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

NINETIETH SESSION

***In re* Bousquet (Nos. 5, 6 and 7)** **Judgment No. 2039**

The Administrative Tribunal,

Considering the fifth, sixth and seventh complaints filed by Mr Karl Bousquet against the European Patent Organisation (EPO) on 13 December 1999, the EPO's single reply of 3 March 2000, the complainant's rejoinder of 13 June and the Organisation's surrejoinder of 4 September 2000;

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 is of French nationality and was born in 1952. At the material time he was a representative of the staff of the European Patent Office - the secretariat of the EPO - and a member of the Staff Union of the European Patent Office (SUEPO).

For the purpose of rapid and easy communication between EPO sites, the Staff Committee, which is composed of a Central Committee and local sections at the different places of employment, was allowed access to "Office Vision", the EPO's internal electronic mail system (hereinafter, the "OV system"). In a letter of 8 December 1997 to the Chairman of the Central Staff Committee, the Vice-President in charge of Directorate-General 4 (DG4) mentioned that staff representatives had started to use the OV system to send staff texts issued by the Staff Union. He considered that the facilities provided for official staff representation were thus being misused, and that a distinction should be made between official staff representation on the one hand, and the activities of the Staff Union on the other. He therefore asked the Chairman of the Central Staff Committee to take the necessary steps to rectify the situation. In a letter of 18 December 1997, the Vice-President in charge of DG4 informed the Chairman of the Central Staff Committee that the mass distribution of information by staff representatives through the OV system was disrupting the smooth operation of the technical infrastructure. It had to cease forthwith or permission to use the system would be withdrawn. He specified that sending documents simultaneously through the system to more than fifty people was not allowed. On 24 March 1998 the Vice-President again wrote to the Chairman of the Central Staff Committee to inform him that since the misuse of the OV system had not stopped, he had taken the necessary steps to disconnect the Staff Committee from the system as from 30 March 1998. The President of the Office so informed staff in Communiqué No. 26 of 27 May 1998.

In letters of 19 June 1998, along with other staff members, the complainant appealed to the President against the decision to disconnect the Staff Committee. He appealed in several capacities: as a staff member, as a member of the Staff Committee and as a member of the Staff Union. He invited the President to order the reconnection of the Staff Committee to the OV system and to award him compensation for the injury suffered. In the *Gazette* of 27 July 1998, the Director of Personnel Development announced that the President had not given a favourable response to the internal appeals and that they had been referred to the Appeals Committee. At the date on which the present complaints were filed, the Administration had still not submitted its position to the Appeals Committee on those internal appeals.

In Communiqué No. 47 of 13 August 1999, the President of the Office brought to the attention of all staff the "Guidelines for using e-mail systems and the Internet". Article 4 of the Guidelines provides that "the distribution of e-mail ... to more than 50 people is not allowed without prior ... authorisation". In a letter of 29 October 1999, the

Vice-President in charge of DG4 informed the Chairman of the Central Staff Committee that the Guidelines had been approved by the members of the General Advisory Committee appointed by the staff representatives, and that he considered their approval as a "promise" that staff representatives would in future comply with the Guidelines. He indicated that he would see to it that staff representatives were again authorised to use the OV system. At the date on which the present complaints were filed, the Staff Committee had not yet been reconnected.

B. The complainant contends that his three complaints, which he filed respectively as a permanent employee (the fifth complaint), a member of the Staff Committee (his sixth complaint) and a member of the Staff Union (his seventh complaint), meet the requirements of receivability as defined by the Tribunal. He submits that the Tribunal has recognised that a complainant need not exhaust the internal remedies where "the appeal proceedings appear unlikely to end within a reasonable time", as is the case here.

On the merits, the complainant argues that the Tribunal's case law, particularly Judgment 911 (*in re* de Padirac No. 2), recognises the principle of freedom of association and its corollaries (freedom of communication, the right to certain facilities, etc ...) and the interest of an international organisation in having competent and efficient staff representation. He contends that the Administration denied staff representatives access to an important communication facility to "punish" them for using it in a manner of which it disapproves. He deems that the reasons given are inadmissible because they are in fact based on political and not technical considerations as was recognised by the Administration's representatives at the 133rd Session of the General Advisory Committee. The complainant adds that the distinction between the SUEPO and the official representation of the staff through the Staff Committee, established under Articles 33 to 36 of the Service Regulations, is "largely artificial", since most of the members of the Staff Committee are also members of the Staff Union. He submits that the latter are entitled to use the OV system by virtue of the right of association recognised in Article 30 of the Service Regulations and points out that another association in the EPO, namely the "Amicale", has access to the system.

In each of his complaints, he asks the Tribunal to set aside the decision to disconnect the Central Staff Committee and its local sections from the OV system, as notified on 27 May 1998, and to award him costs. In moral damages he claims: in his fifth complaint - a lump sum of 1,000 German marks, plus 500 marks for each month since the above decision and until the connection is restored; and in his sixth and seventh complaints - a lump sum of 5,000 marks, plus 1,000 marks for each month since the decision and until the connection is restored.

C. In its reply the EPO first requests the joinder of the complaints on the grounds that all three raise the same points of fact and of law and much the same claims.

In preliminary remarks it affirms that, not having obtained any undertaking from the Staff Committee that it would use the OV system properly in future and in view of the new "abuses" committed by the Committee, the Vice-President in charge of DG4 was obliged on 30 November 1999 to withdraw his offer to restore the Committee's connection to the system.

The EPO also contends that the complaints are irreceivable as the complainant is not challenging a final decision. If it did not expedite the processing of the internal appeals, it was because it hoped to reach a negotiated settlement.

In subsidiary argument the EPO explains that the reference to the case law, and particularly to Judgment 911, is immaterial. The issue in the present case is how an organisation should react when a facility is "misused" for the benefit of a staff union, which, unlike the Staff Committee, is not a statutory body. That being so, the EPO is under no obligation to it. It considers that freedom of association was fully respected and that the Staff Committee bears the entire responsibility for the disconnection. Citing the case law, the EPO points out that staff representatives may not abuse rights granted to them, and infers that it is entitled to take measures to prevent any use of the OV system which is contrary to its "legitimate interests", which in this case means having an "efficient" electronic mail system that is "not disrupted by the mass distribution of information from the Staff Union".

The EPO adds that, according to the computer experts, the Staff Committee was restricted to sending messages to only fifty recipients for purely technical reasons: the OV system is a working tool and not a means of mass communication. Moreover, the complainant has misconstrued the adjective "political" as used by the representatives of the Administration, who intended it to mean "advisable". Citing a ruling of 18 January 1990 by the Court of Justice of the European Communities, the EPO points out that, although the Court confirmed the right of employees to join unions, it found that this did not involve an obligation for the organisation to place facilities at the disposal of unions where the staff rules do not so provide, as is the case here. The EPO also explains that no

inequality of treatment can be alleged between the Staff Union and the "Amicale" as the latter is a statutory social body established in the interests of the staff by the Office and as such receives subsidies from it. Lastly, the EPO denies that the complainant suffered injury: the messenger service for printed documents is still at the disposal of the Staff Committee and the Staff Union.

D. In his rejoinder the complainant does not oppose the EPO's request for joinder. He points out that by the date on which he lodged his rejoinder, the Administration had still not submitted its position to the Appeals Committee. He contends that, by failing to do so, it deliberately chose to delay the procedure, so he could properly bring his case directly to the Tribunal.

He submits that the Administration placed two conditions on the reconnection of the Staff Committee, namely a restriction on the number of recipients of messages (fifty) and an end to the practice of sending the Union's notes by the OV system. Those conditions were unacceptable since they were a "barely disguised intent to exercise censorship". Moreover, the EPO has overstated the technical difficulties, which are no more serious than the normal risks inherent in any computer system comparable to the OV system. Besides, it would not be inconceivable for the OV system to be both a working tool and a means of mass communication. He points out that the distribution of printed documents is subject to the approval of the EPO.

E. In its surrejoinder the EPO denies that because they ban the use of internal e-mail systems for the purposes of mass communication the Guidelines amount to an instrument of censorship. According to the case law, censorship occurs when the administration of an organisation endeavours to influence the content of communications between the staff association and the staff but nothing of that nature occurred in the present case. The EPO also explains that the use of the Office's computer system both as a working tool and a means of mass communication gives rise to real disruption. Finally, it requests that certain documents produced by the complainant in his rejoinder not be taken into consideration.

CONSIDERATIONS

1. The only difference between the present complaints is the capacity in which the complainant has filed them, namely as a staff member of the European Patent Office, a member of the Staff Committee and a member of the Staff Union. They are based on the same facts, raise similar issues of law and seek the same redress. They are therefore joined to form the subject of a single ruling.

The EPO requests that certain documents not be taken into consideration. As they do not affect the outcome of the case, it is not necessary to rule on this point.

2. The complaints have arisen from a dispute concerning, on the one hand, the facilities granted to the members of the Staff Committee (Central Committee and local sections), in their capacity as such, to use Office Vision, the EPO's internal electronic mail system (hereinafter the "OV system") and, on the other hand, the scope of those facilities, or more precisely, the number of recipients of e-mail messages, the authors (whether in their capacity as staff representatives, or as representatives of the Staff Union, of which they are members), and the content and length of such messages.

Several staff members filed individual internal appeals against the decision to disconnect the Staff Committee from the OV system as from 30 March 1998. On 19 June 1998 the complainant filed three separate internal appeals on much the same grounds, one in his capacity as a staff member, another as a member of the Staff Committee and a third as a member of the Staff Union. Considering all the internal appeals to be unfounded, the President of the Office referred them to the Appeals Committee. On 27 July 1998 he informed the staff that he had decided to "take one appeal as a standard case" and that the final decision would be applicable to all the appellants.

When these complaints were filed with the Tribunal on 13 December 1999, the Administration had still not submitted its position to the Appeals Committee.

3. As its principal plea, the EPO submits that the internal remedies have not been exhausted within the meaning of Article VII(1) of the Statute of the Tribunal, and that the complaints are therefore irreceivable.

The complainant responds that as no decision on the internal appeals had been made within a reasonable time, he

was entitled to go straight to the Tribunal in accordance with the case law.

4. Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainants' rights. Complainants may therefore go straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable time, depending on the circumstances (see Judgments 1829, *in re* Müller-Engelmann, 1968, *in re* Concannon, and the numerous judgments cited therein).

However, a complainant can make use of this possibility only where he has done his utmost, to no avail, to accelerate the internal procedure and where the circumstances show that the appeal body was not able to reach a decision within a reasonable time (see, for example, Judgments 1674, *in re* Gosselin under 6(b), and 1970, *in re* White). In general, a request for information on the status of the proceedings or the date on which a decision may be expected is enough to demonstrate that the appellant wants the procedure to follow its normal course, and gives grounds for alleging unjustified delay if the authority has not acted with the necessary diligence. However, there are circumstances in which it is unclear whether the procedure has been abandoned or whether the staff member has implicitly consented to the suspension of his appeal in law or in fact. In such cases, the case law says that the staff member must indicate clearly if he wants the procedure to continue. For example, the Tribunal found in one case that a staff member had not met this requirement because an internal appeal he had filed was not referred to the internal appeals body of the organisation, the Administration having taken steps to reach an agreed settlement to the dispute. As the staff member had not sought the continuation or renewal of the procedure, it was found that he had not pursued his appeal "diligently" and so did not qualify to file a complaint directly with the Tribunal (see Judgment 1970). Similarly, in a case in which the internal appeal had been followed by negotiations in order to reach a settlement, it was found that the staff member was not justified in turning to the Tribunal without first indicating either that the procedure should follow its course in parallel with the negotiations or that it should be taken up again without further ado, and then waiting a reasonable time to see what happened (see Judgment 1674 under 6(b)).

5. The issue here is whether staff representatives may use the OV system in that capacity although they are connected to the system as staff members. The internal appeals were filed in June 1998, and then referred to the Appeals Committee, but the Administration did not submit its position. Nevertheless, it had prepared a draft text entitled "Guidelines for using e-mail systems and the Internet", which was submitted to the General Advisory Committee (GAC), composed jointly of members appointed by the Administration and by the staff representatives, at its meetings on 31 May and 9 July 1999. The Committee was unanimously in favour of the Guidelines, which means that they had the support of the members appointed by the staff representatives. The adopted text was then communicated by the President of the Office to all the staff on 13 August 1999.

The EPO therefore considered it had valid grounds for hoping that the favourable opinion given by the members of the GAC appointed by the staff representatives was an indication that all the staff supported the text, thereby leaving the internal appeals devoid of purpose.

