

SEVENTY-NINTH SESSION

In re BERG

Judgment 1447

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Arie Martinus Willem Berg against the European Patent Organisation (EPO) on 26 July 1994, the EPO's reply of 4 November, the complainant's rejoinder of 23 December 1994 and the Organisation's surrejoinder of 2 March 1995;

Considering Articles II, paragraph 5, and VIII of the Statute of the Tribunal;

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 Dutch citizen who was born in 1947, joined the International Patent Institute in 1973 as a furniture remover and odd-job man. He was transferred to the European Patent Office, the secretariat of the EPO, on the merger of the Institute with the EPO in 1978. He was a permanent employee and was stationed at The Hague. At the material time he held a grade C3 post.

In all the two-yearly reports on his performance from 1973 to 1985 he was rated 4 ("adequate") or 3 ("good"). But from 1982 his supervisors expressed reservations about his time-keeping and the quality of his work. On 12 February 1982 he was reprimanded for taking unauthorised leave, and his supervisor took him to task in a memorandum of 27 July 1983 for not keeping office hours.

At his own request he was transferred in 1984 to the Principal Directorate for documentation as a "photocopy operator". In a letter of 7 March 1985 he told the Director of Staff Policy that he was not happy with his new duties and asked for a messenger's job.

In his report for 1986-87, his supervisor gave him the rating 5 ("unsatisfactory") on the grounds that the quality of his work had gone down, he was often out of his office and he was not "accepted" by his colleagues. In the space for his own comments he wrote that he did not agree with what the report said, but he did not formally contest it. In the draft report for 1988-89 his performance was again rated "unsatisfactory" but since he had applied for the conciliation procedure it was not put in his personal file.

In 1990 he was given the job of filing documents at the Principal Directorate for documentation. His performance improved and was rated "adequate" in his report for 1990-91.

In 1992 he had a dispute with the EPO's health insurance company over the refund of medical expenses. On 10 March 1993 he lost his temper after speaking to someone in the company and threw to the floor some papers he was holding. By a letter of 11 March the Head of the Personnel Department told him that the President of the Office would be asked to report him to the Disciplinary Committee and he was summarily suspended from duty. On 25 March 1993 the Head of Personnel informed him of the start of proceedings for dismissal and sent a copy of his supervisor's report of 18 March on the incident of 10 March. By a letter of 26 May the Director of Staff Policy informed his counsel of the President's decision to order disciplinary proceedings for dismissal and sent a copy of the report instigating them.

In its report of 21 July 1993 the Disciplinary Committee recommended that the President reconsider his decision on the grounds that the complainant's professional shortcomings were not proven. In its view the incident of 10 March warranted no more than relegation by two steps. On 5 August 1993 he was sent a draft report on his performance in 1992-93, made on the President's orders. It described his work as "unsatisfactory". By a letter of 13 August the President told him he was dismissed for professional shortcomings as at 31 May 1994. On 26 August 1993 he lodged an internal appeal against the decision.

In its report of 11 April 1994 the Appeals Committee recommended reversing the decision to dismiss him, but the

President rejected his appeal in a letter of 24 May 1994, and that is the decision he is challenging.

B. The complainant pleads breach of due process. He submits that according to Article 52(2) of the Service Regulations the Head of Personnel should in his letter of 25 March 1993 have given the reasons for the proposal of dismissal. He mentioned only the incident of 10 March, which in itself afforded insufficient grounds for such drastic action. Citing the case law of the Court of Justice of the European Communities, he contends that the Organisation's failure to complete his staff reports for 1988-89 and 1992-93 precluded taking his whole career into account.

On the merits he pleads two flaws. First, the Organisation failed to discharge the burden of proof of his professional incompetence. It may not rely on the reports for 1988-89 and 1992-93 since they were not put on his file, and it has produced no other evidence in support. Secondly, citing the Disciplinary Committee's report, he contends that an employee may not be dismissed unless there are two consecutive staff reports rating his performance "unsatisfactory". There were not.

He submits that the real reason for his dismissal was financial: the EPO wants to save money on staff.

He asks the Tribunal to quash the dismissal; order the Organisation to pay him the sums he would have earned from 1 June 1994 up to the date of judgment, plus interest; reinstate him as from 1 June 1994 or pay him damages equal to the sums he would have earned from the date of judgment up to the date of his retirement; to repay all the expenses his dismissal caused him, such as the costs of removal and sickness insurance premiums, plus interest; and to award him costs and 20,000 guilders in moral damages.

C. In its reply the Organisation points out that the complainant did not in his internal appeal claim moral damages, repayment of his removal costs or payment of his salary until retirement; so those claims are irreceivable.

In the EPO's submission the Appeals Committee misconstrued Article 52(1) of the Service Regulations: dismissal for professional incompetence is a matter of discretion, not just of "quasi-mathematical assessment" of ratings in staff reports.

It denies procedural flaws: it was the letter of 26 May 1993 from the Director of Staff Policy that actually set off the dismissal proceedings; and appended was an introductory report giving the reasons for his dismissal. The Administration neither produced his reports for 1988-89 and 1992-93 during the disciplinary proceedings nor took account of them in deciding to dismiss him.

