NINETY-FIRST SESSION

***In re* Concannon (No. 2), Samwel and Sundqvist** **Judgment No. 2073**

The Administrative Tribunal,

Considering the second complaint filed by Mr Brian Stephen Concannon, the complaints filed by Mr Peter Nicolaas Samwel and Mr Stefan Vilhelm Sundqvist against the European Patent Organisation (EPO) on 20 September 2000, the EPO's replies of 15 December 2000, the complainants' rejoinders of 7 February 2001, and the Organisation's surrejoinders of 6 April 2001;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainants are patent examiners at grade A3 in Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat.

On 18 March 1997 all examiners of DG2 were informed that two new screens, defined as "BP2 and BP3", displaying new data were to be introduced into the "Patent Office Examination Management" system (known as POEM), which provides information on production. The screens displayed data as calculated by a new production measurement system of examiners' output and were to be used to improve the method of calculating production at the Directorate-General, Principal Directorate and examiner levels.

In an opinion issued on 26 May the Data Protection Officer stated that the fact that the implementing rules for using POEM data to monitor individual performance had not yet entered into force, raised the question of whether there was an infringement of Article 21(3) of the Guidelines for the Protection of Personal Data in the European Patent Office (hereinafter "Data Protection Guidelines"), which took effect in 1992. He conceded, however, that the new screens - BP2 and BP3 - need not be necessarily viewed as a major change within the meaning of Article 21(3), because the basic data remained the same and only the calculation method had been modified. He said, however, that it "would have been closer to the spirit of Article 21(3)" if the General Advisory Committee had had the opportunity to discuss the matter beforehand.

Article 21(3) of the Data Protection Guidelines states:

"Until the appropriate implementing rules ... enter into force the existing Office procedures permitting automated individual performance checks may continue to be applied but their content may not be expanded nor may their use insofar as personal data are concerned be extended."

On 19 June 1997 each of the complainants lodged an appeal challenging the introduction of the screens - BP2 and BP3 - on the basis that they represented an expansion of the content of personal data permitting automated individual performance checks; consequently, their use violated Article 21(3) of the Data Protection Guidelines.

In a note of 1 July 1997 the Office's Data Protection Officer informed the Vice-President of DG2 that he had undertaken a review of the new screens and concluded that they did not constitute a "substantive extension of the existing automated performance monitoring procedures" and that there was therefore no violation of Article 21(3). On 31 July 1997 the President of the Office sent a copy of this note to the complainants stating that he was referring the internal appeals to the Appeals Committee for an opinion.

The "Implementing rules for the use of personal data stored in the POEM system for the checking of individual performance" entered into force with effect from 15 September 1998. The procedure for adopting and implementing

the rules is not contested.

In its opinion of 6 December 1999 the Appeals Committee, having regard for the alleged breaches of the Data Protection Guidelines, unanimously recommended that a review of the disputed measure - i.e. the introduction of the two new screens - be carried out. The President endorsed this recommendation. After undertaking a new review of the screens the new Data Protection Officer found that an individual examiner's data could be seen on the screens between 10 March 1997 and 15 September 1998 and concluded that during that period they were not in compliance with Article 21(3). The contradiction from the previous finding was attributed to a difference in information available at the time each review took place.

In letters of 25 July 2000 the President of the Office informed each of the complainants that notwithstanding the fact that the Data Protection Officer found that the Guidelines had been breached, the "situation has been regularised" by the adoption of the implementing rules. The President rejected the claims for moral damages for lack of substantiation and failure to show personal injury. Furthermore, he considered the breach of the Guidelines to be "of a purely formal nature". That is the impugned decision.

B. The complainants argue that they were adversely affected by the introduction of the screens up to the time when the implementing rules were put in place. It was not just a violation "of a purely formal nature" of a minor regulation but an admitted violation of the Data Protection Guidelines. Furthermore, it took months for the Data Protection Officer to establish the true nature of the violation. Most staff might not be aware that their personal data are being compiled and are open to abuse; thus the Guidelines are designed "to protect the staff precisely where they are not in a position to protect themselves". The breach of the Guidelines meant that over a period of eighteen months the personal data of all the examiners in DG2 could have been used by unauthorised people in an unauthorised way.

The complainants ask the Tribunal to set aside the President's decision of 25 July 2000 in so far as it refused the payment of moral damages, and to award each of them 1,850 euros (i.e. 100 euros per month for each month the breach went uncorrected) in moral damages and 1,000 euros in costs.

C. In its replies the Organisation asks for the joinder of the three complaints since the issues of fact and law are identical in each.

It states that the system in question provided information "on production at Directorate-General, Principal Directorate and examiner" levels. After completing the first review of the screens in 1997 the Office's Data Protection Officer concluded that the introduction of the new screens did not constitute an extension of the existing automated performance monitoring procedures and therefore there was no breach of Article 21(3) of the Data Protection Guidelines. Even though the review which took place following the Appeals Committee's recommendation did reveal that a breach had existed during a certain period of time, it had already been rectified. Since the complainants have not shown that they have suffered any injury, the Organisation sees no justification in their claim to moral damages.

D. In their rejoinders the complainants state that they have no objection to the joinder of their complaints.

They assert that the implementing rules did not enter into force until 15 September 1998, that is about 15 months after their appeals were filed and 18 months after the screens were introduced. They consider the relevant point to be that the new screens did represent an expansion of procedures for automated individual performance checks that was prohibited by the then-existing Data Protection Guidelines. The system also made information available to their direct superiors, i.e. the directors, and not just at the "Directorate-General, Principal Directorate and examiner" levels as the EPO stated in its replies. They contend that the Organisation's data protection regime is outdated compared with current technology and represents bare-minimum standards.

The fact of the matter remains that the EPO was operating "an unauthorised data system" until that time when the new implementing rules were adopted, whereas it could have suspended use of the screens while the matter was under dispute. The complainants reiterate that moral damages are the only, and also an appropriate, remedy in this case.

E. In its surrejoinders the EPO says that it did not conceal the fact that the Data Protection Guidelines were breached over the period from March 1997 to September 1998. It was also for a limited period that information

provided through the POEM system was available to directors responsible for staff reporting. However, it presses its plea that the complainants have not shown that they have suffered any injury by the breach, and therefore their claim to damages has no merit.

The Organisation refutes the argument that it should have suspended use of the screens while the appeals were pending. Since the Data Protection Officer found no evidence of breach in the review in July 1997 there was no reason for the EPO to suspend use of the screens. Furthermore, Article 107(3) of the Service Regulations for Permanent Employees of the European Patent Office supports this view: it provides that lodging an internal appeal does not suspend the decision against which the appeal has been lodged.

CONSIDERATIONS

1. The EPO applies for joinder of the three complaints on the ground that they raise the same issues of fact and law, impugn the same decision and seek the same redress. To the complainants' identical briefs, filed in support of their complaints which followed an identical internal appeals procedure for which the Appeals Committee issued a single opinion, the Organisation submitted correspondingly identical replies. The complainants see no reason to object to this application.

2. Before the Tribunal will join two or more complaints and deal with them in a single judgment, two conditions must be fulfilled. The first is that the substance of the claims must be the same. The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto should be the same (see Judgment 657, *in re* Metten and others, under 1).

3. On both counts, and the causes of action being one and the same, the Organisation's application for joinder is granted.

4. The three complainants are all patent examiners at grade A3 assigned to Directorate-General 2 (DG2). On 18 March 1997 the examiners of DG2 were informed through a bulletin that two new screens, defined as "BP2 and BP3", were to be introduced into the "Patent Office Examination Management" system (known as POEM).

5. On 19 June 1997 the complainants each filed an internal appeal objecting to the introduction of these two new screens and alleging that modifying the POEM system through the introduction of these screens represented an expansion of the content of personal data permitting automated individual performance checks and infringed Article 21(3) of the Data Protection Guidelines. They requested "that the modifications in the program be annulled and that they be paid ... 1 000 [German marks] compensation for every month from 1 July 1997 onwards that the new screens remain in use".

6. In a note dated 1 July 1997 the Data Protection Officer reiterated the opinion he had expressed in a previous document dated 26 May 1997 that the introduction of the screens - BP2 and BP3 - is not to be viewed as an expansion of the content of the existing procedures to automate performance monitoring. In other words, he saw no infringement of the Guidelines.

