EIGHTY-FIFTH SESSION

In re Franks (Nos. 3 and 4) and Vollering (Nos. 13 and 14)

Judgment 1762

The Administrative Tribunal,

Considering the third complaint filed by Mr. Nigel Malcolm Franks and the thirteenth filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 28 April 1997, the EPO's single reply of 24 July, the complainants' rejoinder of 6 November and the Organisation's surrejoinder of 11 December 1997;

Considering the fourth complaint filed by Mr. Franks and the fourteenth filed by Mr. Vollering against the EPO on 29 April 1997, the Organisation's single reply of 24 July, the complainants' rejoinder of 6 November and the EPO's surrejoinder of 11 December 1997;

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. Information relevant to these complaints is set out under A in Judgments 1442 (*in re* Rosé) and 1443 (*in re* Vollering No. 6), both of 6 July 1995. Like the complaints then ruled on, these challenge decisions by the President of the European Patent Office, the secretariat of the EPO, to increase from 30 to 45 minutes the compulsory midday break for all staff. In Judgment 1442 the Tribunal held that communiqué 219 of 22 July 1992, which so increased the length of the break, had the effect of reducing the working day by 15 minutes.

The complainants are permanent employees of the EPO. For employees, like them, who joined Directorate-General 1 (DG1) at The Hague after 1978 the normal working week is forty hours. By communiqué 256 of 15 December 1994 the President "confirmed" that the "official lunch break" lasted 30 minutes, not to be included in the 40-hour working week, and authorised a further 15-minute extension "on condition that individual production is not affected".

By letters of 31 August 1995 the complainants asked the President to confirm that that communiqué had increased the time they had to spend on the EPO's premises to 8¼ hours a day. They asked him, in the event of refusal, to treat their letters as internal appeals. In replies dated 22 September 1995 the Director of Staff Policy told them that since they were required to spend only eight hours a day in the Office it was "difficult to imagine how the refusal of a statement that [they] should be present during 8¼ hours a day adversely affects" them; he asked them, before agreeing to treat their requests as an appeal, to explain how it could. In letters of 3 October they cited a staff notice of 23 July 1992 from the Director of Administration, telling them to spend 8½ hours a day at the office, and Judgment 1442, in which the Tribunal had held that the President had impliedly reduced the working day to 7¾ hours.

In letters of 18 October 1995 the Director of Staff Policy confirmed the eight-hour working day and announced that the President was referring their case - No. 96/95 - to the Appeals Committee. By letters of 20 November they asked the President to reverse the decision by the Director of Staff Policy, notified in his letters of 22 September and confirmed in those of 18 October, to lengthen the working day from 7¾ hours to 8 or, failing that, to treat their letters as internal appeals. By letters of 28 November 1995 the Director of Staff Policy informed them that the President had decided to refer that case too (No. 125/95) to the Appeals Committee.

On 10 December 1996 the Committee reported on both appeals. On case 96/95 it recommended reviewing the reckoning of their output to take account of the cut in working hours between 22 July 1992 and 15

December 1994, the dates of communiqués 219 and 256, and rejecting their other claims. In another report it recommended rejecting case 125/95. By letters of 11 February 1997, which they impugn, the President rejected both appeals: although their claim about the effect on their performance of the shorter working week from July 1992 to December 1994 fell outside the scope of their original claims, he found in their staff reports no evidence of any such effect.

B. In Mr. Franks' third and Mr. Vollering's thirteenth complaints they submit that the impugned decision is unlawful. They plead breach of "due process of Administration" for failure to give "true, clear and full information" on working hours. Since the working day, according to Judgment 1442, consisted of 7¾ hours plus a lunch break of 45 minutes, the President's decision in communiqué 256 to increase the break by 15 minutes did not have the effect of increasing the working day by 15 minutes. They first got formal notice of the lengthening of working hours in the letters of 22 September 1995 from the Director of Staff Policy. Output can, they argue, be gauged only by reference to the length of the working day.

In Mr. Frank's fourth and Mr. Vollering's fourteenth complaints they say that the Administration failed to give any valid reasons for changing official working hours: announcing that they "remain" eight a day runs counter to Judgment 1442. Since the rules require the President to refer the matter to advisory bodies before making the working day eight hours the decision to increase it by 15 minutes shows a procedural flaw. What is more, it is discriminatory, since the only difference in fact or law between the complainants, who have to work eight hours a day, and others, who have to work 15 minutes less, is that they asked the President to state how many hours they had to work. Lastly, they object to the Appeals Committee's assertion that communiqué 256 put the working week back to 40 hours.

In their first pair of complaints they ask the Tribunal to (1) set aside the impugned decision; (2) confirm that communiqué 256 "did not change the official working time of 38¾ hours per week and the official working time of 7¾ hours per day for the complainants as this was established by communiqué 219 and the implementation thereof by the letter of the Vice-President of 28-08-1992, and that therefore these official working hours are still valid"; (3) "confirm that communiqué 256 only changed the minimum obligatory lunch break to 30 minutes, which can be taken outside the premises of the Office"; (4) "confirm that the time in which presence is/can be required at the Office is 7¾ + ½ = 8¼ hours"; (5) "order the President of the EPO to use the correct calculation based on the correct official working time (introduced by communiqué 219 and not changed by communiqué 256) in past and future productivity calculations in the Staff Reports"; and (6) grant them 10,000 guilders each in costs.

In their other two complaints they ask the Tribunal to (1) quash the decision to extend their working day to eight hours; (2) "condemn the Administration of the EPO for the discrimination of the complainant[s] where it ordered [them] to work 8 hours per day while other EPO Staff still could continue to work 7¾ hours per day" and grant them 10,000 guilders each in moral damages for such discrimination; (3) "have the EPO return to [them] the total of the ¼ hour per day which they had to work extra since they had to start working 8 hours per day"; (4) "condemn the EPO for the failure of the Internal Appeals Committee to provide for a proper presentation of the [complainants'] arguments and the failure to investigate the [complainants'] situation and arguments regarding the situation that [they were] indeed working 7¾ hours per day (before working time was extended to 8 hours per day for [them] on 22-09-1995)" and grant them 5,000 guilders in moral damages for this; (5) and award them 10,000 guilders each in costs.

C. In its reply the EPO applies for joinder of their complaints inasmuch as they challenge the same decisions, rest on the same facts and raise the same points of law. In its submission they are irreceivable. The internal appeals were time-barred, having been lodged eight and eleven months after communiqué 256 came into force and with it the duty to work eight hours a day. The letters of 22 September and 19 October 1995, which they impugn, are not challengeable decisions, being mere confirmation of the one in communiqué 256. In any event their claim to compensation for working another 15 minutes a day and to moral damages for discriminatory treatment go beyond the scope of their appeals and are accordingly irreceivable for failure to exhaust the internal remedies. So too are their claims to changes in the reckoning of their output.

In subsidiary argument the EPO submits that the complaints are devoid of merit. In its view the complainants overlook the ruling in Judgment 1442 that the impugned decision must stand insofar as it referred to communiqué 256, by which the President restored the break to 30 minutes, thereby putting the working day back to eight hours. What the Tribunal found fault with was not the President's "undeniable"

intention of keeping hours at eight a day but his failure to do so properly in communiqué 219 extending the break. Indeed his purpose in issuing communiqué 256, even before Judgment 1442, was to correct the offending passages in 219.

The complainants may not in good faith plead discrimination on the grounds that the general rule cited by the Director of Staff Policy applied to them alone. Nor are there any grounds for their pleading failure to consult the General Advisory Committee: for as long as they have been in the EPO's employ the President's unwavering intention has been to keep the working day at eight hours. Their claims to damages for the findings of the Appeals Committee are "manifestly unfounded".

D. In their rejoinders the complainants observe that the EPO is relying, not on the effects in law of the President's decisions, but on his intent. If the President meant to hold the working day at eight hours he should have said so. To their mind the Administration has misrepresented the facts and used the Appeals Committee to "overawe and to manipulate" appellants.

E. In its surrejoinder the Organisation says that nothing in their rejoinders persuade it to change its position and that they have resorted to "highly intemperate language". It observes that the members of the Appeals Committee are appointed in equal numbers by the staff representatives and the President after consulting the General Advisory Committee.

CONSIDERATIONS

1. By communiqué 219 of 22 July 1992 the President of the European Patent Office announced to the staff that the compulsory midday break was increased from 30 to 45 minutes. By a note dated 23 July the Director of Administration informed the staff of Directorate General 1, at The Hague, that communiqué 219 should be interpreted as follows:

"The time your presence is required in the Office remains 8½ hours per day for staff working a 40 hour week but the minimum lunch break is extended to 45 minutes ..."

2. In communiqué 256 of 15 December 1994 the President restated his decision about the midday break. He said:

"Some staff see an inconsistency in the fact that they are obliged to take a 45-minute rather than a 30-minute lunch break without actual daily working time being reduced from 8 hours to 7¾ hours, or the daily time when staff are present at work being increased from 8½ to 8¾ hours.

Taking into account the aim of the working time rules ... I therefore hereby confirm that the official lunch break is 30 minutes, and that its extension by 15 minutes is authorised only on condition that individual production is not affected ..."

3. Mr. Alain Rosé filed a complaint on the issue before communiqué 256 went out, and the Tribunal ruled on that complaint in Judgment 1442 on 6 July 1995. It held, under 7, that the inference to be drawn from communiqué 219 was that "the working day was reduced by 15 minutes". It concluded:

"... insofar as the President refused to state that the effect of communiqué 219 was to reduce hours of work, the impugned decision ... 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."

4. The complainants each wrote the President a letter on 31 August 1995 seeking "a clear statement that the time in which [his] presence is required in the Office ... has now become by your communiqué 8¼ hours per day" and asking that, in the event of refusal, his letter be treated as an internal appeal. The Director of Staff Policy answered in letters of 22 September that they had to spend eight hours a day at work, not counting the midday break, and asked them to explain how refusal of the statement they had sought could adversely affect them. By further letters dated 3 October to the Director of Staff Policy they explained that the purpose of their letters of 31 August had been to ask the President to confirm that, as Judgment 1442 had declared, the working day was 7¾ hours and that the compulsory break was 30 minutes, making a total of 8¼ hours and not, as the staff notice of 23 July 1992 had said, 8½. Their letters asked whether the Director accepted the ruling in Judgment 1442. He replied on 18 October 1995 refusing their request and saying that the

matter had been referred to the Appeals Committee as case 96/95. He also confirmed that in accordance with Judgment 1442 the working day was eight hours.

5. By letters of 20 November 1995 the complainants asked the President to withdraw the decisions in the letters of 22 September and 18 October 1995, which they interpreted as increasing the working day from 7¾ to 8 hours and the working week from 38¾ to 40 with a "compulsory lunch break of 30 minutes". They asked that in the event of refusal their letters be treated as internal appeals. The President refused their claims by letters dated 28 November 1995 and referred the matter to the Appeals Committee as case 125/95.

6. At the complainants' own request the Appeals Committee dealt separately with their appeals in two reports each dated 10 December 1996.

7. In its report on case 96/95 the Committee rejected their contention that the working week was still 38¾. It held that the week had been reduced to 38¾ hours only in the period between communiqués 219 and 256, i.e. from 22 July 1992 until 15 December 1994 but after 15 December 1994 had gone back to 40 hours. It gave no opinion, on the grounds that the point had never been at issue, on the claim to a statement that the minimum duration of the compulsory midday break was 30 minutes. On the same grounds it recommended rejecting the claim to a statement that hours of work were 7¾ a day and 38¾ a week and that staff had to spend at the office 8¼ hours a day and 41¼ a week: since 15 December 1994, the date of communiqué 256, working hours a day had been 8, not 7¾. It further held that since working hours had been reduced in between the two communiqués, the logical consequence was that targets of output in that period should be reviewed. It recommended allowing the appeal in part by making a "review of the productivity calculations for examiners in The Hague, Berlin and Munich during the period from 22 July 1992 to 15 December 1994" and taking "the reduction of working hours into account for staff reports covering this period".

8. In its report on case 125/95 the Committee recommended rejecting the complainants' claims in their entirety for the same reason, namely that communiqué 256 had restored working hours to 40 a week. It dismissed the complainants' argument that in accordance with Article 38(3) of the Service Regulations the EPO should have consulted the General Advisory Committee about the letters of 18 October 1995 from the Director of Staff Policy: in its view the letters were not "proposals concerning the whole or part of the staff within the meaning of that article".

9. On 11 February 1997 the President of the Office wrote letters to the complainants about both cases, 96/95 and 125/95. He said he was rejecting their appeal against his refusal to confirm that "the time in which [their] presence would be required in the Office has become 8¼ hours (7¾ working hours and 30 minutes obligatory luncheon break) a day" as well as their appeal against the statement that "working hours in the Office are 8 hours a day". He declared to be irreceivable their "claim that the effect of the 38¾ hours working week between the issue of Communiqués 219 and 256 (22 July 1992 to 15 December 1994) be taken into account for the staff reports covering this period": they had made that claim, he said, "only at the hearing of the Internal Appeals Committee". He nevertheless rejected it on the merits too. That is the final decision impugned in all four complaints.

10. The EPO has applied for joinder of all four. Since both pairs of complaints impugn the same decision and in essence seek the same result, namely confirmation that the working hours are 7¾ a day, the Tribunal grants the defendant's application.

11. The relief that the complainants seek in the first pair of complaints is as follows:

(a) the quashing of the decision of 11 February 1997;

(b) confirmation that communiqué 256 did not change the working time - established by communiqué 219 - 38¾ hours a week and 7¾ a day and that those figures hold good;

(c) confirmation that communiqué 256 had the sole effect of changing to 30 minutes the minimum period of the compulsory midday break, which may be taken outside the Office;

(d) confirmation that "the time in which presence is/can be required at the Office is 7¾ + ½ = 8¼ hours";

(e) an order to the President of the Office "to use the correct calcula- tion based on the correct official

working time (introduced by communiqué 219 and not changed by communiqué 256) in past and future productivity calculations in the Staff Reports"; and

(f) an award to each of the complainants of 10,000 guilders in costs.

12. In their second pair of complaints they claim:

(a) the quashing of the decision of 11 February 1997 confirming "the extension to a working time of 8 hours per day";

(b) condemnation of the EPO for discriminating against them by having them work eight hours a day whereas other EPO staff "still could continue to work 7¾ hours per day" and an award of 10,000 guilders in moral damages to each of them under that head;

(c) the "return to [them of] the total of the ¼ hour per day which they had to work extra since they had to start working 8 hours per day" according to the EPO's letter of 22 September 1995;

(d) condemnation of the EPO for the failure of its Appeals Committee "to provide for a proper presentation" of their arguments and "to investigate" their "situation and arguments regarding the situation" that they were "working 7¾ hours per day (before the working time was extended to 8 hours per day on 22.09.1995)", and an award of 5,000 guilders in moral damages to each of them under that head; and

(e) an award to each of them of 10,000 guilders in costs.

13. The gist of the complainants' case is that communiqué 219 of 22 July 1992, which increased the midday break from 30 to 45 minutes, shortened the working day from 8 hours to 7¾; that communiqué 256 of 15 December 1994, though it put the break back to 30 minutes, did not put the working day back to 8 hours; and that the working day is therefore still 7¾ hours with a 30-minute break.

14. The undoubted effect of communiqué 219 was, as was held in Judgment 1442, to shorten the working day to 7¾ hours. The staff then pointed out an inconsistency in that there was a compulsory 45-minute break without any reduction in the working day to 7¾ hours or any increase in the requirement of daily attendance at work from 8½ to 8¾ hours. It was for the specific purpose of removing that inconsistency that the President issued communiqué 256.

15. The Tribunal is satisfied that the effect of communiqué 256 was to restore the midday break of 30 minutes and the eight-hour working day.

16. The complainants rely on written statements that the committee of the Staff Union issued on the subject on 24 January 1995 and that agreed with their own interpretation. They point out that the EPO failed to contradict those statements and must therefore be assumed to have agreed. The plea is not sustainable. Particularly in the light of the Administration's consistent position before Judgment 1442 that the eight-hour day was unchanged, the fact that it did not expressly contradict the Staff Union statements may not be deemed to denote agreement.

17. The complainants argue that the Administration took decisions - notified to them in letters of 22 September 1995 and 18 October 1995 from the Director of Staff Policy - to make them work an eight-hour day, whereas everyone else was on a 7¾-hour day, and that the President failed to fulfil his duty under Article 38(3) of the Service Regulations of consulting the General Advisory Committee about such discriminatory action.

18. Whether there was any need to refer communiqué 256 to the Advisory Committee is an issue that does not arise. The letters that the Director wrote to the complainants on 18 October 1995 were personal, may not be treated as "proposals which concern the whole or part of the staff" within the meaning of Article 38(3) and therefore did not need to be referred to the Committee. Besides, the complainants are mistaken in contending that they were discriminated against by having to work eight hours a day while everyone else was on a 7¾-hour day: the eight-hour day applied to everyone from 15 December 1994.

19. The complainants are entitled neither to any declarations of the kind that they claim and that are set out

in 11(b), (c) and (d) above nor to the further forms of relief that they seek and that are set out in 12(b) and (c) above.

20. Their further claim, set out in 11(c), to a declaration that the midday break may be taken outside the Office did not form part of their original internal appeal and was never at issue.

21. The claim in 11(e) to review of "productivity calculations" because of a reduction in working hours is merely a corollary of the claims set out in 11(a), (b), (c) and (d) and so, like them, must fail.

22. Lastly, there is no substance to their claim, set out in 12(d) above, about the Appeals Committee's failure to hear their case properly. They disagree with the Committee's opinion about the length of the working week and simply say it has therefore failed to form a proper view. In fact the Committee's opinion is correct. Their further contention that the Committee failed to entertain their plea about discrimination serves no purpose: they suffered no discrimination.

23. Since each of their claims must be dismissed either because it is irreceivable or because it is devoid of merit, the Tribunal need not entertain the defendant's general objection to the receivability of their complaints.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

Mella Carroll
Mark Fernando
James K. Hugessen

A.B. Gardner

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