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

SEVENTY-NINTH SESSION

In re ROSE

Judgment 1442

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain René Pierre Rosé against the European Patent Organisation (EPO) on 11 June 1994, the EPO's reply of 30 August, the complainant's rejoinder of 5 December 1994, the Organisation's surrejoinder of 10 January 1995, the complainant's further submissions of 28 March and the Organisation's final comments thereon of 26 April 1995;

Considering the application to intervene filed by Mr. Jean-Pierre Cervantes on 28 March 1995 and the EPO's comments thereon of 28 April 1995;

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. By a communiqué, No. 219 of 22 July 1992, headed "Working Time Rules" the President of the European Patent Office, the secretariat of the EPO, announced his decision to increase the compulsory mid-day break for all staff from 30 to 45 minutes. By a note of 23 July the Director of Administration told EPO staff stationed at The Hague that for staff on a forty-hour week the time they were required to be present was still eight-and-a-half hours a day. By a note dated 28 August the Vice-President in charge of Directorate-General 1 (DG1) instructed staff at The Hague not to enter the additional 15 minutes of the mid-day break in time sheets.

By a letter of 17 December 1992 the complainant, who is employed in DG1, asked the President to confirm his own view that communiqué 219 meant a shortening of the working day to seven-and-three-quarter hours or, failing that, to treat his letter as an internal appeal. On 27 January 1993 his appeal went to the Appeals Committee.

In its report of 20 December 1993 the Appeals Committee declared his appeal receivable and recommended that the President confirm that his understanding of the communiqué was right. By a letter dated 22 February 1994, the impugned decision, the Director of Staff Policy told him that the President regretted the confusion the communiqué had caused, had never intended to reduce hours of work to "38 3/4 a week", and had decided to amend communiqué 219 and revert to the 30-minute mid-day break. Communiqué 256 of 15 December 1994 announced that decision to the staff; but it added that the extension of the break by 15 minutes was authorised "on condition that individual production is not affected".

B. The complainant submits that the longer break announced in communiqué 219 and the Director of Administration's note of 23 July 1992 shortened his working day by 15 minutes. It was the Administration's refusal to make things clear, in response to the case put by another official, that led him to appeal on 17 December 1992.

By declining to admit that the challenged measure amounted to a reduction of the working day the President had left everyone unsure where they stood. The Vice-President's instruction in the note of 28 August 1992 not to record the 15 additional minutes' break may be taken as an order to make false statements.

He says that the decision to shorten the working day, in the absence of a corresponding reduction in productivity targets, meant that those targets were raised by over 3 per cent, and productivity is a criterion of performance.

He asks the Tribunal to "confirm" that the 15-minute extension of the mid-day break meant a corresponding reduction in the working day and that the result was a shortening of the official working day to seven-and-three-quarter hours or of the week to thirty-eight-and-three-quarters and to declare the EPO liable for making his

administrative situation vague and uncertain, requiring false statements in his time sheets and seeking to lower his output in breach of its duty of sound management. He claims 5,000 guilders in moral damages.

C. In its reply the EPO contends that the complaint is irreceivable because the complainant's internal appeal was time-barred. The reason why the letter of 22 February 1994 failed to raise the issue of receivability was that the measure he was objecting to was to be withdrawn anyway.

In subsidiary argument the Organisation takes up the complainant's pleas on the merits. The impugned decision was just a reform of the schedule of work and official acknowledgement of the staff's common practice of taking another 15 minutes in the middle of the day. Though the working day was that much shorter the week was still 40 hours. The 15 minutes were treated as working time and it was on the President's authority that they were not to be entered in the time sheets. The complainant did not raise the matter of productivity in his internal appeal. At all events communiqué 219 did not lower productivity targets since it did not alter working hours. Since the disputed measure has been withdrawn the complainant no longer has any cause of action.

D. In his rejoinder the complainant observes that the EPO has not amended communiqué 219 and that the disputed measure is still in force. He "believes" that his complaint is receivable: he lodged the internal appeal less than two weeks after the Administration's final reply to another staff member's challenge on the same issue. Besides, the President himself referred to the confusion which his decision to lengthen the break had caused and to the need to set things straight. He presses his arguments on the merits.

E. In its surrejoinder the EPO says that the President announced in communiqué 256 of 15 December 1994 his decision to amend communiqué 219 because he had to put an end to the "questions" it had raised, even though it had merely endorsed the conclusions of a working party which included staff representatives.

F. In further submissions the complainant denies that communiqué 219 endorsed the working party's conclusions. For one thing the working party did not propose extending the mid-day break. For another it did not put its findings to the President until 23 April 1993, several months after communiqué 219 had gone out. He observes that in its surrejoinder, contrary to earlier statements, the EPO acknowledges having taken until 15 December 1994 to withdraw the decision. It has not produced the working party's conclusions. The complainant asks the Tribunal to award him one guilder in token damages for the EPO's having given mistaken information and concealed evidence in the course of the proceedings and demands an apology from the Organisation or, failing that, an award of 10,000 guilders in damages.

G. In its final submissions the EPO maintains that it reversed the impugned decision on 22 February 1994 as it related to the complainant and that communiqué 256 of 15 December 1994 merely broadened the effect to the staff as a whole. It acknowledges that communiqué 219 did not "endorse" the working party's conclusions - except for leaving the working week as it was - and regrets using the word in its surrejoinder. The term should be "relied on".

CONSIDERATIONS:

1. The present dispute arises from changes the President of the European Patent Office made in the schedule of work for staff, among others, at its Directorate-General 1 (DG1) at The Hague. According to the rules of 5 November 1981 on working hours in DG1 "there shall be a lunch break between 11.30 and 14.00 of at least 30 minutes for staff members with a 40-hour working week and at least 45 minutes for all others". So as to improve working conditions, and after "a thorough discussion in the Presidential Committee" the President decided among other things, to lengthen the compulsory mid-day break from 30 to 45 minutes and to authorise another two 15-minute breaks each day. He announced his decision in communiqué 219 of 22 July 1992, which explained that the longer mid-day break should "go some way towards meeting the demand for a reduction in working hours" and would officially recognise "what is largely general practice within the Office". A note dated 23 July 1992 informed staff at The Hague that the time they were required to be present was still eight-and-a-half hours a day for those on a 40-hour week. In other words, the longer break did not require any longer presence on EPO premises.

2. The complainant and others, being unsure of the effect on hours of work, asked for further explanation. On 17 December 1992 the complainant asked the President to confirm that the working day had been reduced from eight to seven-and-three-quarter hours and the week from forty to thirty-eight-and-three-quarters. Failing such confirmation, he asked the President to treat his letter as an internal appeal to be put to the Appeals Committee.

3. The President referred his and 16 other like appeals to the Committee. In the internal proceedings the Administration said that the working week was still 40 hours and the 15 minutes added to the mid-day break did not count as working time. It also said, according to the Committee's own report, that the President realised that the EPO's Administrative Council would never agree to reduce total hours of work but he wanted to make the gesture of lengthening the mid-day break and allowing two other short breaks every day. But the Committee unanimously held that such reasoning was illogical: the 15 minutes tacked on to the mid-day break had to come from somewhere and must be either "subtracted from the working hours or ... added to the time staff are required to be present". Since the Administration had always made out that hours of work were unchanged the conclusion must be that the 15 minutes were to be charged to total working time and that the 17 appeals must succeed.

4. The President thereupon reviewed the matter and had the complainant informed by letter of 22 February 1994 that he regretted the confusion that communiqué 219 had caused, that he had never meant to shorten the week to thirty-eight-and-three-quarter hours and that he had therefore decided to amend the communiqué and go back to the compulsory mid-day break of 30 minutes. That is the decision under challenge. The complainant wants the Tribunal to "confirm" that the effect of the longer compulsory break was to reduce hours of work by 15 minutes a day; to "confirm" that the decision in communiqué 219 lowered hours of work to seven-and-three-quarters a day or thirty-eight-and-three-quarters a week; to declare the Administration liable for making his situation vague and uncertain; and to grant him 5,000 guilders in moral damages.

5. The EPO pleads that the complaint is irreceivable on the grounds that the complainant's internal appeal of 17 December 1992 came too late after the date of communiqué 219 and the decision of 28 August 1992 to apply it to staff at The Hague. But the objection cannot be sustained. What the complainant is impugning is not those general decisions but the application of them to himself which would be the consequence of the EPO's holding to its - in his view mistaken - interpretation of them. That the Administration had decided to change the rules did not bar him from challenging them at any time. He did so in his letter of 17 December 1992, which became a timely appeal to the Appeals Committee.

6. But does the complainant's claim to the quashing of the impugned decision disclose any cause of action, the President having told him of the amendment of communiqué 219 and the return to the compulsory 30-minute break? The evidence is that the latter "decision" did not come about until 15 December 1994. Communiqué 256 of that date said that the mid-day break was to last 30 minutes and another 15 were allowed "on condition that individual production [was] not affected". That may settle the matter for the future, though the complainant's final submissions suggest that it does not. But the issue raised in his internal appeal and in this complaint is unresolved. So he still has a cause of action.

7. The Appeals Committee's reasoning on the merits is sound. The EPO decided both to extend the mid-day break by 15 minutes, as communiqué 219 said, and to keep the number of hours of presence unchanged, as for example the note of 23 July 1992 said. The necessary inference is that the working day was reduced by 15 minutes. So the complainant was right to appeal and is right in contending that, insofar as the President refused to state that the effect of communiqué 219 was to reduce hours of work, the impugned decision of 22 February 1994 cannot stand. But the decision must stand insofar as it refers to the amendment of communiqué 219 and to the return to the 30-minute break as from the date of communiqué 256.

8. The complainant's claims to damages for making his position vague and uncertain and for the consequent moral injury are disallowed. The Tribunal finds no evidence of any such injury.

9. Nor will it allow his claims in his final brief to damages and to an apology from the EPO for "mistaken information" in its submissions, "false witness" and any "concealment of evidence". The allegations are worthless.

10. The application by Mr. Cervantes to intervene succeeds insofar as his claims concur with the complainant's and he is in like case. But insofar as he objects to certain statements in the surrejoinder and seeks compensation for injury the Organisation's attitude caused him, he is raising issues of no relevance to this case and to that extent his application is irreceivable.

DECISION:

For the above reasons,

1. The President's decision of 22 February 1994 rejecting the complainant's internal appeal of 17 December 1992 is set aside to the extent stated in 7 above.

2. The complainant's other claims are dismissed.

3. The application to intervene is allowed to the extent stated in 10 above.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.