**EIGHTY-SEVENTH SESSION**

# *In re* Kybritis

## Judgment 1846

The Administrative Tribunal,

Considering the complaint filed by Mr Nicholas Kybritis against the European Patent Organisation (EPO) on 28 May 1998 and corrected on 16 June, the EPO's reply of 1 September, the complainant's rejoinder of 5 November and the Organisation's surrejoinder of 3 December 1998;

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. The complainant, who is Greek and was born in 1965, joined the staff of the European Patent Office, the EPO's secretariat, in 1991 as a lawyer. At the material time he held grade A2. He took one year's unpaid leave from 15 August 1994 and resigned on 15 August 1995.

Under Article 81(1) of the Service Regulations the complainant, as a permanent employee, was entitled on leaving the EPO "to reimbursement of expenses actually incurred for the removal of household and personal effects". He accordingly sent in a claim for reimbursement of removal expenses. The Office approved the claim on 30 June 1994 as well as an estimate of 15,524 German marks submitted by a German removal firm, Cramer KG, for the cost of moving his belongings from Munich to Monte Carlo.

The final invoice came to 15,570 marks. A Monegasque company was involved in transporting the effects from the French border to Monte Carlo and during the move some of the complainant's possessions were damaged or lost. In a fax of 4 August 1994 Cramer assured him they would "take full responsibility" for any damage caused. The complainant estimated the damage at 6,314 marks. Cramer's insurers, however, set the damage at 4,000 marks, so when he paid the removal firm's invoice the complainant held back 2,314 marks to cover his loss. He says that he took Cramer's continued silence to be tacit acceptance of his action.

In a letter to the complainant of 22 August 1995 the head of the Remuneration Department agreed to refund him the sum of 13,256 marks. The Office would, he said, only reimburse him the shortfall of 2,314 marks when he had either paid the sum to the removal firm or when the firm had agreed that the part he withheld represented "compensation for damages or out-of-pocket expenses" he had incurred. But the complainant claimed the outstanding sum from the Office by a letter of 5 September 1995. An official from the Remuneration Department told him in a fax of 1 February 1996 that the Office had refunded to him the amount that was backed up by proof of payment and reiterated the EPO's stand on the conditions for the refund.

His claim went to the President of the Office and the Principal Director of Personnel replied on his behalf on 22 May 1996 saying that the Office could not reimburse the shortfall to him unless he paid Cramer beforehand or unless the firm agreed to waive payment. In a fax of 31 May to the Director the complainant indicated that the firm had previously "assumed joint liability together with the insurance company with regard to the coverage of [his] sustained damage" and indicated his intention to file an internal appeal if the Office did not reimburse him. By a letter of 3 June the Principal Director of Personnel told him that under a relevant German regulation only a counterclaim acceptable to the other party could be deducted. The Director continued that in his case the removal firm had neither agreed to offset the amount nor renounced their claim to it and the Office would only refund the balance to the complainant if the conditions for refund were met.

On 28 June 1996 the complainant lodged an appeal with the Appeals Committee against the decision to withhold the refund. In its report of 8 January 1998 the Committee recommended the rejection of his appeal. In a letter of 20 February 1998, received by the complainant on 5 March and which he impugns, the Director of Personnel Development informed him that the President had decided to reject his appeal.

B. The complainant alleges that in refusing him reimbursement of the contested sum the EPO acted in breach of general principles of law such as "legal certainty" and good faith.

He contends that there was a contradiction in the stance the EPO took and it did not keep promises made to him. It had agreed to decide in favour of the complainant if there was tacit agreement by the removal firm to offset the amount but later said that the firm's agreement was required. He was also told that if after three years the firm had not opted for legal redress then the EPO would consider that it had tacitly agreed to the offset. To date no legal proceedings have been initiated by the firm, so the conditions for reimbursement are now met.

By insisting that he first had to pay the removal firm in full, after all he had suffered at their hands, the EPO changed tack. It interpreted the rules on reimbursement too narrowly, failed to protect his interests and paid no heed to the spirit of the rules.

He seeks: (1) reimbursement of the outstanding amount of the invoice for his removal expenses in the sum of 2,314 marks with "default interest" - of 28.5 per cent per annum - "the annual average default rate according to Greek law" as from 1 August 1995 or 30 January 1996 at the latest; (2) an award of 5,000 marks in moral damages; (3) 5,000 marks in costs for his internal appeal; and (4) 5,000 marks in costs for his appeal to the Tribunal.

