head of Administration at the EPO's Berlin sub-office to "confirm" that the document concerned had duly been photocopied and distributed and, if not, to explain why and by which date it would be. He was orally given a negative reply that same day. In a letter dated 23 November the complainant asked the President of the Office to ensure that the Staff Committee's rights would continue to be respected. On 22 December 1999 the head of the Berlin sub-office replied that the Staff Committee's rights were not being restricted, but that an authorisation was required for any use of the Administration's services.

On 31 January 2000 the complainant lodged an internal appeal against that decision. The President of the Office wrote to him on 23 February expressing doubts regarding the receivability of his appeal, and asking him whether he intended to maintain it. The complainant confirmed his appeal on 29 February 2000.

In its opinion dated 4 October 2001 the Appeals Committee found the appeal receivable but recommended dismissing it on the merits. It considered that, if the Organisation's facilities are made available to staff representatives, the EPO is entitled to establish rules for the use of those facilities in order to prevent gross abuse and to protect the Office's employees and the dignity of the civil service. By a letter of 23 October 2001, which constitutes the impugned decision, the Principal Director of Personnel informed the complainant that the President of the Office had decided to dismiss his appeal.

B. In a preliminary remark, the complainant, noting that the original of the Appeals Committee's report was drafted in German, expressed the view that in future its reports should be drafted in one of the official languages of the Tribunal, i.e. in either English or French.

The complainant puts forward a single plea, namely the breach of his right to freedom of association and of one of its corollaries, freedom of expression.

He contends that the call for donations of 9 November 1999 did not contravene the principles governing the exercise of the freedom of speech and freedom of expression enjoyed by staff representatives. Neither the tone nor the content of the appeal for donations could reasonably be described as inadmissible "gross abuse".

He rejects the defendant's restrictive interpretation of the Staff Committee's functions derived from Article 36 of the Service Regulations. In the light of Article 34, which defines the functions of the Staff Committee, there is nothing to prevent the latter from taking up the case of one staff member in particular, since the expression "shall represent the interests of the staff" may be understood as covering equally the interests of a single individual or those of a group. Furthermore, there may be typical individual cases which may concern the staff as a whole and the staff representatives should be free to decide in what way they assist staff members.

The complainant notes that the Organisation considers it has a right to carry out systematic prior checking of all documents that the staff representatives wish to have copied and distributed. According to him, this amounts to institutionalised censorship on the part of the EPO. On this point, he refers to several judgments of the Tribunal, expressing the view that broad freedom of expression and speech is the norm: an exception arises in cases of gross abuse, which alone would not be tolerated.

The complainant asks the Tribunal to set aside the decision of 23 October 2001; to order the Organisation to pay him damages; and to award him costs.

C. In its reply the EPO notes that under the terms of Article 14 of the European Patent Convention it has three official languages, namely English, French and German. The complainant's call for the Appeals Committee's reports to be drafted exclusively in one of the official languages of the Tribunal therefore not only disregards the terms of the Convention but also fails to take account of the possibility that a staff member with insufficient command of English or French might request a German version of the Committee's report.

The defendant submits that the complaint is irreceivable. Under Article 108 of the Service Regulations, internal appeals must be lodged within a period of three months following the disputed decision. Its opinion is that the complainant lodged his appeal only on 29 February 2000, and since he had been notified orally on 9 November 1999 that the disputed announcement could not be photocopied and distributed, the time limit for appeal had lapsed.

It denies the existence of any institutionalised system aimed at restricting the staff's freedom of speech and states that the present case is the first occasion on which the question of official staff representatives' access to copying and distribution facilities has been raised.

According to the defendant, it was not within the competence of the Staff Committee, as defined in Article 36, to come to the assistance of the staff member referred to in the disputed "appeal for donations".

The EPO points out that only exceptionally does it refuse to photocopy and distribute documents containing information for staff from staff representatives, and its policy in this respect is in line with the prior announcement system applied in some countries. The examples drawn by the complainant from the case law are not relevant and the EPO's policy complies with the general principles of law.

