SEVENTY-FOURTH SESSION

In re POPINEAU (No. 5)

Judgment 1244

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Gérard Jean Paul Popineau against the European Patent Organisation (EPO) on 16 May 1992, the EPO's reply of 24 August and the complainant's letter of 20 September 1992 informing the Registrar of the Tribunal that he did not want to rejoin;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 14(1), 24(2), 30, 34, 35(2), 93(2), 108(1) and (2) and 113(7) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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. The complainant, a Frenchman who was born in 1949, is employed by the EPO as a search examiner in General Directorate 1 (DG1) at The Hague.

On 9 March 1990 he wrote to the Principal Director of Personnel at DG1 under the letterhead of the French National Union of Research Scientists, an affiliate of the National Education Federation and known as the SNCS-FEN. He informed the Principal Director that for EPO staff the SNCS-FEN had set up a local section and he asked what facilities the EPO provided for the exercise of freedom of association, such as the right to bargain with management and time off.

In a letter of 3 April 1990 the Principal Director ordered the complainant to stop at once his work for the SNCS-FEN, to disband the local section and confirm within one week that he had done so. The Principal Director accused him of breach of the staff member's duties as set out in Article 14 of the Service Regulations and of misconstruing Article 30:

Article 14

"(1) A permanent employee shall carry out his duties and conduct himself solely with the interests of the European Patent Organisation ... in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside the Organisation."

Article 30

"Permanent employees shall enjoy freedom of association; they may in particular be members of trade unions or staff associations of European civil servants."

Having got no reply from the complainant the Vice-President of DG1 wrote to him on 23 April 1990 threatening disciplinary proceedings under Article 93(2)(c) and following and giving him until 4 May to reply in writing.

In a letter of 3 May to the Vice-President the complainant replied that since Article 30 did not bar EPO officials from joining national trade unions they were free to set up a local section of such a union; the purpose of the SNCS-FEN was to safeguard the interests of its members at work; and to regard that purpose as contrary to the EPO's interests within the meaning of Article 14(1) was to deny freedom of association.

By a letter dated 31 May 1990 the Vice-President asked the complainant to confirm that he had acted as directed on 3 April; otherwise the EPO would start disciplinary proceedings. It did so on 21 June.

In his reply of 5 July the complainant refused to obey the instructions of 3 April and stated that a new European Search Federation, known as the FER, had been established on 4 July and comprised the members of the former

EPO section of the SNCS-FEN. The Vice-President asked him for the minutes of the meeting held on 4 July and of the new FER's regulations. In a note of 18 July the complainant said that he had not disbanded the local section of the SNCS-FEN and that his refusal to do so was warranted under Article 24(2) of the Service Regulations:

"(2) ... If the [immediate supervisor] confirms the order in writing the employee shall carry it out, unless its execution would constitute an act contrary to the criminal law in force in the country of which the employee is a national ...".

Under French law if he took it on himself to disband the local section of the SNCS-FEN he would be committing the offence of interfering with freedom of association.

The rules of the SNCS-FEN were given to the Vice-President on 31 August and those of the FER on 12 September.

On 24 September 1990 the Disciplinary Committee reported to the President of the Office. It recommended issuing to the complainant a written warning under Article 93(2)(a) of the Service Regulations. The President notified his decision in a letter of 23 October 1990: it made no mention of disciplinary action but observed that setting up a section of a national trade union within an international organisation like the EPO was bound to harm the working atmosphere, that it was against the Service Regulations, that all activity on behalf of the SNCS-FEN or the new Federation was banned inside the Organisation and that the facilities the complainant had claimed in his letter of 9 March 1990 were refused.

The complainant lodged three internal appeals:

(a) No. 45/90, on 5 December 1990, against the ban on the local section of the SNCS-FEN;

(b) No. 46/90, also on 5 December, against the ban on the European Search Federation;

(c) No. 4/91, on 22 January 1991, against the refusal of staff union facilities.

On 10 December 1991 the Appeals Committee submitted the following recommendations to the President. All were unanimous but the one on appeal 46/90, which was adopted by majority with the chairman's casting vote.

(1) Appeal 45/90 was time-barred and should therefore be dismissed as irreceivable.

(2) Appeal 46/90 should be allowed in part.

(3) Appeal 4/91 should be rejected as devoid of merit.

(4) All further claims should be rejected.

