



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

18 May 2010

FIFTH SECTION

Application no. 415/07
by Roland KLAUSECKER
against Germany
lodged on 22 December 2006

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Roland Klausecker, is a German national who was born in 1973 and lives in Erlangen. He is represented before the Court by Mr U. Weber, a lawyer practising in Berlin.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

In 1991 the applicant, aged 18, lost his left hand and left eye and part of the fingers of his right hand and suffered injuries to his left ear in an accident. He was subsequently recognised as being 100 per cent physically disabled.

He later graduated in mechanical engineering. From 1999 to 2005 he worked as a research assistant in a university.

2. Proceedings before the European Patent Office

In 2005 the applicant applied for a post as a patent examiner at the European Patent Office in Munich. Having sat a series of technical and language tests in May 2005, the applicant was informed that he was being

considered for employment as a permanent staff member as from November 2005 but that he had to undergo a medical examination before a final decision would be taken.

Following his medical examination on 23 June 2005, the examining doctor found in her report dated 4 July 2005 that the applicant was currently able to perform the tasks of a patent examiner. However, in view of the applicant's disability, it could not be excluded that his right hand would be constantly overstrained. This entailed a higher risk of absence due to illness and of premature incapacity to work for health reasons. Therefore, the doctor could not confirm that the applicant was medically fit, unreservedly, for recruitment as a patent examiner.

In a letter dated 12 August 2005 the department of human resources of the European Patent Office informed the applicant that he would not be offered employment. It confirmed that the applicant had passed the professional tests for the post. However, according to the results of his medical examination on 23 June 2005, which had been explained to him by its medical adviser on the phone earlier, he did not meet the physical requirements of the post as required by Article 8 of the Service Regulations (see "Relevant domestic and international law" below).

On 27 September 2005 the applicant requested that the President of the European Patent Office review the decision not to recruit him and that he consider his request as an internal appeal should he not accede to it. He claimed that the doctor's finding that he was presently fit for employment, but would possibly no longer be at some point in the future was insufficient to prove that he did not meet the physical requirements of the post and constituted unlawful discrimination against the disabled.

In a letter dated 2 November 2005 the applicant was informed that the President of the European Patent Office had dismissed his request to review the decision not to recruit him and that his internal appeal had been rejected as inadmissible. Under Article 107, read in conjunction with Article 106 of the Service Regulations (see "Relevant domestic and international law" below) only staff members were entitled to lodge an appeal against an act of the employment authority. Since the doctors who had examined the applicant in the recruitment procedure had found that he did not meet the physical requirements of the post as required by Article 8d of the Service Regulations, the applicant had failed to meet all the conditions for appointment and the President had therefore not consented to it. The applicant did not have standing to lodge an internal appeal against a refusal to appoint him.

In that letter, the applicant was further informed that he could appeal against the President's final decision to the Administrative Tribunal of the International Labour Organization (ILO), which was the highest level of jurisdiction for employment disputes between the European Patent Organisation (EPO) and its staff members. However, that Tribunal, in its judgment no. 1964, had previously rejected as irreceivable a complaint by a person whose application for a job at the EPO had likewise been rejected for failure to meet the physical requirements of the post as stipulated by Article 8d of the Service Regulations.

3. *Proceedings before the German courts*

Arguing that the EPO enjoyed immunity from the jurisdiction of the German courts, the applicant subsequently lodged a constitutional complaint with the Federal Constitutional Court directly. He complained that his right of access to court under Article 19 § 4 of the Basic Law (see “Relevant domestic and international law” below) had been violated in that there was no remedy, either within the European Patent Office or before the German courts, against the decision of the European Patent Office not to offer him employment. Moreover, the decision of the President of the Patent Office not to offer him employment because of his disability had breached his right to protection against discrimination under the second sentence of Article 3 § 3, of the Basic Law (see “Relevant domestic and international law” below).

On 22 June 2006 the Federal Constitutional Court declined to consider the applicant’s constitutional complaint (file no. 2 BvR 2093/05). It found that the complaint was inadmissible. A constitutional complaint only lay against acts of a “public authority” (*öffentliche Gewalt*) and the applicant had failed to demonstrate that such an act was at issue in his case.

The Federal Constitutional Court confirmed that the EPO had immunity from the jurisdiction of the domestic courts within the scope of its official activities under Article 8 of the European Patent Convention (EPC) read in conjunction with Article 3 of the Protocol on Privileges and Immunities of the EPO (see “Relevant domestic and international law” below). It further found that acts of a “public authority” were not only acts of German State authorities. The term also covered acts of supranational authorities, such as the European Patent Organisation and its executive organ, the European Patent Office, which had an impact on the beneficiaries of fundamental rights in Germany.

However, the decision of the President of the European Patent Office here at issue could not be qualified as an act which had an impact on the beneficiaries of fundamental rights in Germany because it did not have any external legal effects within the German legal order. As a measure relating to the relationship between the international organisation and its staff or applicants for posts, it only concerned the internal sphere of the organisation. This conclusion was not altered by the fact that the applicant was a German national living in Germany who, had he been employed, would have worked in Germany. The court conceded that the applicant’s recruitment would have been an act of a supranational nature which, changing his legal status, would have had a concrete effect within the German legal order. The refusal to employ him did not, however, have such an effect. The Federal Constitutional Court’s jurisdiction did not extend to such internal measures.

The Federal Constitutional Court further found that in view of the inadmissibility of the applicant’s constitutional complaint, it did not have to decide the question whether the level of protection in respect of staff issues within the European Patent Organisation complied with the standards set by the Basic Law, which had to be observed in the event of a transfer of sovereign powers.

4. Proceedings before the Administrative Tribunal of the ILO

On 1 February 2006 the applicant lodged a complaint with the Administrative Tribunal of the ILO against the decision of the President of the European Patent Office not to recruit him. He argued that the said decision constituted illegal discrimination on the grounds of his disability. He stressed that he had passed all the technical and linguistic tests for the post and was able, in particular, to use a computer, as he was doing in his job as a research assistant at a university. He further argued that he had been denied a fair trial, in particular access to a tribunal, in that his internal appeal had not been examined in breach of Article 4 § 3 of the Service Regulations (see “Relevant domestic and international law” below) and that the President of the European Patent Office had failed to waive the Organization’s immunity in order to allow him to seek redress in the German courts.

In its reply, the European Patent Organisation submitted that the applicant’s complaint was irreceivable as he had never been a permanent employee. In any event, the medical practitioner who had examined the applicant, the Office’s medical adviser and its occupational health physician had all agreed that in view of the fact that the work of an examiner relied heavily on the use of a computer, the risk of damage to the applicant’s health was too high and he was likely to suffer early invalidity. As the applicant therefore did not meet the physical requirements of the post, he did not fall within the scope of Article 4 § 3 of the Service Regulations, which concerned physically handicapped persons “who possess the necessary qualifications and abilities”.

In its judgment dated 11 July 2007 the Administrative Tribunal of the ILO dismissed the applicant’s complaint as irreceivable (no. 2657, 103rd session). It stated that it had no option but to confirm its well-established case-law according to which it was a court of limited jurisdiction. Relying on Article II § 5 of its Statute (see “Relevant domestic and international law” below) and its judgment no. 1964, it found that it had no jurisdiction in respect of external candidates for employment and persons who had not concluded, with the international organisation in question, a contract of employment of which all the essential terms had been agreed. Thus, persons who were applicants for a post in an international organisation but who had not been recruited were barred from access to it.

The Administrative Tribunal further found that it had no authority to order the EPO to waive its immunity. It noted, however, that its judgment created a legal vacuum and considered it highly desirable that the EPO should seek a solution affording the applicant access to a court, either by waiving its immunity or by submitting the dispute to arbitration.

B. Relevant domestic and international law

1. The legal status of the European Patent Office

The European Patent Office is a body of the European Patent Organisation (EPO), an intergovernmental organisation which was set up on the basis of the Convention on the Grant of European Patents (European

Patent Convention – EPC) of 5 October 1973. The Organisation currently has 36 Member States, including Germany.

Under Article 8 of the EPC, the European Patent Organisation enjoys the privileges and immunities necessary for the performance of its duties in the territory of each Contracting State under the conditions defined in the Protocol on Privileges and Immunities annexed to the EPC.

The Protocol on Privileges and Immunities of the European Patent Organisation, in so far as relevant, provides:

Article 3

(1) Within the scope of its official activities the Organisation shall have immunity from jurisdiction and execution, except

(a) to the extent that the Organisation shall have expressly waived such immunity in a particular case;

(b) in the case of a civil action brought by a third party for damage resulting from an accident caused by a motor vehicle belonging to, or operated on behalf of, the Organisation, or in respect of a motor traffic offence involving such a vehicle;

(c) in respect of the enforcement of an arbitration award made under Article 23.

...

(4) The official activities of the Organisation shall, for the purposes of this Protocol, be such as are strictly necessary for its administrative and technical operation, as set out in the Convention.

Article 19

(1) The privileges and immunities provided for in this Protocol are not designed to give to employees of the European Patent Office or experts performing functions for or on behalf of the Organisation personal advantage. They are provided solely to ensure, in all circumstances, the unimpeded functioning of the Organisation and the complete independence of the persons to whom they are accorded.

(2) The President of the European Patent Office has the duty to waive immunity where he considers that such immunity prevents the normal course of justice and that it is possible to dispense with such immunity without prejudicing the interests of the Organisation. The Administrative Council may waive immunity of the President for the same reasons.

Article 20

(1) The Organisation shall co-operate at all times with the competent authorities of the Contracting States in order to facilitate the proper administration of justice, to ensure the observance of police regulations and regulations concerning public health, labour inspection or other similar national legislation, and to prevent any abuse of the privileges, immunities and facilities provided for in this Protocol.

2. Provisions of the Service Regulations of the European Patent Organisation

Article 4 § 3 of the Service Regulations, in so far as relevant, reads:

“Physically handicapped persons who possess the necessary qualifications and abilities required for a vacant post must not suffer discrimination on account of their disability.”

Article 8 of the Service Regulations for Permanent Employees of the European Patent Office, in so far as relevant, provides:

Conditions for appointment

“To be eligible for appointment as a permanent employee, a candidate must fulfil the following requirements:

...

d) he must meet the physical requirements of the post; ...”

Article 9 of the Service Regulations provides that before appointment, a successful candidate shall be medically examined by a medical practitioner designated by the President of the Office in order that the appointing authority may be satisfied that he fulfils the requirements of Article 8, sub-paragraph d.

Article 107 § 1, read in conjunction with Article 106 of the Service Regulations, provides that permanent employees, former permanent employees or rightful claimants on their behalf may lodge an internal appeal against an act adversely affecting them.

3. Provision of the Statute of the Administrative Tribunal of the ILO

Article II of the Statute of the Administrative Tribunal of the ILO, in so far as relevant, provides:

“5. The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body.”

4. Provisions of the Basic Law

Article 3 § 3, second sentence, of the Basic Law stipulates that no one shall be discriminated against because of his disability.

Pursuant to Article 19 § 4 of the Basic Law, a person whose rights have been violated by a public authority may have recourse to the courts. If no other jurisdiction has been established, the civil courts have jurisdiction.

COMPLAINTS

The applicant complains under Article 6 § 1 of the Convention that the defendant State failed to ensure that he had access to a tribunal in order to protect his civil right not to be discriminated against on the grounds of his disability, a right guaranteed by Article 4 of the EPO Service Regulations and by German and European anti-discrimination law. He submits that the failure of the European Patent Office to examine his internal appeal and the refusal of its President to waive the Patent Office’s immunity in order to allow him to pursue his claim before the German courts entailed a violation of Article 6. He further argues that neither the European Patent Office’s internal appeals process nor the procedure before the Administrative Tribunal of the ILO met the requirements of Article 6, in particular that of independence.

The applicant further claims that the failure of the Federal Constitutional Court to consider his constitutional complaint and to protect his Convention rights breached his rights under Article 6 and Article 13 of the Convention.

QUESTIONS TO THE PARTIES

1. Did the facts of which the applicant complains in the present case occur within the jurisdiction of Germany?
2. If so, was Article 6 § 1 of the Convention under its civil head applicable to the proceedings in the present case?
3. If so, did the applicant have a fair hearing in the determination of his civil rights and obligations, in accordance with Article 6 § 1 of the Convention? In particular, was his right of access to the courts respected?
4. Is Germany to be held responsible in case the European Patent Organisation cannot be sued for the violation of a civil right?