

NINETY-NINTH SESSION

Judgment No. 2443

The Administrative Tribunal,

Considering the complaint filed by Mr T.K. against the European Patent Organisation (EPO) on 17 November 2003 and corrected on 29 December 2003;

Considering the two letters dated 20 January 2004 and 23 January 2004, in the first of which the Organisation applies for a stay of proceedings until such time as the President of the European Patent Office, the secretariat of the EPO, takes a final decision, in the light of the forthcoming opinion of the Appeals Committee, and in the second of which it asks that the present case be joined with that of another permanent employee of the Office, Mr S. (see Judgment 2444 also delivered this day), the comments on these two letters submitted by the complainant on 25 February and the Registrar's letters to the parties, dated 1 March, informing them that the President of the Tribunal had granted a stay of proceedings until 31 May 2004;

Considering the Organisation's reply of 29 June 2004, the complainant's rejoinder of 26 August, the EPO's surrejoinder of 29 November and its further statement of 14 December 2004, the complainant's comments of 19 January 2005 on the defendant's surrejoinder and on its further statement and the EPO's final comments of 25 February 2005;

Considering Articles II, paragraph 5, and VII 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. The complainant, a German national born in 1959, joined the Office in 1991 and is serving in The Hague. The Dutch law of 21 December 2000, which entered into force on 1 April 2001, amended the Civil Code of the Netherlands to allow same-sex marriages. On 7 May 2001 the complainant applied for four days' special leave for his marriage without mentioning that it would be a same-sex marriage. The request was approved on 21 May. On 16 June he wrote to the Vice-President in charge of Administration (Directorate-General 4, hereinafter "DG4") asking whether the EPO acknowledged "Dutch legal marriages". The Principal Director of Administration replied on 4 July that only marriages between people of different sex were recognised as marriage within the meaning of the Service Regulations for Permanent Employees of the Office.

The complainant was married on 7 September 2001. By an e-mail dated 12 September he asked the Organisation to record his new status and to draw the consequences under the Service Regulations. On 13 September the Director of Personnel replied that, since the Office did not recognise marriages between persons of the same sex, his status under the Service Regulations remained unchanged and the four days' special leave he had been granted would be deducted from his annual leave. In a letter of 26 November 2001 the complainant asked the President of the Office to reverse that decision or to consider his letter as lodging an internal appeal. The Head of the Department of Employment Law replied on 21 January 2002 that the President considered that the relevant rules had been correctly applied and he had, therefore, referred the matter to the Appeals Committee.

On 28 November 2002 the Central Staff Committee declared that it supported recognition of same-sex marriages and, in support of its position, sent the President of the Office the opinion of a professor of law concerning the status of staff members of the Office married to a person of the same sex under Dutch law. On 2 May 2003 the Principal Director of Legal Services notified the Chairman of the Appeals Committee that, further to the submission of that opinion, the Administration had likewise decided to commission a legal opinion from an outside expert. In a letter to the Chairman of the Appeals Committee dated 20 May, the complainant's counsel – also acting on behalf of Mr S., another staff member in a similar situation – accused the Administration of deliberately delaying the appeal procedure and informed him that, if a hearing was not convened within a reasonable time limit, his clients would have no alternative but to submit the appeal directly to the Tribunal. The Chairman replied on 27

May that it seemed justifiable, from the point of view of a fair procedure, to grant the Office the opportunity to submit the opinion it had commissioned and that as soon as the Committee received that opinion it would determine whether a hearing on the appeals was still possible before the end of 2003. On 30 June 2003 the Vice-President in charge of DG4 asked another law professor to draw up a legal opinion by September.

In a letter of 3 July the complainant's counsel complained again about the delays in the procedure and notified the Chairman of the Appeals Committee that his clients now claimed a "significant sum" in moral damages. On 7 July the Chairman replied that he had forwarded a copy of his letter to the EPO's Legal Services and that as soon as he received the legal opinion commissioned by the Office, and the latter's position, he would send them on to him. On 10 July the Head of the Employment Law Directorate (formerly Department) sent the Chairman of the Appeals Committee a reply to the letter of 3 July from the complainant's counsel. He denied that dilatory tactics had been employed. On 5 August the complainant's counsel raised a number of questions with the Chairman of the Committee, who forwarded them to the Employment Law Directorate. The Administration replied on 21 August, indicating that the expert opinion was expected by the end of September.

On 25 September the professor of law mandated by the Office submitted his opinion. He concluded that the EPO was not obliged to recognise same-sex marriages contracted under Dutch law. The Organisation endorsed that opinion. On 1 October the Chairman of the Appeals Committee sent the two legal opinions to the complainant's counsel, asking him to comment on these by 21 November, and said that the Committee planned to consider the appeal at its first meeting in 2004, sometime between 10 and 13 February. On 17 November 2003 the complainant filed his complaint with the Tribunal, impugning the decision of 21 January 2002. He notified the Chairman of the Appeals Committee on 18 December 2003 that he had done so. On 8 January 2004 the Chairman informed him that his appeal would be heard on 11 February. In its opinion dated 30 March 2004, the Appeals Committee recommended, by a majority, that the question of same-sex marriages contracted under Dutch law be decided after the Administrative Council had considered the matter and that the decision on the payment of the household allowance be reviewed on the basis of that opinion. Two of the five members of the Committee submitted a dissenting opinion concluding that the appeal was allowable in extenso.

Following the 98th meeting of the EPO's Administrative Council held from 27 to 29 October 2004, at which a majority of delegations came out in favour of recognising same-sex marriages where such marriages were recognised under the law of a contracting State, the President of the Office, in decisions of 11 and 26 November 2004, announced that same-sex marriages would henceforth be recognised by the Office, with retroactive effect from the date of the marriage. Since the present case no longer concerns this substantive issue, the relevant arguments put forward by the parties prior to the above-mentioned decisions will not be reviewed.

B. The complainant recalls that he filed his internal appeal on "13 September 2001 [*recte* 26 November 2001]" and that the hearing before the Appeals Committee could at best take place in February 2004, that is, "29 [*recte* 27] months" later. He asserts, however, that he expressed his concern on several occasions about the delays, for which he was in no way responsible, whereas the Organisation did all it could to hold up the examination of his case. He points out that he was not responsible for the introduction of the opinion of the law professor, who had been mandated by the Central Staff Committee, and that the arguments that he had already submitted were sufficient for the Appeals Committee to reach a decision. He has therefore exhausted the internal means of redress and requests that the Tribunal hear his complaint.

In reply to the defendant's argument, put forward in the course of the internal appeal procedure, that the letter of 4 July 2001 from the Principal Director of Administration constituted the decision not to recognise same-sex marriages and that the complainant's appeal was therefore time-barred, the latter submits that the letter in question was merely a reply to a general enquiry, which cannot be considered as an impugnable decision.

Apart from the claims related to the request for recognition of his marriage, which are no longer relevant, the complainant claims restitution of four days' special leave, reimbursement of all additional costs incurred by him or by his spouse resulting from the non-recognition of his marriage (such as medical insurance payments), a "significant award" of moral damages, and costs.

C. In its reply the EPO contends that the complaint is irreceivable. In his internal appeal the complainant had claimed one euro in token moral damages. To the extent that he is now asking for a "significant award", his claim is irreceivable because he has not exhausted the internal means of redress. The same applies to his other claims because he did not wait for the Appeals Committee to issue its opinion – and for the opinion to be submitted to the

President of the Office for decision – before appealing to the Tribunal. The EPO considers that the complainant's attempts to demonstrate that the Office deliberately tried to delay the proceedings and to avoid a hearing on the merits are not convincing. It recalls that the Chairman of the Appeals Committee had agreed to let it seek an external legal opinion and that the person mandated to do so met the deadline he had been given.

