

## SEVENTY-SIXTH SESSION

### *In re* VAN DER PEET (No. 17)

#### Judgment 1316

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventeenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 16 February 1993, the EPO's reply of 30 April, the complainant's rejoinder of 24 May and the Organisation's surrejoinder of 9 July 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 4(1), 5 and 7, of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Annex II to those Regulations;

Having examined the written submissions;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Articles 4(1), 5 and 7 of the EPO Service Regulations read:

"4(1) Vacant posts shall be filled by the appointing authority, having regard to the qualifications required and ability to perform the duties involved:

- by transfer within the Office;

- by promotion or appointment ...

- by recruitment or appointment as a result of a general competition open both to employees of the Office and to external candidates.

5(1) Recruitment shall be directed to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Contracting States.

...

(3) No particular post shall be reserved for nationals of any specific Contracting State.

7(1) Recruitment shall generally be by way of competition in accordance with the procedure laid down in Annex II.

...

A procedure other than that of competition may be adopted by the appointing authority for the recruitment of ... senior employees ... and also, in exceptional cases, for recruitment to posts which require special qualifications.

(2) For each competition, a selection board, the composition of which is laid down in Annex II, shall be appointed by the appointing authority. This board shall draw up a list of suitable candidates.

The appointing authority shall decide which of these candidates to appoint to the vacant post."

The complainant, a Dutchman who was born in 1945, is a grade A3 examiner of patents at the EPO's headquarters in Munich.

On 22 May 1991 the Office published two notices of vacancy for a lawyer in the Legal Services Directorate (D 5.1.3), one inviting inside applicants and the other seeking applicants from outside the Organisation. The complainant was one of the two inside applicants. On 16 July 1991 the Director of Personnel offered the post on behalf of the President of the EPO to one of the eight outside applicants, Mr. Ludwig Kirst, who accepted it and took up his duties on 19 August 1991. The Director of Personnel told the complainant in a letter of 19 July 1991 that he had not been successful. On 29 August, he appealed against the President's decision.

On 21 January 1992 the President issued a notice inviting by 5 February applications for the post of data protection officer. There was a special edition of the EPO "Gazette" published on 29 June 1992 about the protection of personal data and in it the President announced that "following an internal selection procedure and after hearing the Central Staff Committee" he had appointed Mr. Kirst to the post.

On 26 August the chairman of the local Staff Committee in Munich wrote an open letter to the President stating the staff representatives' strong objections to the procedure and to the "gross infringement of the rules on recruitment".

The Appeals Committee submitted its report on 28 October 1992. It was unanimous that the procedure whereby Mr. Kirst had been picked for the post of lawyer was seriously flawed and its sole purpose had been to give him the job so as to make him data protection officer later. It recommended by a majority of three to two that the President revoke the appointment of Mr. Kirst and order a new recruitment procedure.

In a letter of 24 November 1992 a personnel officer signing on behalf of the Director of Staff Policy told the complainant that the President had turned down his appeal on the grounds that his qualifications did not meet the requirements in the notice of vacancy and so he had no cause of action. That is the decision under challenge.

B. The complainant alleges breach of Articles 4(1), 5 and 7 of the EPO Service Regulations. He submits that the requirements in the vacancy notice did not match the post to be filled and were misleading to candidates other than Mr. Kirst.

He contends that he acquired a thorough knowledge of the law governing employment at the EPO by helping colleagues with their internal appeals and as a member of the Home Loans Committee became conversant with the relevant rules and procedures. His work had given him a solid grounding in patent law and he would have stood a good chance of being chosen by the Selection Board. But instead of convening the Board as it ought under Article 7(2) of the Service Regulations, the EPO set up an "interview panel".

He alleges that the Organisation told Mr. Kirst before the vacancy was advertised - so that he could present his application accordingly - that he would get the post as lawyer and later the one as data protection officer.

It was the open letter of 26 August 1992 from the chairman of the local section of the Staff Committee to the President describing the whole process that alerted the complainant to serious flaws in the procedure and the President's abuse of authority.

He seeks:

- (1) the quashing of the notice of vacancy for the post of lawyer, the recruitment and selection procedure and the offer of employment to Mr. Kirst;
- (2) the quashing ab initio of Mr. Kirst's appointment as a permanent EPO official;
- (3) an award of 6,000 German marks in compensation for the expense, lost time and moral injury which the unlawful procedure caused him;
- (4) an award of 2,000 German marks in costs.

C. In its reply the Organisation states that the impugned decision caused the complainant no actionable injury. He had the opportunity to apply for the post and his name was on the list that went to the Selection Board. The reason why he was not appointed was that he did not have the right qualifications, being an electrical engineer, not a qualified lawyer. His legal experience was confined to applying European patent law to his own technical field, and even there he was closely supervised by Directorate 5.1.2, which deals with patent law. The work of Directorate 5.1.3 is purely legal and the complainant was obviously not fit for it. Indeed that was the Appeals Committee's unanimous conclusion.

Nor, for that matter, is he fit for the post of data protection officer, whose work is mainly legal and who must enjoy the trust of management and staff alike. The complainant lacks the tact, discretion and level-headedness such a position requires.

The successful applicant was a qualified lawyer. He had served in the judiciary, been in charge of the data protection programme of the German Ministry of Justice, and was undeniably fit for the post.

The complainant stood no chance of being appointed to a post he was neither qualified nor temperamentally suited for. He fails to show any personal interest in the quashing of Mr. Kirst's appointment. It is significant that he himself saw no point in applying for the post of data protection officer.

D. The complainant contends that examiners in Directorate- General 2 all perform duties of the kind set out in the notice whereas the candidate who was appointed had no such experience. In twelve years as examiner he had shown "the highest standard of ability, efficiency and integrity" required by Article 5, as is plain from his staff reports. He has always got on well with management, the Staff Committee and the Staff Union. His only defect was that he had never served in the German Ministry of Justice.

The EPO is in breach of the duty of trust and fairness it owes to its staff since only the "interview panel" knew that whoever was appointed to the post of lawyer would go on to become data protection officer. But it had become clear that that was the intention by the time the post of data protection officer was advertised in January 1992, and that was why he did not apply for it.

E. In its surrejoinder the EPO says that there is no new element in the rejoinder to prompt a change in its position. The complainant's forays into the law are no substitute for specialised training honed by practical experience. The paramount issue concerning his candidature is whether his qualifications for the post of lawyer was of the "highest standard", and the EPO maintains they were not.

#### CONSIDERATIONS:

1. The complainant is an electrical engineer by training. He joined the European Patent Office in 1980 as a patent examiner. On 22 May 1991 the Office published a notice of vacancy for a lawyer in its Directorate 5.1.3, which is in charge of legal services. The complainant applied for the vacant post and his name appeared on the list of candidates which the Administration drew up. By a letter of 19 July, however, it informed him that he had not been selected. The successful applicant was Mr. Ludwig Kirst. On 29 August 1991 he filed his internal appeal claiming the quashing of that appointment on the grounds inter alia that the selection procedure had been unlawful. In its report of 28 October 1992 the Appeals Committee was unanimous that the procedure showed serious errors, but that the complainant had not supplied evidence of his having the required knowledge and experience for the post and indeed it was doubtful "whether he had any real chance to be selected". By a majority of three to two the Committee recommended allowing the appeal, setting aside the appointment of Mr. Kirst and ordering a new procedure. But by a letter of 24 November 1992 the President of the Office informed the complainant that the appeal was rejected because he had not satisfied the requirements of the vacancy notice and therefore had no legitimate interest in the quashing of the appointment of Mr. Kirst. That is the decision now impugned and the complainant's claims are set out under (1) to (4) in B above in fine.

2. Since the material facts and the parties' pleas are fully set out in their written submissions there is no need for hearings and the complainant's application for them is disallowed.

3. In the EPO's submission the complainant has no right to challenge the procedure unless he can show that he had a personal interest and that his hopes of success were adversely affected by the procedure followed. The Organisation maintains that neither the procedure nor the decision he impugns adversely affected his interests since he had no prospect of being offered the post of lawyer he had applied for.

4. The plea is mistaken. The material question is whether the complainant's rights as a candidate for the post were infringed. In accordance with Article 4 of Annex II to the Service Regulations the EPO included the complainant in the list of applicants eligible for consideration by the Selection Board and thereby accepted his candidature. So it may not now contend that he had no interest in the outcome of the procedure and has no right to challenge it.

5. Judgment 1315, also delivered this day, allows the related complaint brought by Mr. Richard Menapace against the EPO in regard to the appointment of Mr. Kirst as a lawyer in Directorate 5.1.3. It sets aside the appointment and states the reasons for doing so. The present complaint succeeds for the same reasons.

6. The President's decision of 24 November 1992 is quashed. There is no need to make any further order in this case on the complainant's claims (1) and (2). As regards his claim under (3), he is entitled to damages for the moral

injury that the breach of his rights as a candidate for appointment as a lawyer in Directorate 5.1.3 caused him and the amount is set at 1,000 German marks. As to claim (4), he is awarded 2,000 German marks in costs.

DECISION:

For the above reasons,

1. The decision of 24 November 1992 by the President of the European Patent Organisation is quashed.
2. The Organisation shall pay the complainant 1,000 German marks in moral damages.
3. It shall pay him 2,000 German marks in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda  
William Douglas  
P. Pescatore  
A.B. Gardner