

## SEVENTY-SECOND SESSION

### *In re* RATHS

#### Judgment 1147

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gaston Raths against the European Patent Organisation (EPO) on 12 April 1991 and corrected on 21 May, the EPO's reply of 7 August, the complainant's rejoinder of 17 September and the EPO's surrejoinder of 11 October 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 23 of the European Patent Convention and Articles 1, 34, 35, 49, 106, 107, 108 and 109 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, an EPO official, is Chairman of the Office's Staff Committee and heads both its local section at Munich and its central committee.

Article 49(5) of the EPO Service Regulations says:

"The Promotion Board shall comprise a Chairman and four members belonging to a grade equal to or higher than the grade to be assigned. The Chairman of the Promotion Board and two of the members shall be appointed by the President of the Office. The other two members shall be appointed by the Staff Committee. ..."

General Directorate 3 (DG 3) at the EPO consists of members of the Organisation's boards of appeal, which settle disputes about patent applications. Article 23 of the European Patent Convention lays a "duty of independence" on members of the boards; Article 1(4) of the Service Regulations says that the Regulations apply to board members "in so far as they are not prejudicial to their independence".

By letter of 31 August 1990 to the Vice-President of DG 3 the complainant nominated Mr. Spangenberg as the Staff Committee's representative on a promotion board. In his letter of reply of 10 September the Vice-President took issue with the nomination on the grounds that it had been made without previously consulting him and concerned a member of a board of appeal. After withdrawing the nomination on the Staff Committee's behalf, the complainant lodged an internal appeal under Article 108 of the Service Regulations on 10 December 1990 against the Vice-President's letter of 10 September. Having got no decision from the President of the Office within the two months allotted under 109(2), he is challenging the implied rejection of his appeal.

B. The complainant submits that the letter of 10 September 1990 constitutes a decision "adversely affecting" him within the meaning of Article 107(1) insofar as it sets a restriction on the independence of the Staff Committee and its Chairman. The Service Regulations lay no obligation on the Chairman of the Committee to consult the Vice-President of DG 3 before nominating a board of appeal member for a promotion board. To require prior consultation of the President or a Vice-President might mean that candidates the Staff Committee deemed unfit would gain approval.

If the Staff Committee is to work properly its choice of representatives on boards for which the Regulations make provision must be unfettered. As for the objection to the Committee's original nominee, Article 1(4) of the Regulations affords no grounds for limiting his right to represent staff since in no way would his doing so impair his independence as a member of a board of appeal. Besides, his objectivity and the other qualities which had prompted his assignment to DG 3 made him a sensible choice.

The complainant asks the Tribunal to declare that DG 3 officials may be appointed to the boards and to other bodies provided for under the Regulations without the Vice-President's consent and that the Chairman of the Staff Committee is free to appoint any official, even a member of a board of appeal, without having to consult the Vice-President of DG 3. He seeks lump-sum damages in the amount of 2,000 Deutschmarks.

C. In its reply the EPO submits that the complaint is irreceivable since it was filed by the Chairman of the Staff Committee on the Committee's behalf. Neither an internal appeal nor an appeal to the Tribunal will lie against a decision which does not adversely affect an individual official; both the Service Regulations and the Statute of the Tribunal bar class actions. The Organisation's rejection of the Staff Committee's nominee for the promotion board caused the complainant no injury. Besides, the Regulations empower the Committee, not its Chairman, to appoint representatives; he may not object to checks on authority which he does not have. The only official who may allege injury under 34(2) is the one the Staff Committee chose to represent it on the promotion board.

In subsidiary pleas on the merits the Organisation submits that the Vice-President of DG 3 has authority to see that members of boards of appeal discharge the duty of independence which Article 23 of the European Patent Convention lays on them. In keeping with Article 1(4) of the Service Regulations the Vice-President may at discretion suspend the application of Article 34(2) to a board of appeal member on the grounds that it is improper for him to sit on a promotion or selection board that may report on cases of officials dealing with matters before a board of appeal.

Whether any particular DG 3 official is fit for the duties the Staff Committee may nominate him for is immaterial. What matters is the broader question of "participation of members of the Boards of Appeal in promotion procedures outside DG 3". The general rule is that staff with judicial duties should not take on unrelated administrative tasks; it follows that any outside assignments of DG 3 staff members should be subject to approval by the Vice-President.

