Registry's translation, the French text alone being authoritative.

SEVENTY-NINTH SESSION

In re VOLLERING (No. 6)

Judgment 1443

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 25 May 1994, the EPO's reply of 29 August, the complainant's rejoinder of 6 December 1994 and the Organisation's surrejoinder of 12 January 1995;

Considering the application to intervene filed by Mr. Jean-Pierre Cervantes on 28 March 1995 and the EPO's comments thereon of 28 April 1995;

Considering Articles II, paragraph 5, and VII 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. By a communiqué, No. 219 of 22 July 1992, headed "Working Time Rules" the President of the European Patent Office, the secretariat of the EPO, announced his decision to increase the compulsory mid-day break for all staff from 30 to 45 minutes. By a note of 23 July the Director of Administration told EPO staff stationed at The Hague that staff on a forty-hour week were still required to be present eight-and-a-half hours a day. By a note dated 28 August the Vice-President in charge of Directorate-General 1 (DG1) instructed staff at The Hague not to enter the additional 15 minutes of the mid-day break in time sheets.

By a letter of 20 October 1992 the complainant, an official in DG1, told the President that he took communiqué 219 to mean that the time the staff had to be present on the premises was increased from eight-and-a-half hours a day to eight-and-three-quarters; he asked the President to review the decision of 22 July 1992 or, failing that, to treat his letter as an internal appeal. In a note of 5 November the Head of the Personnel Department replied that the Director of Administration's note of 23 July and the Vice-President's note of 28 August had already settled the matter; so there was no need to refer it to the Appeals Committee. In a letter of 24 November to the Head of Personnel the complainant expressed the view that since the Administration had made the mid-day break 15 minutes longer and staff still had to spend only eight-and-a-half hours at the office the working day had been cut to seven-and-three-quarter hours. He asked for confirmation of that view. In a note of 2 December the Head of Personnel informed him that the Vice-President's note of 28 August 1992 called for no further comment and that he was passing on the appeal to the Directorate of Staff Policy for action.

In its report of 20 December 1993 the Appeals Committee unanimously recommended rejection. By a letter of 22 February 1994, the impugned decision, the Director of Staff Policy told the complainant that the President had decided to reject his appeal.

In communiqué 256 of 15 December 1994 the President informed the staff that he had decided to revise communiqué 219 and go back to a 30-minute mid-day break.

Communiqué 256 added that the extension of the break by 15 minutes was authorised "on condition that individual production is not affected".

B. The complainant submits that the President wilfully omitted to consult the General and Local Advisory Committees before taking the impugned decision. That was contrary to Articles 38(3), 38(4) and 55(3) of the Service Regulations. Such breach of good faith and such misuse of authority by the EPO entitle the complainant to damages for moral injury.

He says he got no reply to his request of 24 November 1992. The Organisation left him unsure of his position and refused to explain properly the effects of the challenged decision. It thereby impaired his right to a hearing, failed to comply with its duty to inform the staff and acted in breach of due process.

He objects to the consequences of reducing hours of work from eight to seven-and-three-quarters a day. He reckons that the EPO imposed a 3.2 per cent rise in productivity inasmuch as targets remained the same despite the reduction in working time. Since he needs as much time as before to reach his target, he now has to spend forty-three-and-three-quarter hours a week at the office. What is more, the decision to lengthen the mid-day break and the Vice-President's instructions of 28 August 1992 not to enter the 15 additional minutes in time sheets forced him to make misrepresentations. The Director of Administration's note of 23 July 1992 requiring him to spend eight-and-a-half hours a day at the office unduly restricted his freedom to go elsewhere during the break.

He objects to the recommendation of the Appeals Committee, whose reasoning, he submits, is mistaken and incomplete.

He seeks the quashing of the President's decision to extend the mid-day break by 15 minutes and wants the Tribunal to declare the EPO liable for (1) upsetting the "legal stability" of his position by its breach of Articles 38 "and/or" 55(3) of the Service Regulations; (2) the breach of good faith and misuse of authority in its failure to comply with Articles 38 "and/or" 55(3); (3) the breach of good faith and of due process in its refusal to give him clear information on his working conditions; (4) the breach of his right to a hearing in its implied refusal to discuss the consequences of the challenged decision; (5) the confusion caused by the measure and the order not to record the break; and (6) flaws in the internal appeals procedure. He seeks 35,000 guilders in moral damages and additional annual leave by way of compensation for time lost on account of the longer break. He wants the Tribunal to cancel his obligation to be present eight-and- a-half hours a day at the office and to award him 10,000 guilders in material and moral damages for the restriction on his freedom. He claims 10,000 guilders in costs.

C. In its reply the EPO submits that the complaint is plainly irreceivable "for lack of purpose" and in any event devoid of merit. Besides his claims are receivable only insofar as he has exhausted the available means of resisting the challenged measure. The Organisation invites the Tribunal to declare the complaint an abuse of the right to appeal.

Its pleas on the merits are subsidiary. It submits that there was no reason to consult the General or Local Advisory Committees on what was a mere rescheduling of hours of work in recognition of common practice.