The complainant's work had long been unsatisfactory and he was so warned as long ago as 1982. Although his performance was better in 1990-91, it lapsed again the following year. The Organisation tried to help by transferring him in 1984 and agreeing not to put the 1988-89 report in his personal file. But the incident of 10 March 1993 and his 1992-93 report made it plain he was unfit for the international civil service. So the allegation that he was dismissed for financial reasons is unfounded.

At all events even if his complaint were allowed his reinstatement would be quite out of the question.

D. The complainant maintains that all his claims are receivable. The additional ones derive from the final decision to dismiss him, which had not yet been taken when he lodged his internal appeal. He submits that his performance was not consistently unsatisfactory and the Organisation never warned him. His work continued to improve after 1992, and the incident of 10 March 1993 was due to personal problems and had no bearing on his professional competence.

E. In its surrejoinder the Organisation presses all its pleas. It again points out that the complainant's supervisors expressed reservations in his staff reports and maintains that it did give him ample warning that his work was unsatisfactory. Dismissing him was therefore in its interests.

CONSIDERATIONS:

1. The complainant, a Dutchman who used to work for the EPO as an odd-job man, is challenging his dismissal for professional incompetence. Having been found medically unfit for some of his duties, such as the moving of furniture, he was transferred on 21 August 1984 to the Principal Directorate for documentation as an operator of photocopying equipment. From about 1990 he was engaged in the "maintenance and updating of the numeric

collection of non-patent literature", known as "XP documents", and performed other "small administrative tasks".

2. An incident involving the complainant occurred in the afternoon of 10 March 1993. On learning that the insurer which covered EPO employees would not meet the cost of an operation performed on his wife, he had an outburst of rage and threw files containing XP documents to the floor of his office. Though the papers were gathered together and there is no evidence of any loss, some damage may have been caused to them. On 11 March the Head of Personnel suspended the complainant pending disciplinary action.

3. On 25 March 1993 the Head of Personnel sent the complainant a report dated 18 March by his first-level supervisor about the incident of 10 March, asked him to comment and announced a proposal "to initiate a procedure for your dismissal in accordance with Articles 52 and 100 of the Service Regulations". The report referred to the incident and added, without particulars, that the complainant's work and time-keeping had never been satisfactory.

4. Article 52 of the Service Regulations provides:

"(1) Subject to Article 23 of the Convention, a permanent employee who proves incompetent in the performance of his duties may be dismissed.

The appointing authority may, however, offer to classify the employee concerned in a lower grade and to assign him to a post corresponding to this new grade.

(2) Any proposal for the dismissal of a permanent employee shall set out the reasons on which it is based and shall be communicated to the employee concerned. He shall be entitled to make any comments thereon which he considers relevant.

The appointing authority shall take a reasoned decision, after following the procedure laid down in regard to disciplinary matters.

..."

5. By a letter dated 19 April 1993 the complainant's counsel replied that the incident of 10 March had not occurred in isolation, that his outburst of rage had not been without cause and that he had neither intended to damage the papers nor actually damaged them. The letter briefly denied the allegation that his work and time-keeping had never been satisfactory.

6. By a letter of 26 May the Director of Staff Policy informed the complainant's counsel that the President had decided to start disciplinary proceedings for dismissal, and he appended a copy of the introductory report submitted to the Disciplinary Committee in accordance with Article 100. That report referred to the incident and to appraisals of the complainant's performance in staff reports and contained allegations of several earlier defaults and lapses. It submitted that they amounted to professional incompetence justifying dismissal under Article 52 and that the incident had been a serious breach of the complainant's obligations under Article 14 and one that warranted dismissal under Article 93(2)(f).

7. The complainant's performance was assessed as follows:

(a) Between 1973 and 1985 it was rated either 4 ("adequate") or 3 ("good") on a scale ranging from 1 ("outstanding") down to 5 ("unsatisfactory").

(b) His performance in 1986-87 was assessed as "unsatisfactory". The next completed appraisal, for 1990-91, rated his performance "adequate" and commented that "the improvement which Mr. Berg has been promising for years, seems to materialise slowly".

(c) Although a draft report for 1988-89 assessed his performance as "unsatisfactory" it was never completed.

(d) On 26 May 1993 - the very day on which the Director of Staff Policy informed his counsel by letter that disciplinary proceedings had started - the President of the Office ordered assessment of his performance from 1 January 1992 to 11 March 1993. A draft report dated 5 August 1993 rated his performance "unsatisfactory". He expressed disagreement, and again the report was never completed.

8. In its report of 21 July 1993 the Disciplinary Committee held that Article 52 of the Service Regulations did not apply to misconduct in general but only to professional incompetence, i.e. inability to discharge duties; that two consecutive unsatisfactory appraisals were usually necessary to establish such incompetence; that the complainant's behaviour on 10 March 1993 had no bearing on his ability to discharge his duties; that in any event he had never had two consecutive unsatisfactory appraisals; and that professional incompetence had therefore "not been proven". The Committee did, however, hold that, though he had not intended to damage the papers, his conduct had been in breach of his obligations under Articles 14 and 24 of the Service Regulations. It recommended relegation by two steps under Article 93(2)(d) on the grounds that dismissal was "too severe" a measure.