D. In his rejoinder the complainant rejects the Organisation's pleas, enlarges on his own and presses his claims.

As to receivability he maintains that this is not a class action but a complaint against a decision that has hampered him in carrying out his duties under Articles 34 and 35 of the Service Regulations. By impairing the Staff Committee's freedom of choice the impugned decision adversely affects every member of the Committee. They have a duty in law to defend their own rights as well as the staff's. If the Chairman may not assert his right to appeal the Administration will be free to foil the Committee's work.

On the merits the complainant contends that the independence of a board member is not compromised by belonging to other official bodies whose business has nothing to do with DG 3 appeals. For ten years board members have been representing the staff, mainly on promotion boards, and the work of DG 3 has not suffered on that account.

It is not for the Administration to decide whether or not the Service Regulations shall apply to a staff member; for such a decision to be at the Vice-President's discretion would be in gross breach of general principles of law.

E. In its surrejoinder the EPO presses the pleas in its reply. Since disciplinary committees are quasi-judicial bodies it is proper for them to benefit from the experience of a DG 3 official. Promotion boards and selection boards are another matter since their work has a direct bearing on the careers of staff who contribute to decisions that a board of appeal may have to rule on.

#### CONSIDERATIONS:

1. In the section of the EPO Service Regulations on employees' rights and obligations there is a chapter that sets up a Staff Committee to ensure staff participation in several areas of administration. The independence of the Committee's members is safeguarded in that they are elected by secret and universal ballot. One of the Committee's functions is to nominate staff representatives on several joint administrative bodies.

2. This case is about the membership of one such body. By a letter of 31 August 1990 the complainant, as Chairman of the Staff Committee, informed the President of the Office that Mr. Spangenberg, a member of a board of appeal, was nominated to represent the Committee on a promotion board. On 10 September the Vice-President in charge of General Directorate 3 told the complainant that he was sorry to have to reject the nomination on the grounds that he ought to have been consulted before any decision was taken and that Mr. Spangenberg was a member of a board of appeal.

The complainant lodged an internal appeal. Having got no answer by the deadline in Article 109 of the Service Regulations, he has come to the Tribunal. His complaint is receivable insofar as he has exhausted the internal means of redress and met the time limit.

3. In both internal appeal and complaint he purports to be acting as Chairman of the Staff Committee.

The Organisation's main plea is that he may not file his complaint on the Staff Committee's behalf. It cites Articles 106, 107 and 109 of the Service Regulations and submits that they provide for appeal against an EPO decision only by someone who is adversely affected. In the EPO's submission the complainant does not qualify. He is just one member of a collective body, only that body may appoint someone to represent the staff, and his chairmanship of it vests no particular authority in him. Only the employee whose nomination has been refused may file a complaint since he is the one adversely affected by the decision.

The EPO goes on to observe that members of the Staff Committee do not as such have access to the Tribunal, not even if they purport to act for the Committee. Those who do are confined to the persons listed in Article II of the Tribunal's Statute. The complainant may not allege breach of any right under his contract of service or the Service Regulations. The Organisation concludes that both because the decision he impugns relates to a collective body and because he shows no injury his complaint is irreceivable.

4. The complainant exercises official duties prescribed in the Service Regulations. Article 34(2) says that "The duties undertaken by members of the Staff Committee ... shall be deemed to be part of their normal service. The fact of performing such duties shall in no way be prejudicial to the person concerned".

The EPO is right in that the Staff Committee, which does not even have personality in law, may not itself appeal. But its members may nevertheless rely on their position as such to ensure observance of the Regulations. Indeed that is why Article 34(2) empowers them to enforce their rights. Were that not so the system of staff representation set up by the EPO would prove meaningless. The staff member has a direct interest in making the Organisation respect his rights because he derives them directly from his status as such. The contingency is one that Article II of the Tribunal's Statute contemplates. If the EPO were right a further effect would be to hamper the functioning of a body established under the Service Regulations and acting within the bounds of authority the Regulations set.

The conclusion is that the EPO's objections to receivability must fail.

5. Article 49(5) of the Service Regulations prescribes the composition of a promotion board. The board shall have a chairman and four members and all shall belong to a grade equal to or higher than the grade to be assigned. The chairman and two of the members are nominated by the President and the other two members by the Staff Committee.

It is not disputed that the Staff Committee's nominee in this case qualified under the Regulations for serving on a promotion board. In fact any staff member may serve, whatever his duties may be, and the Regulations prescribe no disqualification.

Nor is there any requirement in the Regulations of consultation about the Staff Committee's nominees for a promotion board. Since the decision as worded posits a power of review that impairs a safeguard, it is unlawful and must be set aside.

6. The complainant is awarded 1,000 Deutschmarks in costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed.

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

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

(Signed)

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner

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