

NINETY-NINTH SESSION

Judgment No. 2444

The Administrative Tribunal,

Considering the complaint filed by Mr M.E.S. against the European Patent Organisation (EPO) on 13 January 2004;

Considering the letter of 23 January 2004 in which the Organisation asks that this case be joined with that of another permanent employee of the European Patent Office, the secretariat of the EPO, Mr K. (see Judgment 2443 also delivered this day), and as in the proceedings concerning Mr K.'s case, applies for a stay of these proceedings until such time as the President of the Office takes a final decision, in the light of the forthcoming opinion of the Appeals Committee, the comments on these applications 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 Dutch national born in 1956, joined the Office in 1983 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 14 January 2002 the complainant applied for four days' special leave for his marriage. He was married on 21 January 2002 and the same day submitted to the Administration a certificate evidencing his marriage to a person of the same sex. On the next day he asked the Administration to record his new status and to draw the consequences under the Service Regulations for Permanent Employees of the Office, in particular by paying him the household allowance to which any married staff member is entitled under Article 68(2)(a) of the Service Regulations. The Head of Personnel Administration replied on 11 February that a marriage to a person of the same sex was not considered a marriage within the meaning of the Service Regulations.

On 18 February the complainant withdrew his request for special leave, saying that in the event he had worked on the days concerned. On 26 February he asked for the four days of special leave to be credited to the balance of his normal leave. This request was rejected on 11 March by the Head of Personnel Administration. In two letters of 7 May 2002, the complainant asked the latter to reverse his decision of 11 February or to consider his letters as lodging an internal appeal. He also requested compensation for the expenses incurred for private insurance for his spouse and accrued interest on sums due for the period starting 21 January 2002. The Head of the Department of Employment Law informed him on 5 June that the President of the Office considered that the relevant rules had been correctly applied and he had 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 K., 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 Administration (Directorate-General 4) 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 18 December 2003 the complainant's counsel notified the Chairman of the Appeals Committee that his client would be filing his complaint with the Tribunal within a few days. On his complaint form, filed on 13 January 2004, the complainant states that the impugned decision is that of 5 June 2002.

On 8 January 2004 the Chairman of the Committee had 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 explains that he withdrew his request for special leave because, as his request had not been approved in writing, he had eventually decided to work on the days concerned. He asserts, however, that he is entitled to this leave under the Service Regulations and that it should be granted. According to him, the willingness of the EPO to accept the effects of a "legal or judicial decision" or of a "legal obligation" varies according to the latter's financial implications or even the gender of the persons concerned. On all other issues he refers to the brief submitted to the Tribunal by his colleague, Mr K.

Apart from the claims related to the request for recognition of his marriage, which are no longer relevant, the complainant claims the 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 on the grounds that the complainant 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.

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. As in the case leading to Judgment 2443 delivered this day, the complainant is a permanent employee of the European Patent Office serving in The Hague, who married a person of the same sex in accordance with the Dutch law allowing same-sex marriages, which entered into force on 1 April 2001. On 22 January 2002, that is, on the day after his marriage, the complainant asked for his new status to be recognised, to be paid a household allowance and for recognition of his spouse's entitlement to a survivor's pension and to medical insurance. Having initiated an internal appeal against the rejection of his requests, the complainant filed his complaint with the Tribunal before the Appeals Committee issued its recommendation on 30 March 2004.

2. Apart from a specific problem arising from the fact that the complainant – by oversight according to him – did not raise the issue of his right to special leave for his marriage during his internal appeal, as well as the fact that

the defendant had expressly deemed his appeal receivable, the case is very similar to that leading to Judgment 2443. However, although the EPO suggested that since the legal issues involved are the same, the two cases could be joined, it noted in its surrejoinder that a separate examination of the two cases was indispensable. In the circumstances, the Tribunal considers it inappropriate to join the two cases.

3. Following the decisions taken by the Organisation to recognise the validity of same-sex marriages according to the law of a contracting state authorising such marriages, the complainant received payments in January and February 2005 that take account of his new status since the date of his marriage, that is 21 January 2002. The main claims have therefore become groundless, but this does not mean that the complainant's other claims have become irreceivable as a result.

4. The claim for moral damages was introduced in the course of the internal appeal procedure by a letter of 3 July 2003 addressed to the Chairman of the Appeals Committee. This claim, submitted to the Tribunal, is receivable and there is therefore no reason why the complainant should not receive the same compensation as that awarded to his colleague pursuant to Judgment 2443, since the situations of the two complainants are *mutatis mutandis* very similar.

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.

5. The same goes for costs. The defendant has granted the complainant 10,000 euros to cover the costs of the internal appeal procedure, which the Tribunal considers sufficient. The EPO shall also pay him the sum of 5,000 euros to cover his costs before the Tribunal.

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