As to appeal 46/90 the Committee summed up the majority opinion as follows:

"Article 30 [of the Service Regulations] - freedom of association

(a) the right of association under Article 30 includes the right to join a national trade union;

(b) there is no evidence that the aims of the union SNCS or the federation FER were opposed to the interests of the EPO;

(c) freedom of association is a fundamental right which may not be restricted by a total ban on all union activity in the EPO;

(d) the risk that national union policies might be imposed on the EPO or of a "Zersplitterung" [splitting] of EPO staff on national lines would seem to be exaggerated;

Article 14 [of the Regulations] - general obligations

(e) the appellant cannot be reproached for breach of a general principle, only for breach of a statutory provision;

(f) a mere concern of a possible conflict with his obligations under Article 14 or a risk of a conflict of loyalties are no sufficient basis to impose a complete ban on union activity in the EPO or to ground a breach of his obligations under Article 14."

In a letter of 17 February 1992 another Vice-President notified to the complainant the President's decision to reject appeals 45/90 and 4/91 but to reverse the decision of 5 December 1990 banning the FER. That is the decision he impugns.

B. The complainant submits, as to appeal 45/90, that the challenged decision was the ban of 23 October 1990 on the local section of the SNCS-FEN and his appeal, being lodged on 5 December, was therefore in time. He refused to obey the orders of 3 April and 31 May 1990 because the EPO was not competent to issue them. He and the union are quite distinct, and it could be disbanded only according to the proper procedure. His refusal to comply led to disciplinary proceedings and the Disciplinary Committee recommended giving him a written warning, but the President did not do so. The ban on the local section of the SNCS-FEN was unlawful because it was in breach of the Freedom of Association and Right to Organise Convention, 1948 (No. 87), of the International Labour Organisation.

As to his other appeal of 5 December 1990, No. 46/90, the FER, the ban on which has been reversed, is, according to its own rules, made up of local sections of national trade unions, and one is the EPO section of the SNCS-FEN. The ban on that component of the FER is crippling.

His appeal of 22 January 1991, No. 4/91, against the refusal to grant the SNCS-FEN facilities for union representatives was rejected as devoid of merit. Such treatment was discriminatory since the staff association the administration has approved does get such facilities. He deplores the EPO's harassment of two trade unions - the SNCS-FEN and the FER - and their members.

He claims:

(1) a declaration that the reversal of the ban on the FER shall not take effect until the ban on its component, the SNCS-FEN, has been lifted;

(2) a declaration that the EPO section of the SNCS shall enjoy the same facilities as any other staff union, in proportion to its membership and without discrimination;

(3) the refund of travel expenses he and his counsel incurred because of summons by the Appeals Committee to the EPO's headquarters in Munich and the payment of one guilder in token moral damages;

(4) an award of 5,000 Swiss francs in costs.

C. The EPO maintains that appeal 45/90 was time-barred.

In his decision of 3 April 1990 the Principal Director of Personnel of DG1 explicitly ordered the complainant to stop at once the activity of the local section of the SNCS-FEN and take steps to disband it. The Appeals Committee dismissed as pettifoggery his plea that the ban was not issued until 23 October 1990.

In subsidiary pleas the EPO submits that though the complainant is free to belong to any national trade union an international civil servant must perform his duties in complete independence of member States and indeed of all other bodies, public or private. The local section of the SNCS-FEN represented only research scientists in category A whereas Article 35(2) of the Service Regulations calls for the representation of all categories.

The EPO cannot work properly unless its staff have a sense of unity and because of their different backgrounds that means striking a careful balance. Article 30 of the Service Regulations embodies freedom of association but refers to European trade unions and staff associations because they answer the special needs of the international civil service.

Appeal 4/91 too, about staff union facilities for the SNCS-FEN, was time-barred. Moreover, it was contingent on appeal 45/90 and, since the ban of 3 April 1990 on the local section of the SNCS-FEN is final, shows no cause of action.

Lastly, the complainant has shown no moral injury.

CONSIDERATIONS:

Appeals 45/90 and 4/91

1. According to Article VII(1) of the Statute of the Tribunal:

"A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."

According to the case law that means that a complainant must not only have gone through any internal appeals procedure within his organisation but duly complied with the requirements of the rules on that procedure. Thus, if the internal appeal was irreceivable under those rules, the complaint to the Tribunal will also be irreceivable under Article VII(1).

