

EIGHTY-SEVENTH SESSION

In re Créchet (Nos. 3 & 4)

Judgment 1879

The Administrative Tribunal,

Considering the third and fourth complaints filed by Mr Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 2 July 1998 and corrected on 3 August, the EPO's reply of 6 November 1998, the complainant's rejoinders of 16 January 1999 and the Organisation's surrejoinders of 26 March 1999;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written evidence 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 career of the complainant with the European Patent Office, secretariat of the EPO, is set out in Judgments 890, of 30 June 1988, and 1667, of 10 July 1997, which deal with his two previous complaints.

The complainant started work as a liaison officer between the European Patent Office and the Portuguese National Industrial Property Institute (INPI) in Lisbon on 1 May 1992.

The complainant's letter of appointment provided for two types of allowances: a daily subsistence allowance paid in entirety for the first two months of his mission and a special allowance paid on a monthly basis, to reimburse 80 per cent of his rent paid in Portugal should he choose to retain his lodgings in the Netherlands.

On 5 January 1995 the complainant wrote a letter to the Principal Director of Patent Information in which he complained, for the first time, of not being able to use his car where he was working: his insurance company in the Netherlands refused to insure it for more than sixty days after his departure from that country and Portuguese law only enabled him to insure it for a maximum of six months. On 18 April the head of Administration in Vienna replied that the complainant did not require a vehicle in the course of his duties and that insuring his car was a private matter. On 20 April, the complainant informed the Principal Director that he was unable to solve his problems alone. In various electronic mail communications sent between 27 April and 22 June, he was informed that the EPO was taking steps to try to find a solution with the Portuguese authorities.

In a letter of 31 August 1995 to the Principal Director, the complainant stated that his daily subsistence allowance was insufficient. The amounts he received did not cover certain expenses in Lisbon, such as car rental. In letters of 5 October, the Principal Director informed him that his mission would end on 31 December 1995, and stated that he had received all the daily subsistence allowance and special allowance payments he was owed: requests for further compensation to cover expenses were therefore unfounded.

On 20 December 1995, in appeal No. 146/95, the complainant appealed to the President of the Office requesting reimbursement of his car rental. On 28 February 1997, in a second appeal, No. 30/97, he appealed to a senior officer in the Patent Information department requesting payment of the daily subsistence allowance for the duration of his mission. The matter went before the Appeals Committee, which recommended to the President on 19 February 1998 that he reject the appeal as devoid of merit. In a letter of 25 March 1998, the complainant was informed that the President had decided to endorse this opinion.

On 2 July 1998, the complainant filed two complaints: one, his third complaint, was against the dismissal of his internal complaint No. 30/97; the other, his fourth complaint, was against the dismissal of internal appeal No. 146/95.

B. In his third complaint the complainant maintains that the Appeals Committee did not allow him to organise his defence properly and that he was not heard by the Committee.

He alleges that the texts covering the terms of his mission were not respected. A document of 18 August 1989, regarding policy on information on patents, stipulates that liaison officers are assigned to national offices, full time, and funded by the EPO, in conditions provided for under Article 7 of the European Patent Convention, the Protocol on Privileges and Immunities of the European Patent Organisation, and the Service Regulations. Even though the EPO paid him a special allowance he was badly treated: apart from his entire rent in the Netherlands, he had to pay 20 per cent of his rent in Portugal. He asserts that he was unfairly treated. Under Article 78 of the Service Regulations, the Organisation should have continued to pay him a daily subsistence allowance, even at a reduced rate, beyond the first two months of his mission to compensate him for his loss. He claims to have had the expenses of an official on mission without benefiting from the corresponding allowances.

He asks the Tribunal to set aside the decision of 25 March 1998 of the President, to order the Organisation to pay him the daily subsistence allowance provided for in Article 78 of the Regulations, after deduction of the amounts already paid, and to award him 1,000 German marks in costs.

In his fourth complaint, the complainant cites Article 20 of the Protocol, which reads: "The Organisation shall cooperate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice to ensure the observance of police regulations ...". He points out that he was unable to insure his vehicle and that the Organisation provided him with no support while, in his view, it was obliged to do so. On the contrary, it suggested he make false statements to the Portuguese authorities and terminated his mission to sanction him for the steps he had taken.

