

NINETY-SIXTH SESSION

Judgment No. 2280

The Administrative Tribunal,

Considering the second complaint filed by Mr K. M. against the European Patent Organisation (EPO) on 9 September 2002 and corrected on 12 December 2002, the Organisation's reply of 24 March 2003, the complainant's rejoinder of 25 June and the EPO's surrejoinder of 2 October 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 neither party has applied;

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

A. Article 28 of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO, is entitled "Assistance by the Organisation". Paragraphs 1 and 2 read as follows:

"(1) If, by reason of his office or duties, any permanent employee [...] or any member of his family living in his household is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act.

(2) If a permanent employee [...] suffers injury by reason of his office or duties, the Organisation shall compensate him in so far as he has not wilfully or through serious negligence himself provoked the injury, and has been unable to obtain full redress."

The complainant, a Croatian national, was born in 1943. In 1969 he joined the International Patent Institute, which was integrated into the EPO on 1 January 1978, as examiner. He is currently assigned, at grade A4, to the Office's Directorate-General 1 (DG1) at The Hague, in the Netherlands.

At the time of the material facts, the complainant owned a car purchased in Belgium and bearing Belgian export registration plates. In the course of travelling within the Netherlands, the Dutch customs authorities asked him several times to pay the tax on private cars and motorcycles, referred to hereinafter as "the BPM" (*Belasting van personenauto's en motorrijwielen*). The BPM is payable by residents of the Netherlands only.

By a letter dated 26 November 1998 the complainant informed the Principal Director of Administration that he intended to take legal action against the Dutch customs authorities. He asserted that his residence was in Zagreb, in Croatia, and that he spent more than 180 days a year outside the territory of the Netherlands. In accordance with Article 28 of the Service Regulations, he requested legal and financial assistance from the Organisation. The Principal Director replied on 2 December 1998 that his place of residence was Rijswijk and that the provisions of Article 28 did not apply since in this case it was a private matter.

The complainant then brought his case before the Dutch courts. In a judgment delivered on 22 October 1999, the Court of Appeal in Amsterdam held that the complainant was not ordinarily resident in the Netherlands and that he therefore satisfied the conditions for BPM exemption. The Court awarded him 1,420 guilders in costs.

By letter of 14 March 2000 the complainant sent the President of the Office a copy of this ruling and accused the Organisation of having failed in its duty of assistance for the six years during which he had been "harassed" by the Dutch authorities. He contended that the provisions of Article 11 of the Protocol on privileges and immunities of

the EPO, according to which "[t]he Contracting States shall take all appropriate measures to facilitate the [...] stay [...] of the employees of the European Patent Office", had been breached. He alleged that as a permanent employee he had suffered material and moral injury and, relying on Article 28 of the Service Regulations, claimed reimbursement of the costs he had incurred during the court proceedings. To that end he enclosed his lawyer's fee invoices with his request. The President replied on 27 March that the case did not concern immunities and privileges of the Organisation and that the complainant had not suffered any injury by reason of his office or duties.

On 8 June 2000 the complainant appealed to the President against that decision which denied him the compensation he sought. The Appeals Committee, to which the matter was referred, gave its opinion on 22 May 2002. It unanimously recommended that the appeal be dismissed, on the grounds that the complainant was liable to pay the BPM tax and that the conditions for entitlement to compensation under Article 28(2) were not satisfied. By a letter of 17 June 2002, which constitutes the impugned decision, the Principal Director of Personnel informed the complainant that, in accordance with the Committee's opinion, the President had decided to dismiss his appeal.

B. The complainant contends that the EPO violated the provisions of Article 28 by refusing to assist him in December 1998 and then denying him compensation in March 2000. He holds the Organisation responsible for the material injury he suffered.

Arguing that his case is a direct consequence of his status as an international civil servant, the complainant denies that it is a private matter. Citing Judgment 2032, he maintains that the EPO failed in its duty of care since, even if it deemed the case to be a private matter, it should have assisted him by informing the customs authorities that he was not resident in the Netherlands. Since this point was duly established in the Court of Appeal's ruling, the Organisation was obliged to reimburse him the costs not covered by the compensation he was awarded in the judgment. The complainant accuses the Organisation of having disregarded the principle of *res judicata* by challenging the judgment of the Court; in his view, he was not liable to pay the BPM and by virtue of his diplomatic status he was exempted from paying a municipal tax.

Lastly, the complainant accuses the Organisation of abuse of authority, on the grounds that it colluded with the customs authorities "against the independent exercise of the international civil service".

He requests that the Tribunal set aside the decision of 17 June 2002, grant him full consequent relief and award him costs.

C. In its reply the Organisation explains that the complainant's car is intended exclusively for private use. His dispute with the Dutch customs authorities, which is unrelated to his official duties, is therefore undeniably of a private nature. Furthermore, no exemption from the BPM on private cars of permanent employees is provided for either in the Agreement between the EPO and the Kingdom of the Netherlands or in the Protocol on privileges and immunities of the Organisation. It adds that the complainant lost the benefits related to diplomatic status when the International Patent Institute was absorbed by the EPO.

The Organisation considers that it complied fully with its commitments under the Protocol, the above-mentioned Agreement and the Service Regulations. It had no obligation to assist the complainant as the conditions stipulated in Article 28(1) were not met. Since the costs incurred by the complainant during the court proceedings did not constitute injury "by reason of his office or duties", in the meaning of Article 28(2), the EPO maintains that it had no obligation to compensate him. In concluding that the complainant was entitled to exemption from the BPM, the Court of Appeal based itself on "false premises" supplied by the complainant and not checked with the defendant; the EPO mainly contests the fact that the complainant does not reside in the Netherlands. As he gave false information, the Organisation accuses him of having failed in his obligation to abstain from any act which might compromise the dignity of his office.

Lastly, the EPO argues that the prime condition for compensation, that is, unlawful action on its part, is not in this case fulfilled. Since it has committed no error, the accusations of abuse of authority and collusion with the customs authorities are unfounded.

D. In his rejoinder the complainant seeks to demonstrate his non-resident status and his enjoyment of diplomatic privileges and immunities. He argues that it is well-established practice in all states of the European Union that persons enjoying such privileges and immunities are exempted from paying the car registration tax. He considers

that the dignity of his office was never affected and requests that the EPO withdraw the defamatory accusations it made in its reply.

E. In its surrejoinder the defendant Organisation replies that it sees no reason to withdraw the alleged defamatory comments since all it did was to pinpoint and rectify the errors made by the complainant in his submissions. In other respects, it maintains the same arguments.

CONSIDERATIONS

1. The complainant, a permanent employee of the EPO posted in The Hague, bought a car in Belgium and imported it into the Netherlands.

As the Dutch customs authorities asked him to pay the BPM tax, in a letter of 26 November 1998 he requested legal and financial assistance from the defendant Organisation, referring to Article 28 of the Service Regulations. His request was rejected on 2 December 1998.

2. The complainant brought his dispute with the customs authorities before the Dutch courts. In a judgment delivered on 22 October 1999, the Court of Appeal in Amsterdam held that it could not be said that the complainant was ordinarily resident in the Netherlands and that he should therefore be considered exempt from the BPM.

3. On 14 March 2000 the complainant asked the President of the Office to ensure that the Organisation would reimburse the costs he had incurred in the court proceedings, in accordance with Articles 28 and 106 of the Service Regulations. When that request was rejected, the complainant lodged an internal appeal, which the Appeals Committee then recommended dismissing in its opinion of 22 May 2002. On 17 June the Principal Director of Personnel informed the complainant that the President had decided to reject his internal appeal. That is the impugned decision.

4. The complainant requests that the Tribunal set aside the decision of 17 June 2002, grant full consequent relief and award him costs.

He contends that the impugned decision is unlawful insofar as the EPO breached the provisions of Article 28 of the Service Regulations on two occasions and failed in its duty of care for its permanent employees. He also maintains that the defendant committed an abuse of authority.

5. Article 28, entitled "Assistance by the Organisation" and referred to by the complainant in his internal appeal, reads in part as follows:

"(1) If, by reason of his office or duties, any permanent employee [...] or any member of his family living in his household is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act.

(2) If a permanent employee [...] suffers injury by reason of his office or duties, the Organisation shall compensate him in so far as he has not wilfully or through serious negligence himself provoked the injury, and has been unable to obtain full redress."

6. The complainant maintains that the defendant Organisation's refusal to reimburse the costs he incurred in the proceedings before the Dutch courts constitutes a breach of its duty of assistance. That duty, which is expressly provided for by the Service Regulations in the case of injury caused to a permanent employee by reason of his office or duties, should be seen, according to the complainant, within a broader framework and is reflected more generally in what is termed as the Organisation's duty of care for its permanent employees.

The question then arises of whether the complainant was in a situation which entitled him to compensation under Article 28(2) of the Service Regulations.

7. In the circumstances, the Organisation denies that the complainant should be exempted from the BPM. Since he had not been subjected to any insult, threat, defamation or attack, it argues that it owed him neither assistance nor the reimbursement of the costs incurred in his court proceedings, notwithstanding the ruling of the Court of Appeal

in Amsterdam.

It is the Tribunal's view that the Organisation adopted this position in good faith. By no means is it established that the complainant suffered injury by reason of his office or duties. As noted by the EPO, the fact that the complainant resides in the Netherlands to work there for the Organisation is not connected with his personal decision to import a car from Belgium for his private use rather than purchase one in the Netherlands. It was because of that importation that he incurred costs in obtaining the recognition by the Dutch courts of a tax exemption which the EPO considered in good faith that he was not entitled to, based on his status and the provisions of both the Agreement with the Netherlands and the Protocol on privileges and immunities of the EPO. There is no clause in the Service Regulations or in the above-mentioned instruments to indicate that the complainant should be exempted from paying the BPM tax by reason of his office. Article 14 of the Protocol on privileges and immunities of the EPO in particular does not include exemption from that tax among the privileges enjoyed by staff members of the Office, who in fact, contrary to the view held by the complainant, do not enjoy diplomatic status. Under Article 13 of that Protocol, only the President of the Office enjoys the privileges and immunities to which diplomatic staff are entitled in accordance with the Vienna Convention on Diplomatic Relations of 18 April 1961.

8. The complainant contends that the Organisation has disregarded the principle of *res judicata* by challenging the ruling of the Court of Appeal in Amsterdam.

The Tribunal considers that in this case the issue of *res judicata* does not arise. The only issue before the Tribunal is whether, in the light of the rules applicable to the permanent employees of the Organisation, the latter could legally refuse the requested compensation. It may be pointed out that, according to Article 23 of the Service Regulations, a "permanent employee shall reside [...] in the place where he is employed". Since the complainant works full-time exclusively in The Hague, the EPO could not recognise his place of residence as being outside the Netherlands, even though, in breach of the Service Regulations, he might have taken up residence elsewhere.

The Organisation therefore cannot be blamed for not assisting the complainant in his dispute with the Dutch authorities or for refusing to pay the compensation requested on the basis of Article 28(2) of the Service Regulations.

9. With regard to the alleged breach of the duty of care, the Tribunal, in the light of the above arguments, finds this plea unfounded.

10. The plea of abuse of authority must likewise fail. The complainant shows no evidence in support of his accusations, or regarding the alleged collusion between the EPO's administration and the Dutch customs authorities.

In view of the foregoing considerations, the complaint must be dismissed.

11. The complainant contends that the EPO made defamatory accusations against him which, in his view, constitute a slur on his reputation. He asks the EPO to withdraw them, while reserving the right to claim damages in the event of a refusal.

The Organisation considers this request to be unfounded.

The Tribunal will not rule on the request for withdrawal, which is formally addressed to the defendant and has not been submitted as a claim before the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 November 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 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.