The defendant contends that the decision not to copy or distribute the disputed document was taken not only because of its content but also and above all for the reasons given in the letter of 22 December 1999. Moreover, some parts of the document concerned may have been taken from confidential information available to certain officials on account of their position as staff representatives. A further point is that the way the staff member's position was presented in the document was misleading and harmful both to the individual concerned and to the Organisation.

D. In his rejoinder the complainant says he finds it hard to understand the defendant's objections to receivability, in view of the fact that those objections have already been rejected by the Appeals Committee.

He reiterates that the EPO suffers from an institutionalised system of censorship, which is reflected in the general terms in which the decision of 22 December 1999 was drafted. Moreover, he contends that the present case relates far more generally to the conditions in which the right to freedom of association is exercised and that the Office's attitude in that respect has already been objected to on several occasions both internally and before the Tribunal.

He submits that the EPO gives a selective interpretation of Article 36 of the Service Regulations, since in his view reporting a colleague's difficult situation in a broadly disseminated document falls precisely within the scope of "making suggestions", which is one of the responsibilities of the staff representatives.

Lastly, he argues that any staff member can relieve any person he chooses of the duty of confidentiality attached to information concerning his state of health, just as he can discuss his financial situation with whom he pleases. In the case in point the staff member concerned had agreed to the circulation of the "Appeal for donations" dated 9 November.

E. In its surrejoinder the EPO maintains its position and qualifies that appeal as an act of propaganda.

CONSIDERATIONS

1. On 9 November 1999 the Staff Committee of the EPO issued a notice entitled "Appeal for donations", calling on members of the Office's staff to make cash donations in order to assist a sick colleague for whose difficult social situation, according to the authors, the Office was to blame. As the Administration refused to photocopy and distribute the notice, the complainant, who at the time of the facts was Chairman of the Berlin section of the Staff Committee, wrote on 11 November 1999 to the head of Administration of the Berlin sub-office asking him to "confirm" that the notice had been duly photocopied and distributed within the Office.

On the same day he received a telephone call informing him that the President of the Office had refused the request to photocopy and distribute the appeal for donations, whereupon the complainant immediately replied requesting written confirmation of this rejection. On 23 November he wrote to the President noting that the photocopying service had announced that in future circulars from the staff representatives would no longer be either photocopied or distributed unless they had been submitted in advance to the head of Administration for approval. He objected to that, deeming it to be an inadmissible hindrance to the work of the staff representatives and requested that the Staff Committee should be able to continue to provide information for staff members or otherwise be sent a copy of instructions to the contrary.

2. On 22 December 1999 the head of the Berlin sub-office replied on behalf of the President to the letter of 23 November, saying that the Administration reserved the right to approve the photocopying and distribution of circulars issued by staff representatives and that this "reservation", which applied to any use of the Administration's services, did not represent a restriction of the rights of the staff representatives. It is against this communication that the complainant lodged an appeal on 31 January 2000. Questioning the receivability of the appeal, the defendant asked the complainant to withdraw it, but without success. On 29 February 2000 the complainant maintained his appeal, which was examined by the Appeals Committee and dismissed by the President of the Office, in accordance with the unanimous opinion issued by the Committee on 4 October 2001. The Principal Director of Personnel informed the complainant in a letter dated 23 October 2001 that his appeal had been dismissed.

3. The complainant asks the Tribunal to set aside that decision. The EPO for its part contends that the complaint must be dismissed as irreceivable and subsidiarily as unfounded.

