

SIXTY-FIRST ORDINARY SESSION

***In re* ARAS, CONREAUX, DAVISON,
FISHER, KETTLE, KRAANEN (No. 2),
KRUIJDENBERG, MIJNDERS (No. 2),
DE ROO, VAN ROSMALEN, ROSSI,
SCHUURMANS and WATCHMAN**

Judgment 805

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. Jean-Pierre Conreux, Mr. Malcolm Garnet Davison, Mr. Norman Thomas William Fisher, Mr. Nigel Adrian Shepperson Kettle, Mr. Richard Hubertus Kraanen (No. 2), Mr. Gerardus Lambertus Maria Kruijdenberg, Mr. Alexander Renatus Mijnders (No. 2), Mr. Martinus de Roo, Mr. Willem George Frederik van Rosmalen, Mr. Flavio Rossi, Mr. Karel Schuurmans and Mr. Ronald George Watchman on 13 May 1986, the EPO's replies of 24 July, the complainants' rejoinders of 25 November 1986 and the EPO's surrejoinders of 23 January 1987;

Considering the applications to intervene filed by Mr. A. Groeneveld, Mr. L. Hendriks, Mr. S. Moran, Mr. A. Poels and Miss D.G. Verschoor;

Considering the complaint filed by Mr. Christian Aras on 29 April 1986 against the EPO and corrected on 2 June, the EPO's reply of 11 August, the complainant's rejoinder of 10 December 1986 and the EPO's surrejoinder of 23 January 1987;

Considering the opinion of 17 March 1986 written by Mr. David Ruzié and submitted on the complainants' behalf on the lawfulness of the impugned decisions and the EPO's comments thereon;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Rule 85, paragraph 4, of the European Patent Convention and Article 109(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Considering the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainants are staff members of the European Patent Office. They belong to staff categories B and C and are employed in the Receiving Section of the General Directorate of the EPO at the Hague. They are members of the EPO Staff Union. A dispute arose over the difference between the purchasing power of the salaries of B and C staff in The Netherlands and their counterparts in the Federal Republic of Germany and the Staff Union called a series of work stoppages from 10 December 1984 for an indefinite period. On 8 January 1985 the complainants each received an order signed by Mr. Lamadie, the head of the Personnel Office, to turn up for duty. Normal working resumed on 8 February. On 14 February the Administrative Council amended Rule 85 of the European Patent Convention by introducing a new paragraph, 4, which said that where exceptional circumstances such as a natural disaster or strike disrupted EPO work an additional time limit of one month would be allowed for certain official "acts to be completed". By a minute of 27 February the head of the Personnel Office formally cancelled the orders. On 11 March the complainants lodged internal appeals challenging them. In its report of 12 December the Appeals Committee recommended, by a majority, rejecting the appeals for the period from 9 January to 14 February and, unanimously, allowing them for the period from 14 to 27 February on the grounds that the Council's decision of 14 February had made the continuance of the orders less imperative. By letters of 6 February 1986, notified to the complainants on 17 February, the President of the EPO conveyed his decision to reject the internal appeals in their entirety.

B. The complainants submit that the orders were tainted with formal flaws. They take the form of a minute signed by the head of the Personnel Office, who had no authority to take a decision on the matter. It was the President of the Office who ought himself to have taken the decision or made due delegation of his authority for the purpose. Moreover, the orders were not based on any express provision of the Service Regulations or on any general standard.

As regards the merits, the complainants point out that the Administration failed to take account of a minute of 4 December 1984 by Mr. Delorme, the Vice-President of the Office, which listed only a small number of posts that needed to be manned in the event of a strike. Declaring as it did nearly a third of the staff of the section to be indispensable, the decision was far wider in scope than the circumstances warranted, especially after the Administrative Council had taken its decision of 14 February 1985 to amend Rule 85 and thereby made some of the Receiving Section's work less urgent. There was an impediment of the right to strike and an abuse of authority. Moreover, although the strike came to an end on 8 February the orders remained in force until the 27th.

The complainants invite the Tribunal to quash the impugned decisions and the orders for the full period from 8 January to 27 February 1985, to order payment of 100 guilders a day to each of them for the period during which the orders were in force, plus 10 per cent interest, and to award 2,000 guilders in costs.

C. In its replies the Organisation recounts the history of the dispute in some detail. It submits that the complainants may not rely on the Vice-President's minute of 4 December 1984, a purely internal paper and a confidential one at that. It further submits that the orders are not tainted with formal flaws since the head of the Personnel Office acted by tacit delegation of authority.

