

SEVENTY-FIFTH SESSION

***In re* HERBELET**

Judgment 1264

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jean-Claude Herbelet against the European Patent Organisation (EPO) on 24 September 1992 and corrected on 19 October, the EPO's reply of 22 December 1992, the complainant's rejoinder of 6 February 1993 and the Organisation's surrejoinder of 25 February 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 47(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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 born in 1940, joined the EPO in 1973 as an examiner of patents at Directorate-General 1 (DG1) at The Hague.

On 3 April 1990 the Principal Director of Search sent all the directors of the "search directorates" instructions for writing the staff reports of examiners for 1988-89. For each examiner directors were to work out a factor of productivity on the strength of the number of files dealt with, the norm set at the start of the year according to the field of work and the number of working days. But it turned out that there were more "very good" marks for staff at the EPO's Directorate-General 2, at Munich, than at DG1. So in a note of 24 September 1990 the Principal Director of Search issued new guidelines on reporting. The corrective exercise was known as the "stamp operation".

The complainant's staff report for 1988-89 was written on 19 April 1990, countersigned on 31 July and sent to him on 24 August. On 27 August he signed it, stating that he had "no comment". On 17 September the Vice-President of DG1 endorsed it, and it was sent to the complainant on 10 October for final signature. He returned it on 16 October but appended a note in which he pointed out that there was a procedural flaw in that he had been unaware on 27 August of the stamp operation and that his remark "no comment" was to be read only in the context of the regular reporting procedure. Having got no reply from his supervisors, he filed an internal appeal on 19 December 1990 asking that his staff report for 1988-89 be set aside and that a new report be made that took proper account of the stamp operation.

On 10 December 1991 the Principal Director of Administration saw him and in an attempt at settlement proposed the so-called "C4" procedure for conciliation. But he declined in a letter of 19 December.

On 16 June 1992 the Appeals Committee recommended that the President of the Office reject his appeal as devoid of merit. The President endorsed the recommendation and the Director of Staff Policy so informed him in a letter of 30 June 1992, the impugned decision.

B. The complainant cites Article 47(1) of the EPO Service Regulations:

"The ability, efficiency and conduct in the service of each permanent employee, ... shall be the subject of a report made at least once every two years under the conditions established by the President of the Office.

This report shall be communicated to the employee concerned who shall be entitled to make any comments thereon which he considers relevant."

He observes that the reporting procedure, which is set out in circular 188 of 18 December 1989, was further explained in the note of 3 April 1990, which went only to directors, and in the note of 24 September 1990 about the

stamp operation, which was distributed to all examiners. Yet on 27 August 1990, when he signed his report, he had been informed neither of the stamp operation nor of the procedure for carrying it out and so could not have made relevant comment or applied for conciliation.

His report contained no mention of "productivity" or the "norm". Nor did those of other examiners working in the same field as he. He was therefore unable to ascertain that the stamp operation had been properly applied in his case.

He asks the Tribunal to order the Organisation to make further entries in his report and in those of the other examiners to make the stamp operation clear. He claims 25,000 guilders in moral damages.

C. In its reply the Organisation submits that the complaint shows no cause of action. The complainant was well enough informed to understand how productivity had been reckoned. The norm is simply the output target set for each examiner at the start of the year, and everyone knows how many cases he has dealt with and how many days he has worked. If the complainant had doubts about any feature of the reckoning he could have cleared it up by asking his director when his output target was set or when he got his staff report. On 27 August 1990 he said he had no comment on his report, which meant that he concurred in the rating of his productivity.

After he filed his internal appeal his director stated that he had checked the report again and saw no reason to alter it. Besides, the complainant turned down the offer of C4 conciliation proceedings, which would have given him full information.

Lastly, he may not make claims on behalf of other staff, none of whom has challenged the stamp operation.

D. In his rejoinder the complainant explains that he wants to be sure that no errors were made in drafting his staff report. Although it gives the number of cases he dealt with in the year and the number of patents processed, it does not show how his productivity was rated. Every examiner ought to be able to ascertain that he has been rated properly by being allowed access to data on the productivity of other examiners. He has sustained moral injury on two counts: he did not learn of the stamp operation until the day after the deadline for returning his report, and the EPO has never given him the information he needs for checking his report thoroughly.

E. The Organisation presses its pleas in its surrejoinder. It observes that the complainant offers no sound arguments in support of his allegations of moral injury and that since he knows his productivity and output target he has no cause of action.

CONSIDERATIONS:

1. The complainant has been an examiner at the EPO's Directorate-General 1 (DG1) at The Hague since January 1973.

On 3 April 1990 the Principal Director of Search sent a note to all the directors setting out the procedure for reporting on the performance of examiners in 1988-89. The directors were to calculate for each examiner a factor of productivity, P, by a formula that included a figure known as N. N denoted a "norm", or standard, set according to the technical field or fields in which the examiner was working.

The complainant's staff report for 1988-89 was drafted on 19 April 1990 and his "overall marking" was "good". He was invited to submit comments but on 27 August 1990 said that he had none to make. The Vice-President of DG1 endorsed the report on 17 September 1990.

On 24 September the Principal Director of Search sent "all Examining staff" a note about review of the system of marking; the purpose was to remove disparities in assessment between examiners in DG1 and examiners at EPO headquarters in Munich (DG2), and the review was known as the "stamp operation". It was purely mathematical and took as a basis of reckoning the number of files dealt with as shown in each examiner's staff report.

The complainant was asked to sign his staff report and did so on 16 October 1990 on return from holiday. But he appended to the report the comment that when he had seen the text on 27 August he had been unaware of the stamp operation.

The Director having made no comment, the complainant filed an internal appeal on 19 December 1990 seeking the

quashing of the report for a procedural flaw and the drafting of a new one in line with the operation.

The Principal Director of Search rejected his appeal on 20 December 1990 and he went to the Appeals Committee. In its report of 16 June 1992 the Committee recommended rejecting his appeal.

Meanwhile, on 19 December 1991, he had turned down an offer from the Organisation to start the conciliation procedure known as "C4", introduced by circular 188 of 18 December 1989 on the reporting procedure, and he had asked for the quashing of the operation as a whole.

The President of the Office endorsed the Committee's recommendation on 30 June 1992 and that is the decision under challenge.

2. The complainant has two objections. One is that he was not told in time of the further proceedings required by the stamp operation; and the other is that figures corresponding to P and N ought to have been put in his staff report together with the number of files and patents he had processed in the course of the year. He maintains that at 27 August 1990, when he signed the report, he had too meagre data at his disposal to be able to make proper comments and apply for the C4 procedure under circular 188.

3. The pleas fail. It is true that the operation was notified to the directors on 3 April 1990 and to all examiners on 24 September 1990 and the complainant had been on holiday since 7 September. But he was fully informed on his return and had every opportunity of stating his case by 16 October, when he signed the report and appended comments. So he was duly informed, like everyone else, of the operation.

4. He says that he did not have enough data to make a proper appeal since the figures denoting factors P and N were not in his report and that they ought to have been entered in the staff reports of all DG1 examiners so that he could check the data used in the operation.

5. That argument too fails. The Organisation points out that the complainant's report for 1988-89 was made in accordance with the note of 3 April 1990 and that he made no comments at the time.

According to the text headed "The stamp operation 1988-89", and appended to the Principal Director's note of 24 September 1990, factor P, which served as the basis for reckoning, was still the same as the one referred to in the note of 3 April 1990, which was also appended to the one of 24 September. So the complainant is mistaken in pleading unawareness of factor P as the basis for the operation. Moreover, as the EPO observes, N corresponds to the norm that is notified to every examiner at the start of the year, when he is told what his productivity target is.

6. The complainant does not seriously seek to deny being told of factors P and N but explains in his rejoinder that he wants to see them in his report so that he can check that there have been no oversights in drafting it.

The plea is unconvincing. For no valid reason he refused EPO's exceptional offer of C4 proceedings; so he may not now properly object that he could not apply for them earlier.

7. He makes out that he cannot check his report properly unless factors P and N are entered in the staff reports of all other examiners, though he acknowledges that he may not demand to see their records.

The Tribunal may not order the EPO to include the figures denoting factors P and N in other examiners' reports nor - since they are irrelevant to this case - to disclose them. The complainant's objections are therefore unsound and must be rejected.

8. The conclusion is that none of his pleas succeeds. Since his main claims fail so too does his claim to damages for moral injury.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Edilbert Razafindralambo,

Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

William Douglas
E. Razafindralambo
Michel Gentot
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.