4. Before examining the opposing arguments of the parties, it is worth analysing the opinion of the Appeals Committee. The Committee began by noting that the appeal was directed against the decision of 22 December 1999 alone, even though the dispute originated, according to the complainant's letter dated 29 February 2000, "in the Administration's refusal to produce copies of an appeal by the staff representatives for financial assistance to a colleague in need". It deemed the complainant's appeal to be receivable, on the basis of the Tribunal's case law arising from Judgment 1618, consideration 4, and Judgment 1896, consideration 3. On the merits, the Committee expressed the opinion that the internal appeal should be dismissed, since the right to freedom of speech to which staff representatives were entitled did have its bounds, as confirmed by the case law, and could be subject to certain rules to prevent gross abuse of that right and to protect in particular the employees of the Office and the dignity of the international civil service.

5. With regard to the receivability of the complaint, the defendant contends that the refusal to photocopy and distribute the notice of 9 November 1999, of which the complainant was notified the same day, could not be

validly challenged on 29 February 2000, i.e. more than three months later, which meant that the complaint was time-barred. The complainant rejects this plea of irreceivability, arguing that it would be very useful for the Tribunal to "rule on the issue in dispute, which for years has been poisoning relations between the Administration and staff representation" and that the objections to receivability were rightly rejected by the Appeals Committee.

6. On this point the Tribunal accepts the reasoning of the Appeals Committee, to the effect that the appeal was directed only against the decision contained in the letter of 22 December 1999. That letter informed the complainant, in reply to his letter of 23 November 1999, that the Administration reserved the right to approve the photocopying and distribution of the staff representatives' circulars. The issue of the receivability *ratione temporis* of an appeal against the decision not to photocopy or distribute the notice entitled "Appeal for donations" of 9 November 1999 therefore does not arise, since that decision was not the subject of the appeal, which was directed only against the general rule expressed in the letter of 22 December 1999.

No objection is raised against the complainant's *locus standi* to challenge the justification for this general rule on behalf of the interests he is responsible for protecting.

7. It may be concluded from the above that the opposing arguments of the complainant and the defendant regarding the lawfulness of the refusal to photocopy the "Appeal for donations" must be excluded as irrelevant. On the other hand, the general issue raised by the complaint is most important, since it concerns the degree of freedom of speech to which bodies representing staff in international organisations are entitled. On this point, the Tribunal recalled, in Judgment 911 delivered on 30 June 1988, that a staff association enjoys broad freedom of speech and the right to take to task the administration of the organisation whose employees it represents, but that like any other freedom such freedom has its bounds. Thus any action that impairs the dignity of the international civil service, and likewise gross abuse of freedom of speech, are inadmissible. But the prevention of such abuse cannot give the administration a power of prior censorship over the communication of written information produced by the groups and associations concerned. Herein lies the problem in this case: the Office considers it has a general right to authorise, which it maintains it uses only with moderation, but the limits of such authorisation are by no means clear. The Tribunal cannot set aside a general decision on the grounds that it does not offer the guarantees that are in any case available to staff members on the basis of the general principles of international civil service law, as established and interpreted by the Tribunal and other international administrative tribunals. These principles confine the Administration's scope of action to cases where there is gross abuse of the right to freedom of expression or lack of protection of the individual interests of persons affected by remarks that are ill-intentioned, defamatory or which concern their private lives. And it is in the light of these principles that the letter of 22 December 1999 containing the impugned decision should be interpreted. A refusal to grant an authorisation may be regarded as lawful only if it complies with the above principles.

8. The Tribunal recognises the difficulties arising from the translation of documents drafted in German, as allowed by the European Patent Convention. Nevertheless, it must remind the parties, which are aware of the fact, that its Rules admit only two working languages - English and French - but that the EPO is perfectly entitled, as far as its own purposes are concerned, to use any of its three working languages, including German.

9. The other arguments, concerning the soundness of the decision not to photocopy or distribute the notice dated 9 November 1999 and in particular the question of whether the Staff Committee had the authority to defend interests which did not affect the staff as a whole, lie beyond the scope of the dispute submitted to the Appeals Committee, which defines the present proceedings.

10. The conclusion is that the complaint must be dismissed, subject to the observations made in consideration 7 of this judgment.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2003, 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 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.