2. As is explained in A above, the complainant submitted three internal appeals to the Appeals Committee of the EPO, Nos. 45/90, 46/90 and 4/91, against a composite decision which the President of the European Patent Office had notified to him in a letter of 23 October 1990.

3. The Organisation contends that appeals 45/90 and 4/91 were not receivable; the complainant that they were.

The EPO's decision to ban the local section of SNCS-FEN was taken on 3 April 1990 and notified to the complainant on 17 April. It was confirmed on 23 April and 31 May and the President's letter of 23 October merely confirmed it yet again.

The complainant is mistaken in arguing that the letter of 3 April did not explicitly ban activity by the SNCS-FEN within the EPO. The wording of the letter leaves no possible doubt about what the decision was. In particular the last paragraph reads:

"I therefore order you to stop at once any activity by that trade union [sc. the SNCS-FEN] in the Office and to ensure that the section you represent in the Office is disbanded. I expect you to tell me within one week that it has been."

As the Tribunal held in Judgment 532 (in re Devisme), under 3, a decision is "any action by an officer of the Organization which has a legal effect". The letter of 3 April 1990, which was signed by a Principal Director of the Office, had the legal effect of banning the activities of the local section of SNCS-FEN.

4. Article 108(1) of the Service Regulations provides that "an internal appeal shall be lodged with the appointing authority which gave the decision appealed against" and Article 108(2) that "the appeal shall be lodged within a period of three months". Since, as stated in 3 above, the complainant had notice of the decision of 3 April 1990 on 17 April, he had until 17 July to lodge his appeal. Not until 5 December 1990 did he lodge appeal 45/90, and it was therefore time-barred. Accordingly, insofar as the present complaint relates to the subject of that appeal, namely the ban on the local section of the SNCS-FEN, he has failed to exhaust the internal means of redress and his complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

5. It was on 22 January 1991 that the complainant lodged appeal 4/91 against the President's decision of 23 October 1990 to refuse him the facilities he had claimed for the local section of the SNCS-FEN.

The grant of facilities to that local section depends on a decision to allow it to function within the Organisation. Since, for the reasons stated in 4 above, any appeal against the ban on the local section of SNCS-FEN is irreceivable, the ban is beyond challenge and the claim to the grant of facilities for the local section must fail as well.

Appeal 46/90

6. The President's decision of 23 October 1990 banned activity on behalf of the European Search Federation, known as the FER. In appeal 46/90, which he also filed on 5 December 1990, the complainant asked for the reversal of that decision. On the recommendation of a majority of the Appeals Committee the President decided on 17

February 1992 to reverse his decision dated 23 October, and the complainant thereby obtained satisfaction.

7. In this complaint, however, he seeks from the Tribunal a declaration that the reversal of the ban on FER activity shall not be effective so long as any of its components continues to be subject to a ban.

That claim is tantamount to asking the Tribunal to review the decision of 3 April 1990 which formed the subject of appeal 45/90. Since that appeal was irreceivable for the reasons stated in 4 above, the decision is beyond challenge. The claim must therefore fail.

The complainant's other claims

8. The complainant seeks the repayment of travel expenses which he and his counsel incurred for the purpose of attending the meeting of the Appeals Committee at EPO headquarters in Munich. He also asks for awards of one guilder in moral damages and of costs.

9. There are no grounds for ordering the repayment of the travel expenses.

Article 113(7) of the EPO Service Regulations reads:

"Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

The French text of the article is similar. The German version, however, is somewhat different: it provides that the appellant must ordinarily bear the costs of his appeal where it fails, but is silent about cases where the appeal succeeds, as did the complainant's appeal 46/90.

In Judgment 853 (in re Benze No. 6), on a case where the three language versions of the EPO Service Regulations also disagreed, the Tribunal held, in 5:

"According to the general rules of construction, all language versions of a text shall be deemed to bear the same meaning save that, where comparison reveals a point of disagreement, the construction that prevails shall be the one that, with due regard to the purpose of the law-maker, best reconciles the various versions."

In this instance the Tribunal holds that the English and French versions are to be preferred to the German because it is unreasonable to deal with the matter of costs, as the German does, only in cases where the appeal fails. Article 113(7) must be taken to mean that any costs shall as a rule be borne by the complainant save when the appointing authority, on a recommendation by the Appeals Committee, may decide otherwise. Since the President of the Office did not do so in this case, the exception does not apply, and the complainant's claim must again fail.

10. Since none of the complainant's claims is sustained he is not entitled to any relief.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 February 1993.

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner