

NINETY-FIRST SESSION

In re Bousquet (No. 8)

Judgment No. 2068

The Administrative Tribunal,

Considering the eighth complaint filed by Mr Karl Bousquet against the European Patent Organisation (EPO) on 4 February 2000 and corrected on 9 March, the EPO's reply of 26 May, the complainant's rejoinder of 29 September and the Organisation's surrejoinder of 21 December 2000;

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 Frenchman who was born in 1952, is an examiner at the Berlin sub-office of the European Patent Office, the EPO's secretariat, and a staff representative. In 1996, he and several colleagues in Berlin, The Hague and Munich filed internal appeals in the course of a wage dispute (see Judgments 1931, *in re* Baillet No. 3, and 1932, *in re* Vollering No. 17). The Appeals Committee decided to examine the appeals (all registered as RI/33/96) at its sessions of October 1997 in Berlin and June 1998 in The Hague. On 22 September 1997 the complainant informed the Appeals Committee that he wished to be heard and would be accompanied by another appellant, Mr Jean-Jacques Criqui, who serves at The Hague.

On 9 October 1997 Mr Criqui submitted to the Administration, through the chairman of the Staff Committee, a duty travel request so that he could go to Berlin on 15 October in order to assist the complainant at his hearings. Travel orders are issued for officials deemed to be travelling on EPO business. The expenses incurred are covered by the Office within the limits set in the Service Regulations for Permanent Employees of the European Patent Office. The request was refused on 10 October. The same day the complainant wrote to the Principal Director of Administration referring to the refusal and asking "officially for the second time" to be assisted by Mr Criqui. He asked the Director to reconsider the position taken by the Administration or else to treat his letter as a notice of appeal. The Director rejected the request in a letter of 13 October. On 14 October Mr Criqui again submitted his travel request and attached the complainant's letter of 10 October. That request was also rejected (see Judgment 2069, *in re* Criqui No. 4, delivered this day). Mr Criqui was present at the hearings, which were held on 15 October.

On 18 October 1997 the Director of Personnel Development informed the complainant of the referral of his appeal to the Appeals Committee with the reference RI/82/97. After hearing the complainant, who was once again assisted by Mr Criqui, the Appeals Committee unanimously recommended in its opinion of 18 October 1999, sent to the complainant on 22 October, to reject the appeal. By a letter of 4 November 1999, the Director of Personnel Development informed the complainant that the President of the Office had decided to reject his appeal.

B. In support of his complaint, the complainant cites Article 113(3) of the Service Regulations, which provides that:

"The appellant has the right to be heard. He may be represented or assisted by any person of his choice".

However, Article 113(7), indicates that:

"Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person

chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

But, the complainant argues, it is plain from the wording that the intent of the provision is to limit the costs incurred in appeal procedures, and particularly to curb the heavy expenditure on enlisting assistance from outside the Office. In this case, the costs were kept to a minimum, since he enlisted the assistance of an employee of the Office who was paid no fees. Furthermore, Mr Criqui was the only person sufficiently versed in the subject to be able to assist him. The choice of venue of the Appeals Committee's session was not his and he cannot be held responsible for the geographical dispersion of the Office. Consequently, it was not he who incurred the costs and Article 113(7) does not apply. He submitted the travel request in good faith: the Organisation's practice has always been to meet assistance costs, such as air tickets, hotel expenses and leave. He contends that the discretion allowed the appointing authority gives rise to uncertainty in law.

The complainant seeks the quashing of the President's final decision, repayment of the expenditure on Mr Criqui's assistance, and compensation to Mr Criqui for the day's leave that he had to take. He also claims 2,000 German marks in moral damages, and costs.

C. The EPO replies that the complaint is irreceivable. For one thing the complainant did not have to pay Mr Criqui's travel expenses, as they were reimbursed by the Staff Union and for another, he may not submit claims on someone else's behalf.

In subsidiary pleas, the EPO submits that by refusing the duty travel request it acted in accordance with the rule set in Article 113(7) of the Service Regulations. The circumstances did not warrant a waiver of that rule, since the Appeals Committee was to hear internal appeals RI/33/96 in both Berlin and The Hague. Mr Criqui's silence at the hearings in Berlin suggests that the purpose of his attendance was not so much to assist the complainant, who is an expert in pay matters, as to prepare himself for the hearings in The Hague. The EPO adds that Mr Criqui could have deducted the time devoted to assisting the complainant from the quota allowed him for staff representation duties. The EPO challenges the complainant's narrow interpretation of Article 113(7). It has never been the EPO's practice to reimburse assistance expenses automatically. The complainant's case is not comparable to those in which it agreed to reimburse expenses, because the Appeals Committee chose a venue other than his duty station. So there was no breach of equal treatment.

Deeming the complaint to be clearly vexatious, the EPO requests the Tribunal to award all costs against the complainant.

D. In his rejoinder the complainant recalls that by a letter of 25 June 2000 he sought a joinder of this complaint with Mr Criqui's fourth complaint.

He contends that it was the Office and the Chairman of the Appeals Committee who grouped together his appeal and those filed by employees in Berlin, The Hague and Munich and who decided to hold hearings in different places. The costs were therefore incurred by the Office and Article 113(7) does not apply. He explains that the payment made by the Staff Union was only an advance and a token of its support for him, not an obligation. He requests reimbursement of the expenses so that he in turn can repay the Staff Union. In his view, challenging as they did "the fundamental principles and guarantees of the rights of employees", appeals RI/33/96 were exceptional and warranted the reimbursement of expenses. He submits that his so-called expertise in pay matters does not impinge upon his right to be assisted. He refutes the Organisation's argument that Mr Criqui could have deducted his day's leave from the time allotted to staff union representation. That time may be used only for official union duties, which do not cover the case in point. Besides, Mr Criqui was no longer a staff representative. Lastly, the EPO adduces no evidence for its allegations concerning the real reason for Mr Criqui's attendance at the hearings in Berlin.

E. In its surrejoinder the EPO observes that, since he was heard by the Appeals Committee at his own duty station, the fact that the Office comprises several duty stations caused the complainant no injury. The presence of Mr Criqui in Berlin was the result of the complainant's own personal choice, so the latter must assume the financial consequences. The Appeals Committee grouped together the appeals filed by employees in the same duty station in order to rationalise procedure. The EPO points to the contradictions between the complainant's statements and those of Mr Criqui in his fourth complaint concerning the capacity in which the latter travelled to Berlin. It maintains that, even though Mr Criqui was no longer a member of the Staff Committee he could act at its request

and use part of the time allocated to staff representation. It denies that the appeals challenged "the fundamental principles and guarantees of the rights of employees"; on the contrary, in view of what the appellants had obtained, they were vexatious.

CONSIDERATIONS

1. The complainant serves the EPO at its Berlin sub-office as an examiner.

In 1996 he and several colleagues serving in Berlin, The Hague, and Munich lodged appeals against a decision concerning a wage dispute. Since they pursued the same claims, the appeals were registered together as RI/33/96 and forwarded to the Appeals Committee which decided to hear them at two sittings, one to be held on 15 October 1997 in Berlin and the other, on 24 June 1998 in The Hague.

The complainant, who was to be heard in Berlin, sought the assistance of Mr Criqui, a colleague serving in The Hague. On 9 October 1997 the latter filed a duty travel request through the Staff Committee so that he could go to Berlin for that purpose.

Mr Criqui's request having been refused on 10 October, the complainant wrote to the Principal Director of Administration on the same day asking the Administration to reconsider its refusal and reiterating his request for Mr Criqui's assistance. He specified that if the travel request was rejected, his letter was to be treated as a notice of appeal.

The Principal Director of Administration turned down the complainant's request. On 18 October 1997 the Director of Personnel Development informed the complainant that his appeal, registered as RI/82/97, had been referred to the Appeals Committee.

Appeals RI/33/96 concerning the wage dispute were dismissed, after the Appeals Committee's opinion found against the appellants. The Committee's opinion on these appeals contained no recommendation that the Organisation should bear the complainant's costs notwithstanding that he had already filed his appeal against the rejection of the travel request.

On 18 October 1999 the Committee unanimously recommended rejecting appeal RI/82/97 as devoid of merit. By a letter of 4 November 1999 the Director of Personnel Development informed the complainant that, on the Committee's recommendation, the President had decided to reject his appeal. That is the decision he is now challenging.

2. The complainant is asking the Tribunal to quash the impugned decision and to award him full redress in law, and in particular to order the Organisation:

- to reimburse the amounts spent (air ticket, airport transfers, hotel expenses) on Mr Criqui's assistance;
- to grant Mr Criqui an additional day's leave or payment in lieu, to compensate for the day's leave he had to take to assist the complainant;
- to award him 2,000 German marks in moral damages;
- to pay his costs.

3. The complainant asks the Tribunal to join this complaint with Mr Criqui's fourth.

For the reasons set out in Judgment 2069 (*in re* Criqui No. 4) delivered this day, the Tribunal sees no need to allow that request.

4. The complainant considers that Article 113(3) of the Service Regulations establishes a very important principle by allowing appellants to be represented by the person of their choice before the Appeals Committee. In his submission, paragraph 7 of the same article, which constitutes the Organisation's sole basis in law for rejecting his claim to reimbursement, was adopted for the purpose of limiting the costs of appeals and in particular to cut back

excessive expenditure on outside assistance. Consequently, the rule does not apply to him because he chose the only person well versed enough in the issues raised by appeals RI/33/96 to assist him. It so happened that that person served in The Hague.

He concludes that, since he did not choose the venue for the hearings and is not to blame for the Office's geographical dispersion, it was not he who incurred the costs.

He adds that he kept expenditure to a minimum by choosing someone from the Office, so avoiding lawyer's fees. Expenditure was thus much the same as it would have been had his hearings been in The Hague, since according to practice the Office would have borne the cost of his travel (air ticket, airport transfers, hotel expenses) and of a day's leave for his assistant.

5. The Organisation is asking the Tribunal to dismiss the complaint as clearly irreceivable or, failing that, as totally devoid of merit. On the latter point it endorses the Appeals Committee's unanimous opinion that Article 113(7) allows the Organisation to bear appeal costs only in exceptional cases; and that since in this case the reason for having two venues was to enable all appellants to be heard at their own duty stations, there can be no objection to the Administration's refusal to pay for the assistant chosen by the complainant under Article 113(3) to travel from The Hague (duty station) to Berlin (venue of the hearings).

6. Article 113(3) says:

"The appellant has the right to be heard. He may be represented or assisted by any person of his choice."

and Article 113(7) provides that:

"Any costs incurred by the appellant in the course of the appeal proceedings, in particular fees payable to a person chosen from outside the Organisation to represent or assist him, shall be borne by him, unless the appointing authority acting on a recommendation of the Appeals Committee decides otherwise."

7. It is plain from the rules cited above that the complainant had the right to be assisted by any person of his choice at the hearings of the Appeals Committee, wherever it sat.

He asserted that right by enlisting the assistance of a colleague serving at The Hague. That involved his assistant in a journey to Berlin, which raised the problem of who was to bear the costs incurred pursuant to Article 113(7) of the Staff Regulations. Contrary to what the complainant believes, that article does not apply only when assistance is sought outside the Organisation. It lays down the rule that all costs incurred by an appellant in the course of appeal proceedings will be borne by him, unless the appointing authority decides otherwise on a recommendation from the Appeals Committee.

8. It is plain on the evidence that it was the complainant who incurred costs in the internal procedure, since he saw fit to enlist the assistance of an official who had to travel from his duty station in order to attend the Appeals Committee's hearings in Berlin. He was free to choose someone who did not need to travel to another duty station and thus avoid costs, particularly as the person he chose was to be heard at The Hague, and so could have spoken for the complainant at his own hearings, since all the appeals pursued the same claims.

The only issue remaining is whether the complainant is entitled to reimbursement of the costs incurred.

9. The Tribunal may quash the Office's decision only if it shows breach of the rules governing payment of expenses or of relevant general principles of law.

10. First, his claim to an additional day's leave for Mr Criqui cannot succeed. It is not for the complainant, but for Mr Criqui himself, to submit such a claim, which indeed he has, in the complaint ruled on in Judgment 2069.

11. In support of its refusal to bear the costs, the EPO submits - and the complainant does not demur - that he made no claim to reimbursement in appeal RI/33/96 and that Mr Criqui's travel costs were covered by the Staff Union.

12. The evidence shows that during the appeal, though deploring the EPO's denial of a duty travel request for his assistant, the complainant submitted no formal travel claim, so the Appeals Committee made no recommendation on the matter to the appointing authority in its report on appeals RI/33/96.

In the Tribunal's view that fact affords no grounds for declaring his later claim to repayment irreceivable.

In examining appeal RI/82/97 the Committee found that the separate claim to reimbursement of costs was receivable because if the Office had taken a separate decision about the repayment of costs it could be subject to challenge; and it is right on that score.

Accordingly, even though the complainant submitted no such claim in the context of appeals RI/33/96, the fact that the Administration rejected his later claim to payment by a separate decision entitled him to file an appeal claiming repayment of the costs incurred, despite their having been covered by the Staff Union.

13. Nonetheless, the President's decision was taken within the bounds of his discretion and shows no such breach of the Organisation's rules or of general principles as to warrant setting it aside.

The complainant's claim to reimbursement cannot be justified by any exceptional circumstances. The cases he cites in asserting that it is the Organisation's practice to cover travel costs are not the same as the case at bar and, therefore, afford no relevant grounds for the quashing of the impugned decision, particularly as Article 113(7) provides that the Organisation bears such costs only in exceptional instances, to be determined on a case-by-case basis upon recommendation of the Appeals Committee.

The conclusion is that the complaint must be dismissed.

14. The Organisation asks the Tribunal to award all costs against the complainant on the grounds that the complaint is vexatious.

The Tribunal is satisfied that the complaint is not vexatious and so disallows the counterclaim.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The Organisation's counterclaim is also dismissed.

In witness of this judgment, adopted on 9 May 2001, 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 12 July 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet