Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2425

The Administrative Tribunal,

Considering the seventh complaint filed by Mr A. M. against the European Patent Organisation (EPO) on 30 September 2003, the Organisation's reply of 19 December 2003, the complainant's rejoinder of 5 May 2004 and the EPO's surrejoinder of 16 June 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1949, joined the French national patent office, known as the INPI (*Institut national de la propriété industrielle*) in 1979. He was detached to the European Patent Office, the secretariat of the EPO, from 11 January 1982 and resigned with effect from 31 December 1991. The INPI refused to take him back but was finally ordered to do so by French administrative courts. The complainant then sued the INPI for compensation for moral and material injury.

In reply to a query by the INPI received on 20 November 2002, the President of the Office in a letter of 17 December 2002 informed the Institute that the complainant had been paid a severance grant by the Office. He enclosed with his letter copies of various current regulations and of the documents drawn up at the time of the complainant's departure indicating the breakdown of the sums paid. The complainant states that he first became aware that these documents had been disclosed only on 14 March 2003, when, in the context of legal proceedings in France, he received a defence brief from the INPI enclosing them. He wrote to the President of the Office through his counsel on 2 May 2003, asking to be sent a copy of the Service Regulations for Permanent Employees of the European Patent Office. He reminded the President that he had already made that request on a previous occasion and had been told that it was an internal document to which, as a former permanent employee, he was not entitled to have access. He was therefore surprised that the INPI had been supplied with a copy. He claimed 25,000 euros in compensation for the moral injury suffered on that account and by the disclosure of personal data to a third party without his consent. He also requested that, in application of principle 10.4 of the International Labour Office (ILO) publication entitled "Protection of workers' personal data", the INPI be ordered "to withdraw from the proceedings [before the French court] the extracts of the aforementioned regulations, his personal data and all the pleadings and submissions bas[ed] on those extracts of the regulations or his personal data", or, failing that, to pay him 113,664.12 euros, plus interest, which was the sum the INPI intended to deduct from what it owed him for refusing his reinstatement. He also claimed costs. In the event that his claims as a whole were rejected, his letter was to be considered as initiating an internal appeal. In a letter of 17 June the Office replied that the President rejected his claims and had therefore referred the matter to the Appeals Committee for an opinion. On 23 June the Chairman of that Committee informed the complainant's counsel that the appeal would be dealt with as soon as the Committee's workload and procedural deadlines permitted.

On 4 September the complainant's counsel, noting that he had still not received the opinion of the Appeals Committee, again asked to be sent a full copy of the Service Regulations. The EPO replied on 17 September reiterating that the appeal would be dealt with as soon as possible and arguing that when he was employed at the Office, the complainant had received a copy of all the rules concerning the Office's staff; the EPO added that the relevant provisions had not been changed. The complainant states that his complaint is directed against the "implicit decision to reject the claim for compensation" of 2 May 2003.

B. The complainant accuses the EPO of disregarding principle 10.1 of the ILO publication concerning the protection of workers' personal data, which stipulates the conditions to be fulfilled before such data may be communicated. He points out that in 1992 the INPI had already made a request for information similar to the one it made in November 2002, and that at the time the EPO had asked for his consent. When the complainant refused,

the Organisation did not supply any documents. He concludes that the defendant's action in 2002 was contrary to a wish he had already clearly expressed. He also complains of unfair treatment, because the EPO provided the INPI with extracts of the Service Regulations which he had been denied on the grounds that they constituted an internal document that was not available to third parties. In addition to substantial moral injury, the complainant claims to have suffered material injury based on the fact that the INPI is arguing before the French administrative court that the compensation it owes him should be reduced by the amount he received from the EPO. This amount, however, was paid in compensation for the fact that he had not accrued pension rights during his period of employment at the EPO.

The complainant asks the Tribunal to order the EPO to send him a current copy of the Service Regulations, and to award him 25,000 euros in compensation for moral injury, 113,664.12 euros for material injury and 2,000 euros in costs.

C. In its reply the EPO pleads that the complaint is irreceivable on the grounds that the complainant has not exhausted the internal remedies, since his appeal is still pending before the Appeals Committee.

The defendant replies subsidiarily on the merits. It points out that the complainant had received a copy of the applicable regulations when he was working for the Organisation. In any case, the payment of a severance grant was governed by the provisions of the Pension Scheme Regulations and not those of the Service Regulations. Since the relevant provisions were produced in the course of the legal proceedings brought by the complainant against the INPI, his counsel has already had an opportunity to consult them.

With regard to the disclosure of information to the INPI, the EPO points out that for a claim for damages for injury to succeed, the claimant must provide evidence of an unlawful act, actual injury and a causal link between act and injury. In this case, however, the material injury is not certain since the French tribunal has not delivered a final judgment. The EPO therefore invites the Tribunal to stay its judgment on the claim for compensation until the proceedings before the French courts have been completed. With regard to the alleged moral injury, it considers that the disclosure of accurate administrative accounting information is not such as to cause moral injury. It argues that the ILO publication referred to by the complainant does not apply to the Office and points out that the latter is bound by a "duty of administrative cooperation" with the INPI, which is not a third party since it represents France within the Organisation's Administrative Council. It adds that it regularly provides the competent national administrations with personal data concerning its permanent employees or former permanent employees and that the INPI was in any case already in possession of sufficient data to calculate how much the complainant had received at the time of his departure. In its view, moreover, rules intended for the protection of permanent employees "should not be used for personal advantage", which it alleges is what the complainant is seeking.

D. In his rejoinder the complainant leaves it to the Tribunal to judge the receivability of his complaint, which he considers to be "a safeguard which may be unnecessary but which is essential for [his] legal defence […] against an opponent that resorts to all available means". In his view, the defendant's purpose in pleading that the complaint is irreceivable is to delay the proceedings before the Tribunal. He maintains that his complaint must be considered receivable on the basis of Article 109(2) of the Service Regulations*.

The complainant points out that he left the EPO more than 12 years ago and that he no longer has his copy of the Service Regulations, which he considers indispensable in defending his rights. He explains that at the time of his departure from the EPO he was given the choice between a pension entitlement and a severance grant. The INPI could not have known which he had chosen, let alone performed any calculation.

He admits that, in connection with the disclosure of the information concerned, "it is not certain at this time whether [a] material injury has actually been incurred" but requests that, if the judgment is stayed, it should be stayed on that point only, and that the EPO's liability should be recognised with regard to the remainder of the claims. He notes, however, that he has already incurred a material injury, since he is obliged to defend his case before the French courts to prove that the information disclosed is not relevant. The moral injury, on the other hand, is "undeniable". In his view, the ILO's publications apply to the EPO since the latter has recognised the Tribunal's competence. He points out, moreover, that according to the Service Regulations no permanent employee, including the President of the Office, may take instructions from any organisation or person outside the Organisation. Therefore, unless he obtained the complainant's consent, the President should have rejected the INPI's request. The complainant insists that the disclosed data were part of his personal file, which is of a confidential nature. He considers that there was an "intention to harm", since the EPO not only disclosed his

personal data to the INPI against his wishes but also failed to inform him that it had done so. He adds that there is no interdependence between the INPI and the defendant. According to him, the duty of cooperation applied only with respect to the judicial authorities and not to the INPI, which was one of the parties to the dispute. Lastly, he denies ever having tried to obtain any personal advantage whatever.

Arguing that he is compelled to pursue two legal actions at once, one before the Appeals Committee and one before the Tribunal, "in order to avoid the risk of irreceivability", the complainant increases his claim for costs to 5,000 euros.

E. In its surrejoinder the defendant presses its arguments, particularly with regard to the irreceivability of the complaint. In view of the "new information" according to which the complainant no longer has a copy of the Office's current regulations, it says it will send him a copy, so that his claim in that respect no longer shows a cause of action.

CONSIDERATIONS

1. The complainant filed his complaint with the Tribunal on 30 September 2003 by which he challenges an implied decision to dismiss his various claims submitted on 2 May 2003.

In its reply of 17 June the defendant had informed the complainant's counsel that his claims could not be met and that, in accordance with his request, the matter had been referred to the Appeals Committee for an opinion.

On 23 June the Chairman of the Appeals Committee informed the complainant's counsel that the appeal "[would] be dealt with as soon as the Committee's workload and schedule of meetings permitted".

On 4 September the complainant's counsel wrote to the President of the Office as follows:

"[…]

In a letter dated 17 June 2003 you informed me that you have referred this appeal to the Internal Appeals Committee for an opinion.

I have received no opinion to date. I now reiterate my request to be sent a full copy of the [Service] Regulations.

[…]"

On 17 September the defendant replied that the complainant's appeal "[would] be dealt with as soon as possible".

2. The defendant contends principally that the complaint is clearly irreceivable and subsidiarily that it is without merit.

3. The EPO argues that the complainant has not exhausted the internal remedies as stipulated in Article VII(1) of the Statute of the Tribunal and Article 109(3) of the Office's Service Regulations. In fact, it points out the internal appeal procedure was still proceeding normally.

In reply to that objection, the complainant, while leaving it to the Tribunal to judge whether his complaint is receivable or not, states that he made inquiries with the Tribunal before filing his complaint but did not receive a clear reply as to whether he should wait for the Organisation to take a decision (in view of his internal appeal before an apparently overloaded committee). He acknowledges that "[t]he receivability of this complaint remains problematic", but believes that filing it "appear[ed] to be the only way of safeguarding his rights".

Lastly, in support of the receivability of his complaint, the complainant refers to Article 109 of the Service Regulations, which in his view stipulates in paragraphs 1 and 2 that the President must take a final decision within two months from the date on which an internal appeal is lodged regardless of whether the case is referred to the Appeals Committee and whether the latter has had time to issue an opinion.

4. Article 109 of the Service Regulations provides, in paragraphs 1 and 2, that:

"(1) If the President of the Office or, where appropriate, the Administrative Council considers that a favourable reply cannot be given to the internal appeal, an Appeals Committee as provided for in Article 110 shall be convened without delay to deliver an opinion on the matter; the authority concerned shall take a decision having regard to this opinion. Extracts from the decision may be published.

(2) If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected. […]"

Having considered these provisions and contrary to the views of the complainant, the Tribunal finds that the period of two months referred to applies only in the case provided for in Article 109(2), that is, where the President has taken no decision on the appeal, and not where, judging that a favourable reply cannot be given to the said appeal, he decides to refer the matter to the Appeals Committee for an opinion, in accordance with the provisions of Article 109(1).

The complainant therefore cannot argue on the basis of the provisions of Article 109 of the Service Regulations that his complaint is receivable, even though the Appeals Committee has still not issued its opinion.

5. The Tribunal considers that the fact that he asked a member of the Tribunal's Registry whether he could file his complaint or whether he should await the outcome of the internal procedure does not relieve the complainant of the obligation to exhaust all internal remedies prior to bringing the matter before the Tribunal.

6. The complainant submits that since he received no opinion and no further reply, there was an implicit decision to reject his claim for compensation of 2 May 2003.

The Tribunal considers that in this case the appeal cannot be deemed to have been rejected in view of the fact that the internal appeal procedure was still under way.

7. A question remains as to whether the complainant could appeal directly to the Tribunal according to the latter's case law.

The Tribunal has held in the past that the requirement to exhaust internal remedies cannot have the effect of paralysing the exercise of 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 Judgment 2039, under 4, and the case law referred to therein). In the present case, the internal appeal was formally filed when the President of the Office referred the matter to the Appeals Committee on 17 June 2003. The Chairman of the Appeals Committee informed the complainant's counsel of this fact on 23 June 2003.

On 4 September 2003 the complainant's counsel wrote to inform the President of the Office that he had not received any opinion. The reply given on 17 September 2003 was that his client's appeal would be dealt with as soon as possible. A few days later, on 30 September 2003, the complainant filed his complaint with the Tribunal.

In the circumstances, the Tribunal considers that in the absence of any evidence showing that the competent authority did not act with due diligence, the complainant is not justified in complaining of excessive delay in the processing of his internal appeal.

It follows that the complaint is not receivable because internal remedies have not been exhausted as required by Article VII(1) of the Statute of the Tribunal and Article 109(3) of the Service Regulations.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

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*Article 109(2) of the Service Regulations reads as follows: “If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected. […]”

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