As to the merits, the EPO points out that the Receiving Section, whose work it describes, is highly vulnerable to strike movements. By early January 1985 the Administration found the situation serious because of growing delay in processing many files and the damage done to the Organisation's credit and reputation. Only 29 people out of 950 were ordered to work, and there was nothing abusive about that. In exercise of his discretion the President took a decision which he rightly considered essential and, as the Appeals Committee acknowledged, he acted correctly and with due regard to all the relevant factors. Since work resumed on 8 February 1985, the orders fell into abeyance on that date. It was only at the complainants' own request and to put things on a proper formal footing that the head of the Personnel Office issued his minute of 27 February, which was not really necessary.

D. In their rejoinders the complainants describe the Organisation's account of the facts as vague and tendentious. They develop the reasoning in their original briefs. In particular they deny that the Receiving Section is as important as the Administration makes out. They point out that the effects of the orders, which were not withdrawn until 27 February, were serious enough to require compliance with at least some formalities. The percentage of staff required should be based on the total staff of the Receiving Section. The purpose of keeping the orders in force when the strike had already come to an end was to discourage resumption of it.

E. In its surrejoinders the EPO observes that the rejoinders add little to the debate. It gives further information about the number of staff on strike and the number of patent applications and files which had been left unprocessed because of the strike. It maintains that had the situation lasted any longer the EPO's clients and government departments of member States would have lost confidence in it.

It presses its conclusions.

CONSIDERATIONS:

1. The complainants are officials of the European Patent Office and work in the Receiving Section at The Hague. They took part in a strike, called by The Hague branch of the Staff Union, from 10 December 1984 until 8 February 1985. The purpose of the strike was to obtain a rise in pay for B and C category staff in the Netherlands.

2. The complainants' principal claim is the quashing

of the order which the head of Personnel issued to them on 8 January 1985 "requisitioning" their services. They are also objecting to the fact that the order was not withdrawn until 27 February 1985, by which time they had already been back at work for nearly three weeks. They seek an award of 100 guilders each for each day during which the order was

in force, plus interest at 10 per cent a year, and of 2,000 guilders in costs. All the complaints, including that of Mr. Aras, have the same object and rest on the same facts and pleas. The Tribunal therefore joins them for the purpose of delivering a single judgment.

3. The complainants have two pleas: that there were formal flaws, mainly in that the official who issued the order was not competent to do so, and that since it applied to too many staff the order was an abuse of authority.

4. They lodged internal appeals with the President of the EPO who, in accordance with Article 109(1) of the Service Regulations, referred the case to the Appeals Committee. In its report of 12 December 1985 the Committee recommended, by a majority, rejecting the appeal in respect of the period "from 9 January to 14 February 1985" and, unanimously, allowing it in respect of the period "from 14 to 27 February 1985" and awarding the complainants one guilder each in token damages for moral injury.

5. In his decision of 6 February 1986 the President accepted the former recommendation but not the latter and accordingly rejected the appeals in their entirety.

6. The complaints all challenge in substance the order of 8 January 1985 and the decision of 6 February 1986.

7. The order took the form of a minute from Mr. Lamadie, the head of Personnel, to each of the complainants and it read as follows:(Registry translation)

"The President takes the view that the Office's commitments towards the applicants and in particular minimal continuity of service make your presence at work essential.

Until further notice you are required to perform your duties and strictly comply with any instructions from your supervisor. If you do not you may be dismissed."

Those who had received the order thereupon went back to work, though under protest, save a few who were relieved on specific grounds.

8. The strike having ended on 8 February 1985, on 27 February Mr. Lamadie wrote again to the complainants:

"Further to my minute of 8 January 1985 conveying the President's decision to treat your presence at work as essential, I inform you that, since things are steadily returning to normal, your obligations are from now on the same as any other staff member's."

The alleged formal flaws

9. The complainants argue that the order was unlawful because the head of Personnel was not competent to issue it: it came neither from the President nor from anyone to whom he had duly delegated authority. They also say there was a formal flaw in that it was based neither on any provision of the Service Regulations nor on usage.

10. As the Appeals Committee said in its report of 12 December 1985, the Administration may in the event of a strike take any action required to safeguard the Organisation's interests and the continuity of its work, and such action includes an order to the staff to perform their duties. The right to issue such an order is inherent in the Administration's responsibility for the proper functioning of the Organisation, and it is immaterial that neither the Service Regulations nor other internal rules make express provision to that effect.

11. The minutes conveying the order were signed on the President's behalf by Mr. Lamadie, the head of Personnel. Delegation is the normal method of exercising authority within an organisation, and the competence of the head of Personnel, who expressly mentioned the higher authority from whom he derived it, is unchallengeable.

