

EIGHTY-NINTH SESSION

***In re Vollering* (Nos. 18 and 19)**

Judgment No. 1966

The Administrative Tribunal,

Considering the eighteenth complaint filed by Mr Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 29 April 1999 and his nineteenth complaint filed on 28 May and corrected on 21 June, the EPO's reply of 15 July to his eighteenth complaint and its reply of 23 September to his nineteenth complaint, the complainant's rejoinders of 14 October and the Organisation's surrejoinders of 17 December 1999;

Considering Article II, paragraph 5, 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. 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.

Following Judgment 1663 (*in re* Bousquet No. 2, Gourier and Vollering No. 11), the complainant and another staff member, Mr Philippe Gourier, organised a drink for the EPO staff on 16 July 1997 to celebrate the outcome of that judgment. The complainant wanted to invite the entire staff and on the morning of 11 July he drafted an invitation and sent it to the Information Systems Department (hereinafter "the Helpdesk") along with a request that it be distributed to the whole Office via "Office Vision" (OV), the EPO's internal electronic mail system. In the afternoon, the Helpdesk informed the complainant that it was unable to distribute his invitation via that system because it was outside its authority to do so. It suggested that he try to post his message on "EPOSCOPE", an internal on-screen information system located throughout the Office's premises in The Hague. He chose not to pursue that option. Later that afternoon the complainant handed in a letter to the President of the Office requesting that his invitation be delivered via the OV system to the whole Office, or alternatively just to the EPO staff at The Hague. He told the President that in the event that the invitation was not distributed by 15 July at 4 p.m. he would regard that as implied rejection of his request and his letter should be considered as lodging an internal appeal.

When the complainant's efforts to send the invitation via the OV system had failed, he contacted the internal mail distribution office on the afternoon of 15 July to ask how long it would take to have a printed version of the invitation delivered to EPO staff at The Hague. The person responsible for internal mail distribution told him that from a technical standpoint it could be done before noon the next day. However, later that afternoon the distribution office sent the complainant an e-mail saying that it would be unable to distribute the invitations because it was "not allowed to use the formal [EPO] services for private goals". The complainant received that e-mail early on 16 July and then handed in a letter to the President requesting that his invitations be delivered to the staff during that day. The letter also stated that in the event of his printed invitations not being distributed, he would regard that as implied rejection of his request and his letter should be considered as lodging an internal appeal.

In two letters dated 12 August 1997 the Director of Personnel Development informed the complainant that each of his requests were rejected and that his appeals had been referred to the Appeals Committee for an opinion, under the numbers 59/97 and 60/97. His appeals were heard on 26 June 1998. On 1 July the Committee asked the Administration for further information regarding the procedural rules governing use of the OV system and the internal mail distribution facilities. The Administration replied on 25 September 1998 that there were no written rules regarding the use of the OV internal electronic mail system, nor were there any local guidelines regarding internal mail distribution; the complainant's requests were without precedent. Nevertheless, it was within the

President's discretionary authority to deny the distribution of the complainant's invitation by the Office's systems.

In its report of 25 January 1999 the Appeals Committee recommended, by a majority, the rejection of his appeals. In a letter of 2 March 1999 the Director of Personnel Development informed the complainant that the President of the Office had rejected his appeals. That is the impugned decision.

B. The complainant contends that, since there were no rules or guidelines applicable to his requests, the refusal to distribute his invitation amounted to censorship and should be seen as an abuse of power. Furthermore, Article 30 of the Service Regulations recognises that permanent employees shall have the right to freedom of association so by not delivering his invitation this right was also breached. He provides numerous annexes consisting of both OV e-mails and internal mail which although they are unrelated to the official functions of the Office have nevertheless been distributed through the Office's internal systems. He argues that the content and intent of his invitation did not differ from those; therefore, he has been discriminated against. He claims that the President had "arbitrary motives" in denying his requests. Because he was unable to inform all the staff of his reception he had to throw away more than half of the food due to low attendance.