9. By a letter of 13 August 1993 the President informed the complainant that, though he agreed that the incident was a breach of duty warranting relegation in step, he considered dismissal for professional incompetence to be amply justified and dismissal would take effect at 31 May 1994.

10. The complainant appealed against that decision. In a report dated 11 April 1994 the majority of the Appeals Committee expressed the view that the "proposal", within the meaning of Article 52(2), for dismissal of the complainant was in the Head of Personnel's letter of 25 March 1993 to him, together with the report of 18 March 1993; that since that letter had asked him to comment only on the incident of 10 March 1993 the proposal to dismiss him had been based solely on his "misbehaviour"; and that the incident alone was insufficient to justify dismissal. The majority further held that, though the report of 18 March 1993 made "two references to other possible reasons for the proposal", it gave no indication of the other grounds that the EPO was later to put forward in its brief of 10 January 1994 in reply to his appeal; so that report was not the proper statement of reasons required by Article 52. The majority believed that any determination of professional incompetence had to take into account an employee's career as a whole; that the complainant's performance had been rated unsatisfactory only in 1986-87 and had actually improved in 1990-91; and that it was a procedural error to take into account the incomplete staff reports for 1988-89 and 1992-93 in deciding to dismiss him. The majority recommended setting aside the decision. It did not say whether disciplinary action should be taken under Article 93 of the Service Regulations.

11. By a letter of 24 May 1994 the Director of Staff Policy informed the complainant that the President did not accept the recommendation by the majority of the Committee. He considered that the procedure for dismissal had been correctly initiated because a proper statement of reasons had been appended to the letter the Director had sent him on 26 May 1993; that the incomplete appraisals for 1988-89 and 1992-93 had "never motivated" the dismissal; and that if the complainant's career were taken as a whole his "professional insufficiency" had been established and there was "no prospect of improvement". That is the impugned decision.

12. The Organisation submits that it made no procedural error over the statement of the reasons for dismissal. It was its letter of 26 May 1993 "which actually set the dismissal proceedings in motion" and the complainant had ample opportunity to reply and did in fact reply to the charges before the Disciplinary Committee.

13. The Tribunal holds on that score that the proposal to dismiss the complainant for professional incompetence within the meaning of Article 52 was the letter which the Head of Personnel wrote to him on 25 March 1993 and which is referred to in 3 above. That letter was mainly about his "behaviour on the afternoon of 10 March 1993". That incident was neither so serious as to warrant dismissing him on disciplinary grounds nor of any relevance to his professional competence.

14. The letter which the Director of Staff Policy wrote to his counsel on 26 May 1993, and which is referred to in 7(d) above, was not the proposal within the meaning of Article 52 but gave notice of the start of proceedings before the Disciplinary Committee and that a report on disciplinary action which was appended to the letter had been forwarded to the chairman of the Disciplinary Committee in accordance with Article 100. By including in that appended report other allegations that had not been made in support of the proposal for dismissal and by adding a distinct charge of misconduct warranting dismissal under Article 93 the Organisation caused the complainant undue prejudice.

15. Even if the additional charges against him in that report were admissible in support of a proposal under Article 52 the Organisation nevertheless offered no convincing evidence of his continuing inability to fulfil his professional duties. If the incomplete performance appraisals for 1988-89 and 1992-93 are discounted, as the President of the Office himself discounted them, his performance, as summed up in 7 above, shows not incompetence, but some improvement.

16. As for the charge of misconduct warranting dismissal under Article 93(2)(f), the Tribunal accepts the Disciplinary Committee's ruling that the complainant had no intention of causing damage in the incident of 10 March 1993. It is therefore satisfied that the sanction of dismissal was grossly disproportionate to his misbehaviour on that day.

17. The conclusion is that the impugned decision shows errors of procedure and of law and cannot stand, there being no need to entertain the complainant's further objections thereto. He has been wrongfully dismissed, and there are no proven facts which make his reinstatement "not possible or advisable" within the meaning of Article VIII of the Tribunal's Statute. The Organisation must reinstate him and pay him salary, allowances and other entitlements as from 1 June 1994. He need not give credit for any sums he may have earned since that date. For that reason he is awarded no sum in moral damages, even assuming that his claim to such damages is receivable. Though he claims damages on account of expenses he allegedly incurred because of dismissal, he has given no details whatever, and again no award will be made under that head. But since he has succeeded in the main his claim to costs is allowed, and the Tribunal sets the amount at 8,000 guilders.

DECISION:

For the above reasons,

1. The President's decision of 24 May 1994 is quashed.
2. The European Patent Organisation shall reinstate the complainant and pay him salary, allowances and other entitlements as from 1 June 1994.
3. It shall pay him 8,000 guilders in costs.
4. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas
P. Pescatore
Mark Fernando
A.B. Gardner