C. In its reply the EPO contends that the complaint is irreceivable: the internal appeal was out of time. The letter of 22 May 1996 from the President, considered by the Appeals Committee to be the challenged decision, merely confirmed the thrust of the letter of 1 February 1996, which was the "definitive" decision.

The complainant's three requests for sums of 5,000 marks are unfounded as he seeks redress on three counts for the same alleged damage resulting from the Organisation's refusal to pay him 2,314 marks.

The EPO notes that in his internal appeal, he claimed "default interest" at 22 per cent, whereas he claims 28.5 per cent in his complaint to the Tribunal.

On the merits the defendant contends that the complaint is unfounded. The complainant's allegations that the EPO went back on a promise to reimburse him are "irrelevant". From the outset the EPO told him that reimbursement of his removal costs was not possible unless he supplied either evidence of expense incurred or proof that the removal firm accepted that the payment he withheld represented "compensation for damages or out-of-pocket expenses" incurred by him.

The conditions for reimbursement were not met, not only because the removal firm did not give its agreement to the deduction, but also because, in a letter of 5 February 1997, it set a deadline and threatened legal action. So far the complainant had failed to provide evidence of the firm's agreement to the set-off amount.

It denies acting contrary to good faith or interpreting the rules narrowly. The provisions of Article 81(1) and (3) of the Service Regulations and Articles 45 and 46 of the Financial Regulations are clear. Article 81(1) provides for reimbursement of "expenses actually incurred".

D. In his rejoinder the complainant maintains his claims and notes that the Appeals Committee ruled that his appeal was lodged in time.

The removal firm's insurers carried out their damage assessment on 31 August 1994 without visiting the complainant or examining his evidence. The firm did not honour their undertaking to assume full liability for the damage they had caused. Their insurance company covered only part of the damage.

E. In its surrejoinder the EPO affirms that it did not deviate from its initial stand. It told the complainant all along under what conditions he would be reimbursed. The matter must be settled between Cramer, possibly its insurers, and the complainant; the EPO would have no competence to comment on any legal proceedings that may arise between the parties. The removal contract is subject to German law. At present the complainant is suffering no prejudice as by withholding payment he is reimbursing himself fully for the alleged damage, and cannot also claim reimbursement from the EPO. His request is therefore unfounded.

## CONSIDERATIONS

1. The complainant joined the European Patent Organisation as a lawyer in 1991. He was granted one year's unpaid

leave from 15 August 1994 and he resigned on 15 August 1995. He requested reimbursement of his removal costs from Munich to Monte Carlo under Article 81 of the Service Regulations. On 30 June 1994 the Organisation agreed to the estimate of 15,524 German marks from the removal firm, Cramer KG; the final invoice was for 15,570 marks.

2. After the removal, which began on 25 July 1994, the complainant notified Cramer that several items had been damaged while they were being transported by a Monegasque subcontractor. By fax dated 4 August 1994, Cramer agreed to take full responsibility for any damage caused. The transport insurers agreed to grant 4,000 marks in compensation, 2,314 marks less than the cost of damage estimated by the complainant (which he subsequently withheld). The amount of 4,000 marks was paid by the insurer to Cramer.

3. In August 1995 the Organisation reimbursed the complainant 13,256 marks. In a letter dated 22 August 1995, the amount is shown as being made up of direct and indirect payments as follows:

2,491 marks paid to the Monegasque transport company.

6,765 marks as part payment to Cramer KG.

4,000 marks for the insurance claim, paid by the insurer to Cramer KG.

The letter stated that the outstanding balance could only be refunded when it had been paid or when Cramer accepted that the amount represented compensation.

4. By a letter dated 5 September 1995 the complainant asked the Organisation to reimburse him 2,314 marks, being the outstanding balance from the sum of 15,570 marks. He said the lack of response from Cramer constituted tacit acceptance of his action.

5. After several phone calls and following a letter from the complainant dated 30 January 1996, the Office's Remuneration Department replied by fax on 1 February 1996 to say that he was only entitled to claim a refund for costs actually incurred. It stated that an additional refund would be possible only if he made further payments or if the removal firm agreed to a set-off and added "please enclose the relevant proof".

6. The Organisation received a copy of a letter from Cramer to the complainant dated 5 February 1996 asking him to repay the outstanding 2,314 marks by 29 February and threatening to take legal action in default of payment.