It did not deny the complainant information on the effects of the measure. The Head of the Personnel Department himself twice explained things to him and told him that communiqué 219 did not change the amount of time he was to spend at the office. Besides, he had the opportunity to make his case in the internal appeal proceedings.

The working day is still eight hours. The EPO may set the same standards of productivity as before, even though the complainant's claims are on that score irreceivable. He may forgo one of the two daily 15-minute breaks if he thinks he must in order to keep up his output.

There is plainly no need to enter the 15 additional minutes in time sheets since on the President's authority they count as working time. As for being "present" at the Office, the complainant seems to have misunderstood the communiqué: there was never any question of restricting his freedom of movement during the mid-day break.

The EPO is not liable for the views of the Appeals Committee, which is an autonomous body.

D. In his rejoinder the complainant enlarges on his pleas. He alleges that the practice of a 45-minute break, however common, cannot lay any obligation on the staff as a whole. The President is responsible for ensuring that the Appeals Committee conducts its business properly.

He wants the Tribunal to order the EPO to pay him a further 5,000 guilders in damages for discriminatory treatment since he has to go on working during the 15-minute breaks in order to make up for the extended mid-day break and his bigger workload. He cannot exercise his right to a 45-minute break, unlike others who were already taking such a break and who fare better for the change.

E. In its surrejoinder the EPO presses its pleas. On receivability it points out that the complainant said nothing in his internal appeal of the connection between the longer break and productivity. The new claim in his rejoinder is

irreceivable and unsound. The President announced in communiqué 256 of 15 December 1994 his decision to amend communiqué 219 because he had to put an end to the "questions" it had raised, even though it had merely endorsed the conclusions of a working party which included staff representatives.

CONSIDERATIONS:

1. Like another dispute on which the Tribunal rules this day (Judgment 1442, in re Rosé) this dispute arises from changes the President of the European Patent Office made in the schedule of work for, among others, staff at its Directorate- General 1 (DG1) at The Hague. According to the rules of 5 November 1981 on working hours in DG1 "there shall be a lunch break between 11.30 and 14.00 of at least 30 minutes for staff members with a forty-hour working week and at least 45 minutes for all others". So as to improve working conditions, and after "a thorough discussion in the Presidential Committee", the President decided, among other things, to lengthen the compulsory mid-day break from 30 to 45 minutes and to authorise another two 15-minute breaks each day. He announced his decision in communiqué 219 of 22 July 1992, which explained that the longer mid-day break should "go some way towards meeting the demand for a reduction in working hours" and would officially recognise "what is largely general practice within the Office". A note dated 23 July 1992 informed staff at The Hague that the time they were required to be present was still eight-and-a-half hours a day for those on a forty-hour week. In other words, the longer break did not require any longer presence on EPO premises.

2. The complainant, an employee who was affected by the changes, wrote to the President on 20 October 1992 to say that for him communiqué 219 meant "an extension of my daily presence in the Office from 8 1/2 hours to 8 3/4 hours". He accordingly asked the President to withdraw his decision or else treat his request as an internal appeal. In a reply dated 5 November the Head of the Personnel Department said that the note of 23 July made it plain that his presence at the office was still required for eight-and-a-half hours a day, that the Administration had met his request and that the matter need not go to the Appeals Committee unless he pressed it. In a letter of 24 November 1992 he sought further explanations and clarification. He got a summary reply dated 2 December from the Head of Personnel, who just passed his internal appeal of 20 October on to the Directorate for Staff Policy. The Directorate put it to the Appeals Committee on 8 December 1992. The Committee unanimously recommended rejecting his claims and the President did so by a decision of 22 February 1994, which he is impugning.

3. Some of the complainant's great many procedural and substantive objections to communiqué 219 concur with claims and pleas from other staff whose appeals also went to the Appeals Committee. As the EPO observes, the material issues of this complaint are determined by the thrust of the decision he was challenging in his internal appeal. What he was challenging at the outset was the lawfulness of communiqué 219 on the grounds that it increased the amount of time he had to spend at the office every day. The Tribunal is satisfied on the evidence, and holds in Judgment 1442, that the amount of time to be spent at the office was always eight-and-a-half hours a day and that the decisions taken in July 1992 did not alter that. Indeed that is just what the EPO said in its note of 23 July 1992, which the complainant thought irrelevant.

4. So his internal appeal of 20 October 1992 disclosed no cause of action, and neither did his objections to the decision which the Head of Personnel took on 5 November 1992 by reference to the note of 23 July 1992. Since the complainant may not put wider claims to the Tribunal than in the internal appeal, and since the impugned decision of 22 February 1994 merely rejected his appeal of 20 October 1992, he has no cause of action. His complaint is therefore irreceivable.

5. He accordingly fails in his claims, set out above under B and D, to damages under several heads, including the claims that he rests on flaws he mistakenly alleges in the appeal proceedings.

6. The Organisation asks the Tribunal to declare his complaint to be an obvious abuse of the right to appeal, though it does not make any formal counterclaim. The EPO is mistaken. All that the complainant did was exercise his right to appeal; communiqué 219 was, as Judgment 1442 observes, so vague as to prompt many internal appeals, and, however they fared, they were quite understandable.

7. The application to intervene, though receivable, must also fail.

DECISION:

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

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