12. The allegations of formal flaws are therefore mistaken.

The merits

13. Formal objections apart, the complainants are not challenging the making of the order. What they do object to is its scope in that it was addressed to 29 out of the 135 staff in the Receiving Section. Since there were already 35 in

the section who did not go on strike far more were ordered to work than were needed to provide "essential" services, a term that ought to be strictly construed.

14. The complainants cite a minute of 4 December 1984 by Mr. Delorme, the Vice-President of the Office, about orders to be issued in the event of strike. They point out that it provides for requiring the presence of only one staff member to meet the needs of the Receiving Section. They infer that the purpose of the order in this case was not to safeguard essential services but to "crush the strike". In their view the order may be seen as "tantamount to impediment of the right to strike", to quote point 8 of Judgment 615 (in re Giroud and Beyer). They believe that the EPO's action was the less warranted in that a provision added on 14 February 1985 to Rule 85 implementing the European Patent Convention allows the extension of time limits for filing "communications" when there are exceptional circumstances such as "a natural disaster or strike".

15. The EPO's answer is that the strike had not only brought work in the Receiving Section to a standstill but seriously disrupted that of the other branches of the Office at The Hague, in Berlin and in Munich. By the beginning of January 1985 there were many patent applications which because of the strike had not been processed, while letters, communications and search work were also pending. The rights of many third parties were at risk and the EPO was under threat of huge claims to damages. The strike was damaging its repute, the more so since the strikers were waging a publicity campaign by addressing letters in their defence to government departments and to some of the EPO's clients. The Organisation's very survival being in jeopardy, something had to be done to keep the work going and restore its good name.

16. The Tribunal has two preliminary observations on the complainants' plea. The first is that it will discount Mr. Delorme's minute, which they have produced from some unstated source. As the EPO explains, it was intended for limited readership within the Office and had been prompted by earlier incidents: it has nothing to do with the situation that prevailed during the lengthy strike from December 1984 until February 1985. It therefore has no bearing on the lawfulness of action calculated to deal with a situation that obviously had to be assessed at the material time.

17. Secondly, the Tribunal dismisses the objections to Mr. Lamadie's minute of 27 February 1985 addressed to those he had earlier ordered back to work. That minute merely acknowledged that the order was no longer in force because work had been resumed on 8 February. There was nothing wrong in waiting until things had returned to normal before sending it: it did no more than state the consequences of the end of the strike. The only other material issue, therefore, is whether the scope of the order was out of proportion to the difficulties caused by the strike.

18. It is beyond question that like any national civil service an international organisation has the right and indeed the duty, when its staff goes on strike, to take action to ensure its survival and the continuance of its work. For that purpose it may, among other things, order staff to perform their duties. Provided it respects the principle of proportionality such order will not upset the proper balance between the parties' rights and duties in the event of a collective dispute. The question is whether the order of 8 January 1985 did go beyond the proper bounds.

19. To determine whether the order was justified the Tribunal will take account of the effects of the strike not just, as the complainants do, on the section but on the EPO as a whole. The complainants do not challenge the EPO's statement that the strike was paralysing a key section on which all the others depended and was disrupting EPO work as a whole. Though the number of staff in the section who were ordered to work may seem high - 29 out of some 135 - the percentage of the 950 staff at The Hague was tiny and that of total EPO staff - 1,880 - even smaller. What the EPO says also shows that the staff members ordered back to work were chosen with due regard to the sort of work that had to be done. It is no answer to say that the Office already had the services of the staff who had not gone on strike: there was no assurance that they would remain at work in the circumstances or could do the work required.

20. Apart from the services it renders member States the EPO has a direct and heavy responsibility to patent applicants and any disruption of its work is bound to affect the rights and interests of many private individuals. Although the rules implementing the European Patent Convention have been amended to allow postponement of time limits in the event of a strike, that does away with only part of the problem: it does not relieve third parties of the inconvenience caused by dilatory performance of the EPO's duties, nor the Organisation of the risk of liability.

21. Lastly, the EPO rightly points out how much more vulnerable an international organisation is than a national

civil service and what a serious threat the strike posed to its reputation in the eyes of national bodies and clients.

22. The Tribunal concludes that in issuing the order the Organisation did not exceed the proper scope of its authority to respond to a strike that had disrupted its work from December 1984 to February 1985.

23. The complaints fail insofar as they seek the quashing of the order and an award of damages, there being no need to draw any distinction between the periods up to and after the date on which the staff went back to work.

24. The applications to intervene also fail, and there is no need to rule on their receivability.

DECISION:

For the above reasons,

The complaints 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 Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 13 March 1987.

(Signed)

André Grisel
Jacques Ducoux
Pierre Pescatore
A.B. Gardner