He maintains that had the Organisation respected the relevant texts, his position with the Portuguese authorities would have been correct and he could have solved his insurance problems alone. He is shocked by the defendant's inaction, since normal practice for companies with employees abroad involves completely settling all residence problems. The Organisation had, however, simply suggested that he take out travel insurance, although this type of insurance does not apply to lengthy residence of a professional nature. He asks the Tribunal to set aside the decision of the President communicated on 25 March 1998, to order the Organisation to pay him 1,500 German marks per month of mission for loss of use of his vehicle and for moral damages, and to award him 1,000 marks in costs.

C. In its reply the Organisation first of all applies for joinder of the complainant's third and fourth complaints on the grounds that they are based on the same issues of fact and have the same objectives.

Regarding the third complaint, the defendant asserts that the complainant was not heard before the Appeals Committee because he "refused" to provide enlightenment on his appeals.

It questions the complainant's view that he was working under mission conditions without receiving the related allowances. Its obligations in respect of the letter of appointment had been fulfilled: the daily subsistence allowance had been paid in full for the first two months, followed by a special allowance for the rest of the mission. Since the complainant had accepted these conditions, he could not claim to have been badly or unfairly treated. The Appeals Committee had decided that "maintenance of a (reduced) daily subsistence allowance, in accordance with the provisions of Article 78(3) of the Regulations, was not justified". The defendant states that the complainant had no right to expect the Organisation to finance his two rents in full, since it was his own choice to retain his accommodation in the Netherlands. It adds that throughout his stay in Lisbon his pay had been calculated according to the scales applicable in The Hague, which enabled him to make a profit of 1,500 Dutch guilders per month compared with scales applicable in Portugal.

Payment of an allowance for additional expenses was not possible, since the conditions for such a payment were not met.

Regarding the fourth complaint, the defendant contests having given the complainant no support: although his problems were a private matter - since he had no need of a car in carrying out his functions - it had contacted the INPI requesting it to take steps with the Portuguese authorities to conclude a complementary agreement as provided for under Article 25 of the Protocol.

The complainant was not being sanctioned by the termination of his mission: the Administrative Council's policy of information on patents established a maximum length of three years for such missions and moreover, in its letter of appointment, the Administration had retained the possibility of terminating the mission at any moment.

It stresses that he accepted the conditions of his assignment as set out in his letter of appointment and that he had had sufficient time to sort out his problems before leaving on mission. The normal practice for companies to which he referred was "irrelevant", since it concerned situations in law and in fact which were not comparable to the present case. It states that it never proposed that the complainant submit false statements and asserts that it suggested the travel insurance solution only for the last months of his mission.

D. In his rejoinders the complainant contests the joining of the two complaints, on the grounds that they concern two different points of law: the third complaint concerns Article 78 of the Regulations and the fourth, his legal situation as a liaison officer in Portugal.

In respect of his third complaint, he maintains that he has suffered financial loss, and that the contents of his letter of appointment had not been negotiated. Basing his argument on Tribunal case law, he pointed out that the special accommodation allowance was in addition to, and not in replacement of the subsistence allowance. Furthermore, he justified his decision to keep his accommodation in The Hague by the fact that the Organisation could terminate his mission at any moment. He also contested the assimilation of the daily subsistence allowance with the allowance for additional expenses: the latter being linked to the activity carried out, while the former are linked to the mission.

He explains that even if the Organisation had paid him too high a salary - which in his view is not proven - this does not make good the non-payment of subsistence allowance, since there was no text which stipulated that additional expenses should be paid from salary.

In respect of his fourth complaint, he asserts that he took no action before leaving because his letter of appointment failed to indicate what steps might be necessary.

He states finally that although the use of his vehicle was not necessary to the fulfilment of his professional activity, his freedom of movement was limited without one.

E. In its surrejoinders the defendant reiterates its request for joining of the two complaints.

It explains that the complainant "amalgamates" the various allowances and expenses and that he has never supplied proof of his unsuccessful efforts with respect to Portuguese insurance companies.

CONSIDERATIONS

1. The complainant, a European Patent Office employee, was appointed as liaison officer with the Portuguese National Industrial Property Institute (INPI) in Lisbon, where he was on mission from 1 May 1992 to 31 December 1995: see Judgment 1667 (*in re* Créchet No. 2).

The aim of creating a post of liaison officer was outlined in a paper, No. CA/47/89, on the policy of information on patents, accepted by the Administrative Council and also in the appeal for applications for the post of liaison officer in Portugal.

The details of the mission were stipulated in a letter of appointment of 5 March 1992, and the complainant accepted the conditions set out therein. This letter fixed the length of the mission and also allowances granted by the EPO. It carried the following clauses:

"2. *Employment conditions:*

...

(c) The daily subsistence allowance provided for in Article 78, paragraph 3, shall be paid you in full for the first two months of your mission

...

(d) An allowance equal to the installation allowance as defined by Article 73, will be paid you in full at the end of your mission ...

(e) You will receive a special allowance each month for the duration of your mission if you keep your accommodation in The Hague for your own use. This allowance is fixed at 80 per cent of the actual rent paid at the place of employment, as defined by Article 74(6) of the Regulations, and shall not exceed 2,000 German marks per month.

...

(i) All additional expenses incurred in the course of your duties must be authorised by your supervisor. Reimbursement will be made on submission of receipts."

It should be noted that the letter of appointment did not provide for the use of a vehicle by the complainant in the fulfilment of his duties.

2. On 5 January 1995, the complainant wrote as follows to his supervisor:

"I have been without my car since the beginning of my mission three years ago, as its use is made impossible on the one hand because of a six-month time limit imposed by the Portuguese authorities, and on the other hand because the [Dutch] insurance company only provides sixty days cover abroad."

He asked whether there might be a "special administrative solution" available to international civil servants on mission, or if not, whether it would be possible to extend the accommodation allowance to cover the cost of long-term rental, or find some other solution.

Lengthy correspondence followed. The EPO asserted that it was a private matter; the staff member was responsible for registering his vehicle in Portugal and getting insurance to cover his civil liability. There was no question of the EPO paying an additional allowance. The President of the Office subsequently approached the Portuguese authorities to obtain better future protection for his staff members in this connection.

The complainant took the EPO to task for failing to support him as it was obliged to do.

On 20 December 1995, he asked the President for an award of damages corresponding to the rent paid for a car, 1,500 German marks a month for forty months, giving a total of 60,000 marks.

3. On 28 February 1997, he asked to be paid, for his entire period of residence in Portugal, a daily subsistence allowance under Article 78 of the Staff Regulations, less sums already paid. He justified his claim on the grounds that "[his] situation in Portugal had not been settled as initially established".

4. The President decided he could not concede to these claims, and transmitted them to the Appeals Committee.

The Committee joined the two appeals, and on 19 February 1998 unanimously recommended dismissing them.

By a letter of 25 March 1998, the complainant was informed that the President had decided to disallow the appeals, in line with the opinion of the Appeals Committee.

In two separate complaints to the Tribunal the complainant requested each decision to be set aside.

The Organisation asks for joinder of the two complaints and for the Tribunal to disallow them. The complainant contests such joinder.

On the joinder

5. The two complaints concern the situation of the same staff member and are based on the same facts, resulting from the legal consequences of the complainant's mission to Lisbon, and a violation, in the complainant's view, of the contract relevant to that mission, although in one case the complainant claims damages, and in the other he claims the implementation of a statutory obligation, for failure to apply the terms of a contract. Since the two cases are related it is reasonable to maintain the joinder decided by the Appeals Committee.

On the claim for damages

6. The complainant criticises the EPO in particular for not having concluded a complementary agreement with Portugal under the terms of Article 25 of the Protocol on the Privileges and Immunities. In his view the Organisation was thus in breach of its duty to protect and assist one of its staff members.

However, the agreement on the complainant's mission neither provided for his needing the use of a car, nor that the EPO should cover the cost of a private vehicle for him. That being the case, in the absence of a complementary agreement with the receiving country, the EPO staff member residing in that country could choose to register a vehicle himself in that country, in accordance with its legislation; he was not, therefore, deprived of the use of a

vehicle for his own purposes, and his plea that the EPO did not give him sufficient assistance in solving a possible insurance problem must fail.

True, he did not have the advantages which certain international civil servants enjoy; that he should regret this is understandable. But the EPO could not be considered at fault, since his work did not require use of a personal vehicle, and no such advantage had been granted him. Besides, the post of liaison officer to Portugal was a very recent creation and, once alerted to the problem, the President contacted the Portuguese authorities with a view to coming to a possible complementary agreement under the terms of Article 25 of the Protocol on Privileges and Immunities.

In the absence of a breach of contract governing the relations between the parties by the EPO, the claim for damages fails.

On the claim for daily

subsistence allowance

7. Article 78(3) of the Service Regulations provides that:

"In the case of a mission lasting more than two months, special provisions may be adopted by the President of the Office either at the commencement of or during the mission with the regard to the rate of daily subsistence allowance to be paid from the commencement of the third month."

The complainant puts forward various arguments to prove violation of this provision.

(a) He maintains that the letter of appointment was in breach of Article 78(3).

Payment of daily subsistence allowance during the first two months under Article 78 of the Service Regulations was stipulated in the letter. Point 2(e) of the letter of appointment provided for an allowance equal to 80 per cent of the complainant's rent in Lisbon, should he decide to retain his accommodation in The Hague, as was the case.

The gist of the complainant's argument is that that clause is not in conformity with Article 78(3), since the allowance it mentions is different in nature from the allowance termed "daily subsistence allowance" in Article 78(3), and that it does not determine the "rate of daily subsistence allowance". That argument cannot be sustained. Regarding the terminology employed, it is quite understandable that the expression "daily" subsistence allowance should not be used when speaking of a long-term mission and long-term allowances; as to the nature of the allowance, its purpose was also to contribute to the additional costs to be covered by the staff member in fulfilment of his mission. Given these conditions, the President did not exceed his discretionary authority in considering this allowance to be in accordance with Article 78 of the Regulations.

(b) The complainant also claims that the letter of appointment violates Article 78(3) of the Regulations, since the EPO allowance did not cover the whole of his additional expenses, especially additional accommodation expenses, which were only covered to 80 per cent. This violated the basic principle of Article 78 of the Regulations, as well as the right to equal treatment of staff members. The daily subsistence allowance should thus have been paid for the duration of his mission to Portugal.

The EPO challenges this argument. It holds that the provision left the President a wide degree of discretion, and he took into consideration the fact that living costs are lower in Lisbon than in The Hague, which enabled the complainant to make considerable savings. Moreover, the conditions set out in the letter of appointment were accepted by the complainant.

The complainant supports his argument by referring to Judgment 363 (*in re Ghaffar No. 2*). That Judgment cannot be cited as a relevant precedent since the provisions applicable and the facts therein were quite different from the present case.

The conformity of the letter of application with the Service Regulations can only be judged by returning to the moment at which the parties agreed on the terms of the mission.

Article 78(3) of the Regulations allows the President a wide measure of discretion in the fixing of the daily

subsistence allowance - or its equivalent - for the period following the first two months of the mission, in particular regarding assessment of expenses and advantages arising from the mission. Firm precedent has it that the Tribunal will not substitute its opinion for that of the executive chief of an organisation, unless exceptional circumstances so warrant, which is not the case here.

(c) The complainant also asserts violation of Article 78 of the Regulations, on the basis of expenses he had and the inadequate level of compensation which became evident during the mission.

However, the complainant produces no new, unforeseen circumstances which would have required revision of the contract (*clausula rebus sic stantibus*). The level of compensation as compared with the cost of accommodation already figured in the contract. A car was not indispensable, and the cost of a possible vehicle registration fee in Portugal was foreseeable. The post of liaison officer in Portugal was a new creation, and certain logistic problems still to be solved could be anticipated.

It should be noted that although the mission involved new expenses, the complainant's letter of appointment would have enabled him to arrange their prior approval. The complainant has not appealed to the Tribunal on the ground that a request in this respect had been refused.

This being the case, if the contract governing the mission was not in breach of Article 78(3), then neither was the way it was applied.

(d) The complainant's plea of unequal treatment fails, since he provides no evidence in this connection. As in Lisbon his conditions of remuneration were established by agreement, his situation may not be compared with that of staff members governed exclusively by the Regulations or by other agreements; he cites no definite cases comparable to his own in fact and in law.

The claim for daily subsistence allowance fails.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 14 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet