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

NINETY-FIFTH SESSION

Judgment No. 2228

The Administrative Tribunal,

Considering the complaints filed by Mr F. B., Mr K.C. B. - his tenth - and Mr A. K. - his second - against the European Patent Organisation (EPO) on 18 January 2002 and corrected on 30 April, the EPO's single reply of 25 July, the complainants' rejoinder of 23 October 2002 and the Organisation's surrejoinder of 4 February 2003;

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

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

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

A. Facts related to this dispute appear in the Tribunal's Judgment 2039 delivered on 31 January 2001. At the European Patent Office, the secretariat of the EPO, staff are represented by the Staff Committee and by the Office's Staff Union (SUEPO). As explained in Judgment 2039, the Staff Committee on several occasions circulated documents via "Office Vision", the EPO's internal electronic mail system (hereinafter the "OV" system), on behalf of the Staff Union, which did not have access to the OV system. On 24 March 1998 the Vice-President in charge of Directorate-General 4 (DG4) decided to withdraw the Staff Committee's access to the system as from 30 March 1998.

In June 1998 several staff members lodged an appeal against that decision before the Appeals Committee. In view of the Office's lack of response, on 13 December 1999 one of them filed three complaints before the Tribunal, in his capacity as a staff member, as a member of the Staff Committee and as a member of the Staff Union, respectively. In Judgment 2039 the Tribunal dismissed the three complaints on the grounds that internal remedies had not been exhausted. Meanwhile, in November 2000 the Staff Committee's access to the OV system was restored.

In its opinion of 14 August 2001 the Appeals Committee, by a majority of its members and subject to reservations, recommended that the appeals be dismissed. In letters dated 2 November 2001, which constitute the impugned decisions, the Director of Conditions of Employment and Statutory Bodies informed the authors of the internal appeals that the President of the Office had decided to follow the Committee's majority recommendation, for the reasons stated in the Office's position paper as submitted in the proceedings leading to Judgment 2039.

B. As a preliminary remark, the complainants, noting that the original version of the Appeals Committee's report was drafted in German, express the view that in future the Committee's reports should be drafted in one of the official languages of the Tribunal, i.e. in either English or French.

The complainants, who emphasise that the dispute concerns the adaptation to modern communication techniques (internal e-mail and internet) of facilities granted to or withheld from staff representatives, have but one plea, namely the breach of their right to freedom of association and of one of its corollaries, freedom of expression.

They contend that the Staff Committee is altogether justified in conveying the Staff Union's position in its electronic messages, considering that the latter is denied messaging facilities by the Office. In this connection, they refer to Judgment 1547, which, in their view, went against the defendant because it had "illegally thwarted the

distribution of Union notices" and in which the Tribunal drew no distinction "between 'statutory' [staff] representation (the Staff Committee) and non-statutory representation (the Union)".

They contend that restricting the circulation of electronic messages to a maximum of 50 recipients, except where a special prior authorisation has been obtained, amounts to no more than disguised censorship, insofar as it has no technical justification.

They submit, lastly, that to withdraw the Staff Committee's access to the OV system is contrary to the principle of proportionality.

They ask the Tribunal to set aside the decision of 2 November 2001, to order the EPO to pay them compensation for the injury suffered, and to award them costs.

C. In its reply the EPO notes that under the terms of Article 14 of the European Patent Convention it has three official languages, namely English, French and German. It adds that no international organisation has any obligation to align its official languages on those of the Tribunal.

The EPO argues that, contrary to the complainants' view, the issue is that of how an organisation should react if it finds that a facility - in this case access to the OV system - made available to statutory staff representatives for the purpose of facilitating communications between local sections of the Staff Committee is misused, that is, used as a means of mass communication instead of as a working tool, for the benefit of a union which is not provided for in the Service Regulations. It points out that the Staff Committee, which has no assets of its own and whose operation depends entirely on the facilities made available by the Office, is elected by the staff, all of whom it represents, unlike the Staff Union, which has a separate legal personality and its own funds derived from the subscriptions of the members it represents.

According to the Organisation, the Staff Union was never authorised to use the OV system as a means of mass communication. It does now have its own internet site, however, and the possibility of setting up an intranet site is being considered. It also makes extensive use of traditional means of communication made available free of charge. The EPO points out that the Staff Committee had received three warnings before being notified of the precise date on which its access to the OV system would be withdrawn.

The EPO explains that the only solution to the technical problems arising from the mass distribution of Staff Union information, via the Staff Committee's access to the OV system, was to withdraw that access.

It contends that the reference to Judgment 1547 in this case is irrelevant, since that judgment concerned a departure from usage. Moreover, the judgment did not establish either that the facilities used by the Union should be the same as those made available to the Staff Committee, nor, *a fortiori*, that the latter facilities should be misused for the Union's benefit.

The Organisation rejects as groundless the complainants' accusation that the requirement of an authorisation to distribute electronic mail to more than 50 recipients is a disguised form of censorship. Experts consulted by the General Advisory Committee found that the restriction was due to purely technical reasons.

D. In their rejoinder the complainants point out that from 1988 to 1991 the Staff Union enjoyed unfettered access to the internal message system.

They contend that the real reason why the Administration refuses to allow staff representatives to use the OV system as a means of mass communication is not technical but political.

They reiterate that freedom of association and of expression have been breached: the availability of internet or intranet sites offers the Staff Union at best a passive means of communication, since the operation originates with the user; the defendant pretends to overlook the fact that the Office's attitude regarding the printing and distribution of documents produced by staff representatives has been challenged both internally and before the Tribunal; furthermore, the repeated warnings were part and parcel of the policy of depriving staff representatives as a whole of any modern means of mass communication.

They contend that there are no grounds for drawing a distinction between statutory staff representation and the Staff Union.

E. In its surrejoinder the EPO reiterates that the Staff Union was never authorised to use the OV system as a means of mass communication and contends that the complainants have not proved otherwise.

CONSIDERATIONS

1. In Communiqué No. 26, of 27 May 1998, the President of the Office informed all staff that the Staff Committee's access to the OV system, the EPO's internal electronic mail system, had been withdrawn as from 30 March 1998. In its Judgment 2039 delivered on 31 January 2001, the Tribunal dismissed three complaints filed by a staff member of the Office in his capacity as a permanent employee, a member of the Staff Committee and a member of the Staff Union, respectively, against the decision to withdraw the Committee's OV access. It concluded that the complainant had not exhausted all internal remedies since the Appeals Committee had not yet expressed an opinion, and that in any case it was far from certain that the Tribunal was "currently in possession of all the elements it would need to rule on the substantive issue of the dispute, namely how to adapt the facilities provided for union activities to modern communication technologies (internal electronic mail, Internet) without disrupting the work of the Organisation".

2. Since that judgment, the Appeals Committee has examined the case and issued an opinion dated 14 August 2001. The majority of its members recommended dismissing the appeals, taking the view that, even though the withdrawal of the Staff Committee's access to the OV system represented a serious encroachment upon the rights granted to the staff representatives, the President had simply been concerned to prevent the Staff Committee from providing support for the activities of the Union or performing the Union's duties. Subject to that interpretation, it considered that the impugned action did not involve any unlawful restriction on the information and communication channels open to the Staff Committee. In addition, a majority of the Appeals Committee expressed serious reservations regarding the Office's view that for technical reasons staff representatives should not be allowed to send electronic mail to more than 50 recipients. Such technical grounds did not, in its opinion, provide a sufficient justification for the restriction introduced by the EPO.

A minority of the Appeals Committee expressed a dissenting opinion, arguing essentially that the factual and legal basis for the disputed decision, as stated in the President's Communiqué No. 26 of 27 May 1998, no longer existed following the publication of Communiqué No. 47 regulating the use of e-mail systems and the internet, which has been in force since 13 August 1999.

3. In a letter dated 2 November 2001, the Director of Conditions of Employment and Statutory Bodies informed the authors of the internal appeals that the President of the Office had decided to follow the majority recommendation, not for the reasons given in the Appeals Committee's opinion but for those stated in the Office's position paper as submitted to the Tribunal in the proceedings leading to Judgment 2039.

4. In the present case, the complainants ask the Tribunal to set aside that final decision. The receivability of their complaints, which is obvious, is not challenged by the defendant, so that the Tribunal does not need to examine the arguments submitted in this respect by the complainants, who justified their cause of action on the grounds that, although the circumstances had changed since the time of the facts, and although "the parties [had] entered into a dialogue which had not proved entirely sterile", the Tribunal should "rule on the issue from the point of view of the principles involved".

5. The complainants submit a single plea, namely the breach of their right to freedom of association and one of its corollaries, freedom of expression. Before the merits of this plea are examined, it is worth ascertaining the scope of the dispute as submitted to the Appeals Committee and retracing the developments which have occurred since the facts that led to Judgment 2039.

6. The decision challenged by the complainants in their internal appeal appears in the letter of 24 March 1998 from the Vice-President in charge of DG4 informing the Chairman of the Central Staff Committee that the Staff Committee's access to the OV system would be withdrawn as from 30 March 1998. The author of the letter referred to previous correspondence concerning the use of the system by the Committee, in particular a letter of 4 March 1998 warning that any further abuse of the OV system would result in the Committee's disconnection from the system. He concluded by saying that he was prepared to restore the Committee's access to the OV system on the condition that all future use of the system complied with the terms on which access had originally been granted.

7. The content of this letter was further clarified and explained in Communiqué No. 26, addressed by the President to all staff, where he made it clear that, contrary to the Staff Committee's allegation, the decision to withdraw its OV access was in no way related to any policy of censorship, but was intended, following several warnings, to end the use made of the OV system by the Staff Committee and its local sections to distribute Union documents to all staff. And the Communiqué added: "The staff committees had however been granted the use of OV in their capacity as elected representatives of all staff and not to support the activities of the union, which is based on paying membership". The President pointed out that an offer had been made to restore the staff representatives' access to OV, provided that their OV addresses were not used to distribute Union texts. That proposal had been turned down by the Central Staff Committee. Since the Staff Committee had never been prevented from making whatever statements it wished or from distributing information, there had, in his view, been no infringement of the right to freedom of association, with the proviso that such a right did not oblige the employer to put its electronic mail services at the disposal of unions.

8. The dispute now before the Tribunal is confined to the issue of whether the decision of 24 March 1998 is legal, in the light of the explanations given in Communiqué No. 26, all arguments relating to subsequent developments being beyond the scope of the dispute. In determining the scope of the dispute, however, it is worth outlining the changes introduced in EPO regulations concerning the use of electronic mail since 1998.

9. In Communiqué No. 47 of 13 August 1999, the President published "Guidelines for using e-mail systems and the Internet", which had been approved by all the members of the General Advisory Committee. The purpose of those guidelines was to define the principles and procedures to be followed in connection with e-mail systems. Amongst other rules, the guidelines specify that "[u]nless otherwise authorised, the distribution of e-mail, notes and documents to more than 50 people is not allowed without prior submission to and authorisation by the local Helpdesk".

After these guidelines had been published, the Vice-President in charge of DG4 wrote to the Chairman of the Central Staff Committee on 29 October 1999 saying he considered that their approval by members of the General Advisory Committee appointed by the Staff Committee implied that staff representatives would in future comply with the new guidelines. He would see to it that staff representatives were again authorised to use the OV system.

As the Tribunal pointed out in Judgment 2039, the staff members knew from that letter that the Administration hoped that they would in future comply with the new guidelines and that acceptance thereof would lead them to abandon the claims made in the internal appeals, but it did not turn out that way. After several incidents, the Staff Committee's access to the OV system was restored in November 2000. Consideration was given to the possibility of connecting the Staff Union to the e-mail systems: it was then allowed certain facilities, which it considered inadequate, including the opening of an internet site.

10. While all the facts occurring after the impugned decision help to clarify a situation which is still evolving, they do not provide an answer to the only issue at stake, namely whether the EPO's decision to withdraw the Staff Committee's access to the OV system in March 1998 was legal or not. The complainants contend that by its action the Office breached their freedom of expression, which is a constituent element of the right to freedom of association. The Organisation argues, on the other hand, that the OV system is an internal work tool which is not designed for mass communication, on account of the technical difficulties that entails, and that the Staff Committee, a statutory body, ought not to have used the OV system for the purposes of the Staff Union, whose members include only those employees who have joined it and paid their membership fee.

11. The Tribunal has doubts regarding the relevance of the objection made on technical grounds to the Staff Committee's use of modern facilities to communicate with staff. According to Article 34 of the Service Regulations, the Staff Committee is responsible for representing the interests of the staff and maintaining "suitable contacts between the competent administrative authorities and the staff", which necessarily implies the availability of adequate means of communication within the Organisation of which it is a statutory body. Nevertheless, the incident mentioned by the EPO involving the mass distribution of a union report in March 2000 - for which the Committee indeed subsequently apologised - shows that some degree of control is necessary, without jeopardising the Staff Committee's freedom of expression and speech.

The Organisation puts forward another, much more weighty argument: the facilities offered to the Staff Committee cannot be made available to the Staff Union without creating confusion with regard to the attribution of roles and

responsibilities, even if those in charge of one of these bodies are also, or may be, in charge of the other. This does not mean to say that the unions should not be provided with certain facilities by the organisations. On the contrary, their freedom of expression should not be hampered, as indicated by the Tribunal in Judgment 1547, which precisely concerned the Office's Staff Union, and unions must clearly be provided with sufficient facilities, within the framework of negotiated agreements or, if need be, administrative regulations, to enable them to carry on their activities. It is legitimate, however, for the Organisation to ensure that the facilities made available to a body officially representing the staff as a whole are not misused for the benefit of a union, or any other body having its own assets and representing only part of the staff.

12. In view of the above, the EPO was within its powers in reminding the Staff Committee several times that it should cease making the facilities derived from its access to the OV system available to the Staff Union.

13. The complainants argue that in any case the defendant's reaction was disproportionate, since the decision to suspend the OV access was equivalent to an act of censorship and infringed the freedom of expression to which the Staff Committee was entitled. On this point, the defendant emphasises that after the warnings issued to the Staff Committee had remained without effect, the withdrawal of its access was the only way of ending the misuse of the facilities they had been granted. The defendant shows that the Staff Committee was not deprived of all means of communication, even though, as the complainants maintain, these alternative facilities were more limited and less satisfactory than electronic mail. The impugned action could not be regarded as a disciplinary measure and the fact that some staff members, including one of the complainants, received a letter dated 30 September 1999 expressing the dissatisfaction of the head of Administration of the EPO's Berlin sub-office, following the distribution of a communication from the Berlin section of the Staff Committee to all OV system users in Berlin, lies outside the dispute which gave rise to the internal appeal, as does the fact that the complainant concerned was allegedly denied an opportunity to consult the "staff representation" file. The EPO therefore committed no mistake of law by taking the impugned decision.

14. The Tribunal is aware that translation difficulties may arise in this case in view of the fact that the important opinion issued by the Appeals Committee was drafted in German. It can only recall, as it did in Judgment 2227 also adopted this day, that the Tribunal's two working languages are English and French, but that the EPO is perfectly entitled, as far as its own purposes are concerned, to use any of its three working languages, including German.

15. Since the impugned decision is not unlawful, the claims for compensation for the injury allegedly incurred by the complainants shall also be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 21 May 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.