D. In his rejoinder the complainant points out that he complained a number of times about the delays in the proceedings and never hid his intention to apply directly to the Tribunal if necessary, which he was eventually obliged to do. He does not agree that the issue of the recognition of same-sex marriages needed to be referred to the Administrative Council. In his view, that was a deliberate attempt to delay the decision. Furthermore, the defendant's initial objection to receivability and its request for additional time to reply to the complaint amounted to an abuse of process. In his opinion, the Office is trying to undermine the authority of the Tribunal by "arrogating" the latter's functions and authority to the Administrative Council, thereby depriving him of legal protection and due process of law. He draws attention to the fact that he increased his claim for damages as early as 3 July 2003, that is, in the course of the internal appeal proceedings; consequently, his claim in this respect is receivable.

E. In its surrejoinder and in the further statement it submitted the EPO contends that the complaint has become groundless, since at the outcome of the 98th meeting of the Administrative Council the President of the Office decided to recognise same-sex marriages with retroactive effect from the date of the marriage. Consequently, the complainant no longer has a cause of action and "[t]he decision caused [him] no injury". Since the complainant's main claim is therefore irreceivable, his claims for moral damages and costs are similarly irreceivable. According to the defendant, in view of the complexity of the matter, the delay incurred during the proceedings cannot be deemed either excessive or unacceptable.

F. In his comments on the EPO's surrejoinder and further statement, the complainant expresses surprise at the defendant's assertion that it has "no responsibility for the costs incurred". He reiterates that the delays were excessive and accuses the EPO of having made the case unnecessarily complex by confusing the issues and by its determination not to recognise the effects of same-sex marriages. He points out that the Appeals Committee has still not taken a "decision" and denounces the lack of an adequate internal appeals system. In his view, there is no reason why the last-minute abandonment of its position by the EPO should mean that he – and the staff representatives – should bear the costs for fighting claims that are now acknowledged to have been fully justified. The EPO's remark that "[t]he decision caused the complainant no injury" is offensive insofar as it assumes that the latter was interested purely in the material consequences of the matter, whereas in fact he and his spouse lived in a state of insecurity during the whole time the defendant refused to recognise their marriage, which caused them a lot of worry, stress, humiliation, loss of time and energy, and in the end, considerable moral injury justifying a substantial award of moral damages.

G. In its final comments the EPO states that by submitting the issue to the Administrative Council the President of the Office followed the Appeals Committee's recommendation. It denies having refused to recognise same-sex marriages but asserts that from the outset it held the view that "the question [...] of whether or to what extent same-sex marriages are to be placed on an equal footing with opposite-sex marriages [...] involves fundamental convictions within society" and that "[a]ny revision of the relevant employment and pension provisions is the task of the Administrative Council, as the Organisation's legislative body". As for the question of the implementation of the Council's decision, the EPO comments that the complainant received, with retroactive effect, the amounts of the entitlements provided for married employees plus 8 per cent interest on the sums due. It reiterates that the appeal procedure was conducted without delay and that the claim for moral damages is therefore unfounded. Lastly, it states that it is prepared to pay the complainant a lump sum of 10,000 euros to cover the costs of the internal appeal procedure, but it refuses to cover the costs of the proceedings before the Tribunal on the grounds that the complainant failed to exhaust the internal means of redress before filing his complaint and that he has not shown that he suffered injury other than the deprivation of certain benefits, which he was granted retroactively with interest.

CONSIDERATIONS

1. The complainant, a permanent employee of the European Patent Office serving in The Hague, asked on 12 September 2001 for his new status to be recognised after marrying a person of the same sex in accordance with the Dutch law allowing same-sex marriages, which entered into force on 1 April 2001. When this was refused by the

Director of Personnel on 13 September, the complainant filed an internal appeal against that decision, which led to lengthy proceedings before the Appeals Committee, particularly because of the fact that two external legal opinions were commissioned, one by the staff representatives, the other by the Office, and those opinions reached opposite conclusions. Tired of waiting for the outcome of the internal appeal proceedings he had initiated in November 2001, the complainant filed a complaint directly with the Tribunal on 17 November 2003.

2. Since the filing of the complaint, the situation has changed substantially. As the Appeals Committee recommended on 30 March 2004, the President of the Office brought the matter before the Administrative Council. At its 98th meeting, held in October 2004, the Council expressed the majority opinion “that the Office should recognise same-sex marriages as ‘marriages’ under the Service Regulations if these marriages were formally recognised according to the law of a contracting state”. In the light of that opinion, the President took the following decision on 11 November 2004, as quoted in the defendant’s surrejoinder:

“In view of the majority opinion of the [Administrative Council], I agree that the Office should now recognise same-sex marriages.”

On 26 November the President indicated that the decision would be given retroactive effect either from the date of marriage or from the date of entry into the Office. Staff were informed of this in Communiqué No. 284 of 20 December 2004.

3. In a letter dated 25 February 2005 the complainant was notified by the Director of Personnel Management and Systems that the former had received the payment, with retroactive effect and interest at 8 per cent per annum, of the sums due as a result of the recognition of his marriage and that he would be awarded a lump sum of 10,000 euros for the costs incurred during the internal appeals procedure, but that his claim for the award of moral damages was dismissed.

4. According to the defendant, as a result of these decisions the complainant no longer has a cause of action and it follows that his claims are irreceivable. This is clearly not so. The claims relating to the recognition of the right which the complainant sought to establish have undoubtedly become redundant, and no ruling is required in that respect since all the entitlements claimed by the complainant have been retroactively granted. A cause of action remains, however, where the claims for moral damages, for special leave and for costs are concerned.

5. Before assessing the merits of these claims, the Tribunal must consider the defendant’s initial objection to the receivability of the complaint as a whole. The EPO notes that the complainant brought his case directly before the Tribunal without waiting for the outcome of the internal appeal procedure he had initiated. But, although the investigation of this difficult case justified legal consultations and in-depth analysis, the complainant, who filed his internal appeal in November 2001, cannot be blamed for going ahead with his complaint with the Tribunal without waiting for a decision to be taken on his appeal three years later. According to precedent (see for instance Judgments 1344 and 1433), the complaint must be regarded as receivable, considering that the internal appeal was not time-barred, as alleged by the Office.

6. Regarding the claim for moral damages, the defendant argues that the complainant, who in his internal appeal claimed only a token award of one euro in compensation, cannot extend the scope of his claims before the Tribunal. It does acknowledge, however, that, in a letter of 3 July 2003 addressed to the Chairman of the Appeals Committee, he had claimed a “significant sum” for moral damages and this claim, reiterated in these proceedings, cannot be regarded as irreceivable, even though it is not quantified.

7. There is no evidence in the file to support the view that the Organisation showed ill will in its handling of this sensitive case either before the decision was taken or afterwards. Nevertheless, the complainant is not wrong to point out that for a long period he was left in doubt as to rights which in the end were recognised and that his anxiety, particularly regarding the protection to which his spouse was entitled, should be taken into account in the assessment of his injury. In view of all the circumstances of the case, the Tribunal considers it fair to set at 2,000 euros the amount of compensation which the defendant should pay the complainant for moral injury.

The complainant’s claim regarding the restitution of four days’ special leave for his marriage should also be met, if that has not already been put right.

8. As regards costs, the complainant has incurred substantial expenses both during the internal appeal

procedure and before the Tribunal. In view of the complexity of the case, the President of the Office decided in February 2005 to award the complainant a lump sum of 10,000 euros for the costs incurred in the course of the internal appeal procedure. The Tribunal takes note and considers that this sum is sufficient to meet the claim for costs incurred during that procedure. With regard to those incurred before the Tribunal, the complainant, whose complaint broadly succeeds, is entitled to costs, which the Tribunal sets at 5,000 euros, notwithstanding the defendant's objections to the effect that the President followed the opinion of the Appeals Committee and that the issue raised was far from clear-cut.

DECISION

For the above reasons,

1. There is no longer any need to rule on the complainant's claim for recognition of his marriage by the EPO with all legal effects thereon.
2. The EPO shall pay the complainant 2,000 euros in compensation for moral injury.
3. It shall grant him four days' special leave for his marriage if it has not already done so.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet