

NINETY-SECOND SESSION

In re Vollering (No. 21)

Judgment No. 2114

The Administrative Tribunal,

Considering the twenty-first complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 6 October 2000 and corrected on 14 November, the EPO's reply of 16 February 2001, the complainant's rejoinder of 23 March, and the Organisation's surrejoinder of 24 April 2001;

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

Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses;

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

A. The complainant, a Dutch citizen born in 1952, is a patent examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, in The Hague.

On 5 March 1998 the complainant and another Dutch colleague sent a letter to a member of the Dutch parliament. On the same day the complainant forwarded a copy of the letter to approximately 100 Dutch staff members of the Office via the internal electronic mail system "Office Vision" (OV). On 24 March the Principal Director of Personnel in DG1 informed the complainant that the contents of the letter could cause discord in the EPO Administrative Council and tension among certain delegations, thus breaching a statutory obligation under Article 14 of the Service Regulations for Permanent Employees of the European Patent Office, which requires staff to conduct themselves solely with the interests of the EPO in mind. He added that, since disciplinary action against the complainant was being considered, he would be given an opportunity to be heard on 31 March. On that day the complainant was heard by the Vice-President in charge of DG1 and the Principal Director of Personnel. The complainant was given ten days to submit his comments in writing, which he did on 8 April 1998.

On 8 July the President of the Office informed the complainant that, although he viewed the complainant's written comments of 8 April as an apology, he considered nevertheless that by writing and sending the letter - as well as forwarding it - the complainant had not kept his obligations as a staff member under Article 14(1) of the Service Regulations, had ignored his duty, under Article 16(1), to abstain from any act and expression of opinion which may reflect on the dignity of his office, and had ignored the obligation of discretion under Article 20. Consequently, the President imposed a reprimand on him.

The complainant appealed against this decision to the President on 2 October 1998 requesting him, in particular, to withdraw the disciplinary measure. In the event that his request could not be granted, he asked that his letter be considered as the lodging of an appeal. The Director of Personnel Development informed the complainant on 14 October that the President could not grant his request and had referred the matter to the Appeals Committee. In its Opinion of 10 June 2000 a majority of the Committee considered that the complainant had, indeed, breached his obligations under Articles 14 and 16 - but not under Article 20; it recommended rejecting the appeal as unfounded. In a dissenting opinion a minority considered that the reference to Articles 16 and 20 in the letter of reprimand constituted a procedural flaw, insofar as these articles did not form the subject matter of the 31 March hearing, and the complainant had been deprived of his right to be heard on those charges; on this ground the minority considered that the reprimand should be withdrawn. In a letter of 18 July 2000 the Principal Director of Personnel informed the complainant that the President of the Office had rejected his appeal. That is the impugned decision.

B. The complainant submits that even though Article 94 of the Service Regulations gives the appointing authority the right to issue a reprimand without consulting the Disciplinary Committee, in his case the disciplinary procedure and the impugned decision were tainted by several procedural and substantive flaws. First, there was an abuse of

his right to prepare a proper defence. He was given only five days to prepare before the hearing, but contends that in using the time limits provided in Article 101.1 by analogy, he should have been given fifteen days. Also, the letter of 24 March 1998, informing him that disciplinary action might be taken against him, contains incorrect facts. It refers, in particular, to an OV-note of 11 March which never existed: the complainant denies having sent such a note, on that day, to a large number of colleagues. Furthermore, he asserts that the President's decision to sanction him no longer refers to the letter addressed to the Dutch parliament member. The complainant concludes that the disciplinary measure "is therefore not receivable".

There was a breach of his right to be heard. He was heard before the Vice-President in charge of DG1 but the disciplinary sanction was issued by the President. In the complainant's view the decision was taken without a reasoned report, and he was not given the proper opportunity to be heard, thus breaching Articles 94 and 102 of the Service Regulations. Additionally, under Article 102 the sanction should have been taken within one month but the President's decision was taken some three months after the 31 March hearing. Consequently, his "right to have the decision in time" has also been breached.

There was also a breach of his right to defend himself. On 24 March he was informed of the possibility that disciplinary action would be taken against him for a violation under Article 14 of the Service Regulations and the minutes of the 31 March 1998 hearing make reference to the same. But, in the President's letter of 8 July, violations of Articles 16 and 20 were added and the complainant was never given an opportunity to defend himself against these accusations. He considers that for a disciplinary measure to be valid it must be based on the correct article.

The complainant submits that there was no public discredit arising from his actions and the Administration failed to prove such discredit. Only the letter informing him of the 31 March hearing refers to the Dutch parliament member. The President's letter inflicting the reprimand refers to the fact that he distributed the letter to colleagues, but this, for the complainant, does not constitute public distribution; the Organisation cannot now, retroactively, base the disciplinary measure on that reason. Furthermore, by virtue of their own status, members of parliament are under a duty to keep confidential the contents of information they receive unless the parties concerned agree to make it public. As the contents of the letter were not made public there was no effect on the dignity of the Office.

He submits that there has never been any proof that delegations of the EPO Administrative Council were aware of the letter or that any tensions were created by it. However, he points out that the Netherlands is a member State of the EPO and that its delegation in the Administrative Council is instructed by the Dutch government. It is therefore in the EPO's interest that the Dutch parliament remains informed about "facts and concerns". As a Dutch citizen, he has a right, and even a duty, to communicate freely with members of parliament.

Any content alleged as "discrediting" in the letter comes from a misinterpretation arising from the EPO's translation. That translation, the complainant asserts, is inaccurate. He has provided a translation of his own which, he submits, is quite different and more accurate. The motive and intent of the letter to the member of parliament were to provide information and initiate discussion on an article of the Service Regulations of interest to Dutch employees. He never intended to create any tension in the Administrative Council or between that body and the Office.

The complainant asserts that as a citizen of the European Union he enjoys freedom of speech; that not only means his statements were permissible, but he cannot be disciplined for them. He provides several reasons why he believes that the disciplinary measure was based on hidden grounds and amounts to an abuse of power and censorship. He has asked the Administration to insert in his personal file his letter of appeal of 2 October 1998 against the imposition of the reprimand, but his request has been refused. This constitutes a breach of Article 32 of the Service Regulations.

He asks the Tribunal: (1) to quash the President's decision of 18 July 2000 and order compensation of 50,000 Dutch guilders for moral injury suffered; (2) to condemn the President for "abuse of power" arising from his refusal to insert the complainant's letter of 2 October 1998 into his personal file and to impose a financial penalty on the President for the "waste of time and money" caused by the "pursuit of the abusive and unnecessary use of [the President's] discretionary power"; (3) to condemn the EPO for abuse of process and substantial procedural violation shown in the Appeals Committee's majority opinion and to order compensation to the complainant of 10,000 guilders for the moral injury suffered; and (4) to order compensation of 10,000 guilders in costs.

C. In its reply the EPO submits that the complaint is irreceivable in part. The complainant's claim that the President

be censured for an alleged abuse of power was not made during the internal appeal and his claim to moral damages was not pursued in his internal appeal or during the Appeals Committee hearing. In its opinion the only receivable claims are to the quashing of the President's decision and costs.

Notwithstanding the issues of receivability, the Organisation argues that the entire complaint is without merit. The reprimand was not based on an incorrect fact. In his letter of 24 March 1998 the Principal Director of Personnel clearly referred to the letter the complainant sent to the member of the Dutch parliament in addition to its electronic mail distribution to staff members. There was unanimous agreement in the Appeals Committee that there could be no doubt as to what constituted the act on which the reprimand was based. Furthermore, the complainant never mentioned in his internal appeal that the Principal Director's letter contained, by mistake, the wrong date of the OV-note.

The EPO contends that the complainant's letter was not misinterpreted. In it he identifies an individual, by name and nationality, as well as a national delegation in the Administrative Council. By doing so he created a "risk of irritations" and breached his obligations as a staff member under Article 14. His argument that the real aim of the letter was to draw attention to an article of the Service Regulations of interest to Dutch staff members cannot serve as a mitigating circumstance, particularly as the EPO considers that the letter contains "derogatory remarks". Furthermore, the complainant's explanations in defence of his translation are both unconvincing and contradictory. In this regard the Organisation points out that one of the members of the Appeals Committee - and one who signed the majority opinion - was able to read the original letter and evaluate the complainant's arguments.

Contrary to the complainant's assertion, the mere sending of the letter to a member of parliament made its contents public, and consequently violates the obligations set out in Article 14. Furthermore, there is a firm line of precedent in the Tribunal's jurisprudence which establishes that an international civil servant's freedom of expression is not unlimited: the obligations set out in Articles 14 and 16 of the Service Regulations are an embodiment of proper limitations to freedom of expression. It points out that no reference is made to Article 20 in the President's impugned decision, so the complainant's argument regarding that article is no longer justified.

It denies that there was any flaw, procedural or otherwise, in the imposition of the disciplinary measure. The measure applied did not breach the principle of proportionality and the complainant's rights were respected during the disciplinary procedure. The analogy to Article 101.1 drawn by the complainant is misplaced: he bases it on the procedures to be followed for more severe disciplinary sanctions. His assertion that the disciplinary measure was based on "hidden grounds" is unfounded.

D. In his rejoinder the complainant refutes the EPO's statement that he did not pursue his claim to moral damages. He points out that it was indeed put forth in his appeal and that "claims originally put forward are maintained, unless the complainant explicitly drops them". Furthermore, he is not in a position to provide proof of what was or was not said during the Appeals Committee hearing because he has been denied access to the tape of the hearing.

He enlarges his claims to include a request that the Tribunal condemn the EPO for the "abuse of process" arising out of the refusal to provide him with the tape of the hearing or transcript and to order compensation of 5,000 guilders in moral damages in this regard.

E. In its surrejoinder the Organisation asserts that after having made a claim for moral damages in the letter lodging his internal appeal the complainant did not reiterate this claim in any other submissions. Nevertheless, it submits that since his main claim - to set aside the impugned decision - is unfounded, the claim for moral damages must be rejected by the Tribunal. It also points out that even the dissenting members of the Appeals Committee, who would have recommended in favour of the complainant's claim to the quashing of the decision, felt that there would be "no further justification for the payment of moral damages". As for the new claim to moral damages set out in his rejoinder, it is irreceivable and unfounded.

CONSIDERATIONS

1. The complainant, a Dutch citizen, addressed a letter dated 5 March 1998 to a member of the Dutch Parliament. On the same day the complainant transmitted to his Dutch colleagues, via the Office's internal electronic mail system (OV), the text of that letter.

2. At a hearing on the matter, which took place on 31 March 1998, the complainant was invited to explain his position in writing, and he did so.

3. By a letter of 8 April 1998, addressed to the two officials who had been present at the hearing, the complainant stated that it had never been his intention to create any tension or discontent between the Administrative Council and the Office. He concluded by expressing the belief that no grounds existed for statutory measures to be taken by the Office and hoped that the matter could be regarded as settled.

4. The President, in a letter dated 8 July 1998, imposed on the complainant the "mild disciplinary measure of a reprimand". He based the reprimand on the following grounds: that by sending the letter of 5 March 1998 the complainant had publicly discredited a national delegation of the Administrative Council by using information which was by no means substantiated; accordingly, he had not respected his general obligations as a staff member under Article 14(1) of the Service Regulations; he had ignored his duty to abstain from any act, and in particular, any public expression of opinion which may reflect on the dignity of his office, under Article 16(1); and that he had ignored his obligation to exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties, under Article 20.

5. The disciplinary action was taken by the President on the basis of Article 94(1) of the Service Regulations which authorises him to issue a written warning or a reprimand without consulting the Disciplinary Committee.

6. Following an appeal filed by the complainant on 2 October 1998, the majority of the Appeals Committee, in its opinion of 10 June 2000, recommended that the appeal be rejected as unfounded.

7. The salient points of this opinion are as follows:

(a) The reprimand was based on the fact that the complainant sent a letter to a member of the Dutch parliament which contained remarks which could cause discord in the EPO Administrative Council and tension between a national delegation on the Council and the Office; it was not, as the complainant insists, based on his transmittal of this letter to a number of his colleagues via an OV-note.

(b) By distributing this letter, the complainant failed to comply with Article 14(1) of the Service Regulations which requires that a permanent employee conduct himself solely with the interests of the EPO in mind; he also failed to comply with Article 16(1) of the Service Regulations which states that a permanent employee "shall abstain from any act and, in particular, any public expression of opinion which may reflect on the dignity of his office". The letter in question was a public expression of opinion which was not protected by freedom to express one's opinion as it contained discrediting statements which could have been detrimental to the Office's reputation.

(c) The choice of disciplinary measure lies within the proper exercise of discretion of the appointing authority; in this case, the President, in imposing a reprimand - a mild disciplinary measure - exercised such discretion correctly.

(d) The general procedural safeguards were observed even if the Disciplinary Committee was not consulted. These safeguards included the right for the complainant to be informed of the allegations against him, a reasonable period of time for him to prepare his defence, and the right to be heard.

(e) As regards the complainant's request to put his letter of 2 October 1998 in his personal file, it was assumed that the Office would proceed in accordance with Article 32(1) of the Service Regulations, which provides that the personal file contains all documents relating to a permanent employee's administrative position and any comments by him on such documents.

8. The President of the Office endorsed the recommendation of the Appeals Committee to dismiss the appeal as unfounded and in a letter of 18 July 2000 the complainant was so informed. This is the decision that the complainant impugns.

9. The complainant perceives his writing of the letter as a legitimate exercise of his freedom of expression.

In this connection, however, his position in the EPO as a patent examiner does not call for him to communicate with a member of his national parliament.

10. The EPO cannot be faulted for condemning this act as going beyond the boundaries of freedom of expression, for such a right of international civil servants cannot be regarded as being without limit. Indubitably, the complainant failed to comply with his obligations under Article 16(1) the Service Regulations to "abstain from any act and, in particular, any public expression of opinion which may reflect on the dignity of his office". He also failed to comply with the obligations under Article 14(1) of the Service Regulations to "carry out his duties and conduct himself solely with the interests of the European Patent Organisation ... in mind".

11. The complainant's remarks about a national delegation not only tend to cause embarrassment to the Office, but could also have led to tension in the Administrative Council contrary to the interests of the EPO.

12. In expressing his opinion regarding developments within the EPO to a member of parliament, the complainant seems to assume that it is the role of national parliaments to control the actions of international organisations. This betrays an attitude on the part of the complainant which undermines the independence of the international civil service of which he is part.

13. The complainant cannot exculpate himself from the consequences of his misconduct by acknowledging in his letter of 8 April 1998 that he may not have been fully aware of the fact that his actions failed to come up to the standards laid down in the Service Regulations, or that he did not intend either to discredit a member of the Administrative Council or to damage the reputation of the EPO. However, this statement was taken by the President of the Office as an apology and was thus a mitigating factor in the imposition on the complainant of a mild disciplinary measure, a reprimand.

14. When the measure takes the form of a reprimand, the Tribunal will exercise a limited power of review. It will not interfere "unless the measure was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts". (See Judgment 274, *in re* Connolly-Battisti No. 2, under 2.)

15. In this case, none of the above grounds was present and the President had the authority to impose the reprimand. Considering the evidence, he did not overstep the boundaries of his authority and there was no abuse of power.

16. The charge that the investigation procedure was flawed cannot be seriously entertained for the facts reveal that the complainant was informed in advance of the allegations against him and that consideration was being given to taking disciplinary action against him and that this could possibly extend to a reprimand. In the letter from the Principal Director of Personnel, the complainant was given the opportunity to be heard at a hearing and was informed of its date and venue. Furthermore, he was given ample time to prepare his defence, along with ten days after the hearing to submit his comments in writing. The time limits laid down in the Service Regulations for disciplinary proceedings were not applicable since the Disciplinary Committee was not involved in the case.

17. Since the principal claim fails, the subsidiary claim for moral damages also fails.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Mella Carroll

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.