7. On 31 July 1997 the President of the European Patent Office sent the complainants a copy of the Data Protection Officer's note. He informed them that he could not allow their appeals and said that he was submitting them to the Appeals Committee for an opinion.

8. In its opinion dated 6 December 1999 the Appeals Committee stated that the Administration should be given the opportunity to review current practice and refer the matter back to the Data Protection Officer, as requested by the appellants. It unanimously recommended that a review be carried out of the disputed measure, that is the introduction of the two new screens into the POEM system.

9. By letters of 19 January 2000 the President informed each of the complainants that he had "asked the Data Protection Officer to produce a report along the lines set out by the Appeals Committee" and that he would take a decision on their appeals only after receiving that report.

10. In his report submitted to the President, the new Data Protection Officer concluded that "the introduction of the new BP2 and BP3 screens between 10 March 1997 and 15 September 1998 (date of entry into force of the POEM

implementing rules) did not comply with the requirements of the [Data Protection Guidelines] because this introduction represented an expansion of existing Office procedures for automated individual performance checks within the meaning of Article 21(3) of [the Guidelines]". He further concluded that it was only upon the entry into force of the implementing rules for the POEM system, on 15 September 1998, that the screens - BP2 and BP3 - "became compliant" with the Guidelines.

11. In letters of 25 July 2000 to each of the complainants, the President accepted the findings of the Data Protection Officer. He said:

"during a limited period and in the absence of the required formal authorisation, there was a breach of the Data Protection Guidelines. However, you have not shown any personal damage caused by this breach, which was of a purely formal nature.

I consider that, in view of these circumstances, there is no justification for paying moral damages."

It is this decision that is now being impugned.

12. Each complainant requests the Tribunal to order that:

"(1) The decision of the President dated 25.07.00 is set aside in so far as it refuses the payment of moral damages.

(2) The [Organisation] shall pay the complainant 1 850 (one thousand eight hundred and fifty) euros in moral damages.

(3) The [Organisation] shall pay the complainant 1 000 (one thousand) euros in costs."

13. Adverting to paragraph 11, the President admitted that the Administration indeed committed a breach of the Guidelines. This was based on the findings of the Data Protection Officer who, among other things, pointed out that giving superiors access to the individual examiner's data displayed on the screens was in conflict with the Guidelines.

14. The President downplayed this breach, however, saying it was "of a purely formal nature" i.e. that when the controversial screens were introduced, the implementing rules required by the Data Protection Guidelines had not indeed entered into force. But when they did on 15 September 1998, the requirements of the Guidelines were met and the "formal flaw" was rectified.

15. Contrary to the President's view, a breach of the Guidelines in question cannot be dismissed in a cavalier manner as being "purely formal" in nature, that is, relating merely to form and not to the substance of the issue.

16. Although the Guidelines, which took effect in 1992, obligated the EPO to lay down implementing rules "governing the permissible subject-matter, purpose and scope of performance monitoring", this was not done until 15 September 1998. However, in his letter of 19 January 2000 the President had shown his awareness of the importance of data protection with these words: "clearance of these questions, some of which concern matters of principle, is in the interest of data protection". Hence, the eighteen-months (from March 1997 to September 1998) when the employees were not protected must be deplored. Since this question involves electronic surveillance, it must be monitored by data protection; the EPO itself failed to follow its own rules by the delay in bringing in the implementing rules.

17. While the complainants have not shown any prejudicial consequences, the Tribunal nevertheless will sanction the EPO's breach by a nominal global award of damages amounting to 1,000 German marks and a global award for costs amounting to 2,000 euros.

DECISION

For the above reasons,

1. The decisions of the President dated 25 July 2000 are set aside in so far as they refused payment of moral

damages.

2. The defendant shall pay the complainants a nominal global award of damages amounting to 1,000 German marks.

3. It shall pay them a global award of 2,000 euros for costs.

In witness of this judgment, adopted on 27 April 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

Flerida Ruth P. Romero

Updated by PFR. Approved by CC. Last update: 27 July 2001.