Another staff member, Mr C., asked the Chairman of the Appeals Committee on 31 March 1999 when it would be likely to make a recommendation. On 20 April he was informed that the Administration's response would not be submitted before the end of the year. On 7 October Mr C. repeated his enquiry, and was told that the Committee had still not received the Administration's brief.

On 29 October 1999 the Vice-President in charge of DG4 wrote to the Chairman of the Central Staff Committee. He recalled that the Staff Committee had been disconnected from the OV system pursuant to the letter of 24 March 1998 and stated that:

"In the meantime, the Guidelines for using e-mail systems and the Internet - following a totally unanimous opinion from the GAC - have come into force.

The fact that the members of the GAC appointed by the staff representatives approved the Guidelines is considered by me as a promise that the staff representatives will in future comply with the new Guidelines.

I will therefore take the necessary steps for the staff representatives to be given access once again to the internal electronic mail system."

However, he added that, in the event of any further misuse, the connection would once again be withdrawn.

Nothing in the evidence shows that either after receiving this letter or prior to filing the present complaints, all or some of the authors of the internal appeals, took steps to advise the Administration that they were not satisfied with the Guidelines and intended to maintain their appeals.

6.(a) The EPO has not agreed to waive the requirement that the internal remedies must be exhausted.

(b) The position is therefore the same as that in precedents which have required complainants, before going directly to the Tribunal, to inform the internal authorities of their continued interest and to ask for the internal procedure to be set in motion again.

After the internal appeals were filed, the Administration took steps for the adoption of guidelines on the use of internal electronic mail systems. While they were being produced, staff representatives would have had the opportunity to give their opinion and make proposals, which could be seen as an attempt to settle the dispute. It is therefore understandable that the Administration did not consider it urgent to submit its brief to the Appeals Committee. Those who had filed the appeals could undoubtedly have objected and expressly requested the continuation of the internal procedure in parallel with the production of the guidelines. But they did not, so they can hardly criticise the Administration, or for that matter the Appeals Committee, for not pressing on with the internal procedure during that period.

After the adoption of the Guidelines, the staff representatives realised that the Administration had endeavoured to develop new rules for the use of the internal electronic mail system and that the GAC had delivered a unanimously favourable opinion on the draft guidelines. Moreover, it was planned to restore the connection to the OV system of the members of the Staff Committee in their capacity as such. They also knew from the letter of 29 October 1999 that the Administration hoped that they would in future comply with the new Guidelines. Indeed, the acceptance of the Guidelines probably involved relinquishing the claims made in the internal appeals, so the latter could be deemed to have been abandoned. There were accordingly grounds for doubting that the appeals were being maintained. Moreover, since the Administration had hopes that the dispute was as good as settled, it is difficult to take it to task for not having submitted its reply at that time.

True to say, in November 1999, after the letter of 29 October 1999, some staff representatives, logging on in their capacity as staff members, again used the internal electronic mail system to send union communications in breach of both the new Guidelines and the earlier rules. There is no need to rule on whether this should be taken as implying that the staff representatives intended to maintain their appeals and reactivate the proceedings. Even if that were the case, the EPO would have had to be given time to process the appeals. And on 13 December 1999, when he filed his complaints with the Tribunal, the complainant could have had no grounds for thinking that the EPO was unable to process his appeals within a reasonable time.

After the GAC delivered a unanimous favourable opinion, it was at best uncertain as to whether the complainant intended to maintain his internal appeals, so he had to take further steps before appealing directly to the Tribunal.

The conclusion is that the internal remedies were not exhausted and the complaints are therefore irreceivable.

(c) Nor are the circumstances such that, in order to make the proceedings simpler the Tribunal would be justified in examining the merits of the complaints despite the failure to exhaust the internal remedies.

Besides, quite apart from any procedural issues that might arise, it is far from certain that the Tribunal is currently in possession of all the elements it would need to rule on the substantive issue of the dispute, namely how to adapt the facilities provided for union activities to modern communication technologies (internal electronic mail, Internet) without disrupting the work of the Organisation. Such issues would be better addressed through dialogue between the parties.

7. There is accordingly no need to consider the other issues raised by the parties.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 9 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.