In each of the present complaints the complainant asks the Tribunal to (1) quash the President's decision of 2 March 1999 and order compensation of 20,000 guilders for the "moral and factual damage" suffered by him because of the refusal to distribute his invitations; (2) condemn the President for abuse of power because he censored the complainant's invitations, thereby abusing his right to freedom of association, and discriminated against him while using arbitrary motives; and order compensation to the complainant of 30,000 guilders for this abuse of power; and (3) order compensation of 10,000 guilders for costs.

In his eighteenth complaint he also asks the Tribunal to condemn the EPO for the bias shown by the majority opinion of the Appeals Committee and the resulting breach of due justice and to order compensation of 5,000 guilders for the moral injury suffered.

In his nineteenth complaint he further asks the Tribunal to condemn the EPO for the bias shown by the majority opinion of the Appeals Committee and/or the Committee's failure "to comply with its procedural rules prescribed by the Service Regulations" and for the resulting breach of due justice, and to award him 10,000 guilders by way of compensation. He also asks that the EPO be ordered to pay him 200 guilders for the loss he has suffered as the result of the Organisation's rendering his invitations "worthless".

C. In its reply to the eighteenth complaint the Organisation asserts that the President's refusal of the complainant's request was not based on a wish to impose censorship but on "the criterion of compliance with the Office's business activities and interests in general". It denies having hindered the complainant; in fact, the Helpdesk had presented him with an alternative which the complainant disregarded. Furthermore, the "Rules of Use" for the OV system clearly state that it "is only to be used for approved EPO business purposes". Circulation of the complainant's invitation would have blocked part of the system for "an entirely private purpose". As there is no "established right" to the circulation of private mail, the EPO has not discriminated against the complainant.

Moreover, the examples that he has provided of private e-mails that have been circulated constitute "more or less disputable exceptions" to the policy of not circulating e-mails that serve commercial or private interests. However, this was not so widespread as to give the complainant an expectation that his e-mail would be circulated as well. In addition, he is neither in the same legal nor factual situation as staff who sent the e-mails he refers to.

The complainant was neither acting as staff representative of an existing staff association nor attempting to create a new staff association, so the allegation of breach of his right to freedom of association is irrelevant. The right to association under Article 30 relates to staff associations, not private gatherings as is the issue in this case.

In its reply to the nineteenth complaint, the Organisation requests the joinder of the two complaints, arguing that they raise the same issues of fact and of law. In view of the lack of any substantive difference between the complaints the EPO refers the Tribunal to its comprehensive reply to the complainant's eighteenth complaint.

The EPO contends that the complainant has demonstrated "a vexatious and abusive manner of exercising his right to appeal" and therefore, in both complaints, requests the Tribunal to order that he bear his own costs, and if deemed appropriate, the costs of the Organisation.

D. In his rejoinders the complainant admits that the President has discretionary authority to refuse the circulation of

certain private mail, but says that in his case this refusal was unjust and not in the interest of the staff. He argues that due to the widespread use of electronic mail the staff has a "binding" expectation that all electronic mail will be delivered provided that it does not contain offensive information. He chose not to use "EPOSCOPE" because of its limited nature. He presses his other pleas.

E. In its surrejoinders the Organisation stresses that "the Office's information circulation facilities were set up exclusively to serve its business interests"; therefore, any non-business use must be limited. There is no "established right" to the circulation of private mail in the Office. It presses its counterclaims.

CONSIDERATIONS

1. The complainant, who has been an employee of the European Patent Office since 1 September 1982, is a patent examiner in Directorate-General 1 (DG1) at The Hague.

2. In Judgment 1663, delivered on 10 July 1997, the Tribunal decided to set aside the EPO's decision of 2 April 1996 regarding the adjustment of salary and to send the cases back to the Organisation for new decisions, as from 1 July 1992, in favour of the complainants, who included Mr Vollering. When he learnt of the judgment, he decided with a colleague to organise a drink for staff to celebrate what he considered to be a victory over his employer.

3. Consequently on 11 July 1997, he sent an invitation in the form of a note to the Information Systems Department for distribution to all the staff of the EPO through the Office's internal electronic mail system, called "Office Vision" (OV).

The Department refused to comply with the complainant's request and suggested that he post his message on "EPOSCOPE", an internal on-screen information system broadcasting continuous internal information on screens situated in various locations of the Office's premises in The Hague.

On the same day, the complainant wrote to the President of the Office reiterating his request that his invitation be distributed to all the Office's staff (or, failing that, to the staff serving in The Hague) through the internal electronic mail system. In the event that his request was not met, he asked for his letter to be considered as lodging an internal appeal.

In a letter dated 12 August 1997, the Director of Personnel Development informed him that his request could not be met and that his internal appeal would be referred to the Appeals Committee for an opinion under the number 59/97.

4. On 15 July, the complainant also delivered 1,900 printed invitations to the internal mail distribution office at The Hague requesting their distribution to all the staff serving in The Hague. The distribution office refused on the grounds that it was not allowed to use formal Office services for private matters.

On 16 July, the complainant once again wrote to the President renewing his request for the distribution of his invitations to the staff serving in The Hague. In the event that his request was not met, he asked for his letter to be considered as lodging an internal appeal.

By a letter of 12 August, the Director of Personnel Development informed the complainant that his appeal would be referred to the Appeals Committee under the number 60/97.

5. The Appeals Committee reported on 25 January 1999. It recommended, by a majority, the rejection of his appeals numbered 59/97 and 60/97.

On 2 March, the complainant was informed that the President of the Office had decided to follow the majority opinion of the Appeals Committee and had therefore rejected his internal appeals. It is this decision of 2 March 1999 which is challenged in the complaints filed on 29 April and 28 May 1999, respectively.

6. The EPO requests the joinder of the two cases. Since the complaints are identical in fact and in law, they are therefore joined to form the subject of a single judgment.

7. The complainant contends that the censorship exercised against him constitutes abuse of authority. He alleges a

violation of freedom of association, and says he was the victim of discrimination and that arbitrary motives were invoked for refusing him the use of the Office's information facilities. He also says that there was breach of his right to have information distributed through the Office's services.

8. The EPO has produced a document dated September 1995 containing the "Rules of Use" of the "Office Vision" electronic mail system which indicates that the system "is only to be used for approved EPO business purposes".

The guidelines for the handling of mail at the EPO, published on 29 August 1994, state that staff should not have private correspondence sent to them at the EPO and that private mail cannot be posted at the Office's expense.

9. However, notwithstanding these rules and guidelines, which clearly indicate that the use of Office facilities in this context should be limited to business purposes, it should be recalled that Judgment 1547 (*in re* Baillet and others), delivered on 11 July 1996, noted that the EPO had "admitted to the Appeals Committee that its consistent practice since 1992 had been to distribute any unsealed unofficial internal mail, whether private or not, save any text containing a personal attack on someone".

10. However, even if this practice could be considered as creating an obligation upon the Office, it should be emphasised that such an obligation could involve limits relating, for example, to the content, nature and purpose of the mail that it is requested to distribute.

11. In the present case, the Appeals Committee rightly found that the scale of the operation and the costs that it could imply for the EPO fully justified the refusal of the complainant's request.

If account is also taken of the wording of the invitation and the purpose of the event to which the staff were invited, which is somewhat provocative towards the EPO, whose defeat it was intended to celebrate, it may be deduced that the EPO was justified in taking the impugned decision and that its reasons for doing so cannot be said to be arbitrary.

12. It follows from the above, and from the dossier that EPO staff members do not enjoy an absolute right to have information or documents of any type distributed through the Office's facilities.

13. On the issue of alleged discrimination against the complainant, the latter does not produce proof that in like conditions and circumstances the facilities which he was refused had been granted to any other staff member of the EPO.

14. The Tribunal finds that there was no breach of freedom of association in the present case.

15. The complaints must therefore fail, although the Tribunal sees no reason to order the complainant to pay costs.

DECISION

For the above reasons,

1. The complaints are dismissed.
2. The EPO's counterclaims are dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.