7. The complainant replied to the Remuneration Department on 5 February 1996. He said that if the Department's position remained unchanged after considering all the facts, he would request that the matter be brought before the President for a reasoned individual decision under Article 106. He asked to be informed about the form, procedure and time limits to be observed in filing a valid request for an individual decision. In a fax dated 6 February 1996 he put forward more arguments and stated his intention not to pay any money to the transport firm. He concluded by saying that he persisted in all his claims and asked for a reply after his request had been forwarded to the President.

8. By a letter dated 22 May 1996, the Principal Director of Personnel wrote to the complainant on behalf of the President. He said the complainant's request for reimbursement of the remaining sum of 2,314 marks could not be granted, and cited Article 81(1) of the Service Regulations. In August 1995, he continued, the Office had reimbursed the amount of the invoice from Cramer as fully as possible; the remaining sum would be reimbursed as soon as the complainant had paid Cramer or as soon as the firm agreed to set it off.

9. The complainant replied by a fax dated 31 May 1996 setting out further arguments. He asked whether the President's decision was final pursuant to Article 106. He said he intended to lodge an internal appeal against it and requested information about the relevant procedure.

10. The Principal Director of Personnel replied on 3 June 1996 enclosing an extract of the pertinent German regulation. He said the company had neither agreed to a set-off of the debt nor renounced its claim to the outstanding balance, but rather had insisted on receiving payment in full. The letter concluded by stating that the Office was willing to refund the balance only if the conditions for the refund were met.

11. On 28 June 1996 the complainant filed an internal appeal against the President's decision of 22 May 1996. The Appeals Committee in its report dated 8 January 1998 rejected the Administration's argument that the appeal was

out of time, but recommended unanimously that the appeal be rejected on the merits. In a letter dated 20 February 1998 the President rejected the appeal. That is the decision impugned.

12. The Organisation argues that the complaint is irreceivable because the complainant did not file his internal appeal in time. It claims the decision of 1 February 1996 was definitive. The letter of 22 May 1996 merely repeated the same decision. The Appeals Committee took the view that the letter of 1 February did not appear to contain a "decision" since it included the request: "please enclose the relevant proof".

13. The Tribunal believes that letter to be somewhat ambiguous. The complainant may therefore rely on the later letter of 22 May 1996 as containing the final decision which unequivocally refused his request.

14. Article 81(1) of the Service Regulations refers to removal expenses and provides that:

"A permanent employee shall be entitled to reimbursement of expenses actually incurred for the removal of household and personal effects ...

(c) on leaving the service ..."

15. The complainant argues that the Organisation's interpretation of Article 81(1) is "over legalistic". He claims that the letter dated 22 August 1997 stated that the outstanding balance would be refunded when it could be shown that the transport company accepted that the amount was in "compensation for damages or out-of-pocket expenses" he had incurred. He says that he was told that if the transport company did not take legal redress within three years, as was the case, this represented tacit acceptance. He appears to allege involvement on the part of the Organisation in Cramer's letter of 5 February 1996 which threatened legal proceedings. In his view, the fact that these threats were not put into action provides the Organisation with sufficient proof of tacit acceptance of his action. Moreover he states that the Organisation acted in bad faith.

16. The Organisation contends that the complainant has failed to furnish any evidence to prove he paid 2,314 marks or that the removal firm agreed to treat this balance as compensation. On the contrary, they threatened to initiate legal proceedings in the event of non-payment. It believes that the dispute concerning the outstanding sum must be settled between the complainant and the removal firm prior to any reimbursement by the Organisation. The firm did not unconditionally and irrevocably assume full liability as alleged by the complainant but merely stated that it assumed full responsibility for any damage caused.

17. The Tribunal is satisfied that the Organisation correctly applied Article 81(1), which provides only for the reimbursement of "expenses actually incurred". The complainant has neither proved that he has paid the outstanding sum of 2,314 marks to the removal firm, nor provided evidence of the firm's agreement to treat this amount as compensation.

18. There is no proof of bad faith on the part of the Organisation. Also the complainant has failed to produce any evidence in support of the alleged promise that the EPO would pay if legal proceedings were not initiated within a certain time by Cramer, which is contrary to what was stated in the correspondence.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll
Mark Fernando
James K. Hugessen

Catherine Comtet

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