

EIGHTY-NINTH SESSION

In re Martinuzzi

Judgment No. 1962

The Administrative Tribunal,

Considering the complaint filed by Mr Livio Martinuzzi against the European Patent Organisation (EPO) on 26 February 1999 and corrected on 12 April, the EPO's reply of 27 July, the complainant's rejoinder of 2 September, and the Organisation's surrejoinder of 23 September 1999;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Facts relevant to this case are set out under A in Judgment 1864, *in re Andrews and others*. The complainant, an Italian national born in 1948, is a permanent employee of the EPO. Like the complainants in Judgment 1864, he resided in the country of his duty station for more than three years before commencing employment with the EPO.

The complainant filed an internal appeal on 26 October 1998 requesting payment of the expatriation allowance under Article 72 of the Service Regulations for Permanent Employees. On 1 December the appeal was rejected on the same grounds as the internal appeals which led to Judgment 1864. That is the impugned decision.

B. The complainant alleges that by withholding the expatriation allowance the EPO discriminated against him. It arbitrarily created two categories of expatriate staff for no objective reason, since Article 72(1) b) is not a valid criterion for granting or withholding the allowance. It was thus in breach of the principle of equal treatment, a principle recognised in the Tribunal's case law and a number of international texts including the Universal Declaration of Human Rights.

He contends that the system established in Article 72 is inconsistent and open to abuse: for example, someone who was granted the allowance on recruitment may keep it even after the "disqualifying period" has been completed. The rule is therefore "superficial and arbitrary".

The complainant asks the Tribunal to quash the decision of 1 December 1998 and to order the EPO to pay him the allowance retroactively to his date of appointment or, failing that, to 1 July 1990 or to 23 September 1992 or to the date of his complaint.

C. In its reply the Organisation argues that the present complaint and pleas submitted by the complainant's counsel are "verbatim repetitions" of the complaints and rejoinder submitted in the cases which led to Judgment 1864. Following the Tribunal's decision in that judgment, to dismiss the complaints, the EPO invited the complainant to withdraw his complaint; he chose not to do so. The defendant asks the Tribunal to find that the present complaint is an "abuse of procedure" and order the complainant to pay the costs incurred.

Subsidiarily, considering that the complainant has not made any specific additions to the brief submitted in the above-mentioned complaints before filing it as his own, the EPO asks the Tribunal to refer to the statement of facts and the arguments it put forth in Judgment 1864; it argues that the complaint is irreceivable in part and unfounded.

D. In his rejoinder the complainant withdraws the complaint as to its merits. However, he argues that the counterclaim for costs is defective as the Organisation has neither specified an amount nor provided the Tribunal with facts and arguments relevant to this claim. He denies that "he (or his attorney) were responsible of any

negligence or contempt of court" and contends that because the EPO made a counterclaim he had to continue his complaint to preserve his rights. By setting a deadline for him to withdraw his complaint so that it would not have to file a reply with the Tribunal, the Organisation has shown concern only for saving costs without regard for the staff member's right to legal redress. He asks the Tribunal to reject the Organisation's counterclaim and instead award him 2,000 German marks in "punitive costs" or "moral damages" and 1,000 marks in costs.

E. In its surrejoinder the EPO notes the withdrawal of the complaint as to the merits. However, the filing of a rejoinder, which requires the Organisation's surrejoinder, is proof that it is the complainant who is merely trying to increase the workload of the Organisation and the Tribunal. It says that its position in this particular complaint does not contest the right of staff, in general, to lodge complaints with the Tribunal to defend legitimate interests. The Organisation presses its counterclaim.

CONSIDERATIONS

1. The complainant, an employee of the European Patent Office, the secretariat of the EPO, is of Italian nationality and serves in Munich. On 26 February 1999, he filed a complaint requesting the Tribunal to set aside a decision by the President of the Office refusing him the expatriation allowance provided for under Article 72(1) of the Service Regulations. The complaint was based on identical arguments to those made by forty-one employees of the Office, whose claims were dismissed in Judgment 1864 (*in re Andrews and others*), delivered on 8 July 1999. The Principal Director of Legal Services advised the complainant on 14 July 1999 of the existence of Judgment 1864 and indicated to him that:

"it would appear appropriate to us, both in your interests and those of the EPO, for you to envisage - freely - the possibility of withdrawing your complaint."

2. Having received no reply to this letter within the period indicated therein - namely, before 21 July 1999 - the EPO stated in a brief to the Tribunal dated 27 July that the complainant had shown disregard for his employer, firstly by filing his complaint later than his colleagues, which prevented its joinder with theirs, and subsequently by maintaining a challenge which clearly could not succeed. Therefore, the EPO makes a counterclaim, requesting the Tribunal to find that the complaint is an abuse of process and to order the complainant to bear the costs.

3. In his rejoinder the complainant decides not to pursue further his complaint as to its merits, but he does not withdraw suit. Indeed, he requests the Tribunal not only to dismiss the EPO's counterclaims, but also to order the defendant to pay him 2,000 German marks in damages and 1,000 marks in costs.

4. The Tribunal will rule, firstly, on the issue of whether the complainant's failure to withdraw suit constitutes an abuse of process for which he could be ordered to pay the costs incurred in whole or in part. In accordance with Judgment 1884 (*in re Vollering No. 15*), the Tribunal asserts unequivocally that it has the inherent power to impose costs on a complainant because:

"frivolous, vexatious and repeated complaints to the Tribunal absorb the latter's resources and impede its ability to deal expeditiously and fully with the many meritorious complaints which come before it. They are also, of course, costly and time-wasting for the defendant organisation."

However, the Tribunal considered it important to point out that such power must be exercised only in exceptional cases, since "it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of costs".

5. In the present case, it is clear that a full withdrawal of suit would have been desirable once Judgment 1864 had upheld the rules on expatriation allowance for EPO employees. However, neither the fact that the complainant filed his complaint later than his colleagues, nor his failure to reply to the invitation made by the Legal Services to withdraw suit in the week following 14 July 1999, can be considered as constituting abuse. The Tribunal finds that in the circumstances, this is not one of the exceptional cases in which it could penalise the filing or maintenance of a complaint as being abusive. It therefore dismisses the EPO's counterclaims.

6. The new claims made by the complainant in his rejoinder must also fail. He cannot allege any prejudice arising from the completion of a process which he had himself initiated, nor can he claim the payment by the EPO of the costs incurred, since his main claims had no chance of being entertained and were, moreover, withdrawn.

DECISION

For the above reasons,

1. The withdrawal of the claim to set aside the decision by the President of the Office, dated 1 December 1998, and of the claims for damages made in the complaint of 26 February 1999 is recorded.
2. The EPO's counterclaims are dismissed.
3. The claims made in the rejoinder of 2 September 1999 are dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet