

EIGHTY-SECOND SESSION

In re Vollering (No. 10)

Judgment 1568

The Administrative Tribunal,

Considering the tenth complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 27 February 1996, the EPO's reply of 20 May, the complainant's rejoinder of 21 June and the Organisation's letter of 10 July 1996 informing the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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 EPO employs the complainant, a Dutchman, in the European Patent Office, its secretariat, at The Hague. He is a patent examiner in its Search Directorate (DG1). In a note of 3 April 1992 his supervisor set the target, or "norm", for his output in 1992 at 110 "files". By a note dated 17 December 1992 he told his supervisor he could not "accept" that figure and asked for conciliation. In a note of 26 August 1993 the conciliation officer informed him that though 110 was an "equitable norm" it should apply only from 1993 because of the "delay" since April 1992; for the first three months of 1992 the target would be at the rate of 100 a year and for the remaining nine at the rate of 106.5.

By a letter of 25 November 1993 the complainant asked the President of the Office to lower the target from 110 to 100 files and, if not, to treat his letter as an internal appeal. The President put his case to the Appeals Committee. In a report dated 23 October 1995 the Committee recommended rejecting it. By a letter of 12 December 1995 the Director of Staff Policy informed him that the President had endorsed the Committee's recommendation. That is the impugned decision.

B. The complainant submits that the target for his output is unlawful. It is, he says, arbitrary and in breach of the Organisation's duty to maintain standards of quality. The EPO discriminated against him by failing to make allowance for the two daily coffee breaks that a communiqué of 22 July 1992 allowed on condition that they did not interfere with work. He objects to having been transferred to another technical field on 1 January 1994 and sees that as a hidden disciplinary sanction for appealing against the target. He pleads breach of due process by the Appeals Committee.

He wants the Tribunal:

"A) to have production norms for the technical fields based on the clear and correct calculation as is provided for in [a] note of 18 February 1992 of the Principal Director Search ...;

B) to condemn the arbitrary determination of the increased production norm for [his technical field], an arbitrary determination which denied the right of the complainant to be heard and to condemn the excessive delays in treatment of this case by the Administration and to order compensation to the complainant of [10,000 guilders] for the factual and moral damage suffered by this arbitrary treatment;

C) a recalculation of the production norms for the technical fields in the complainant's directorate and the one for [his technical field], based on those figures which were valid till 1992, an adaptation of these norms based on an increased workload because of additional electronic tools, working time reduction, increased paper documentation and increased complexity of the dossiers and documentation, in order to meet a correct quality standard which belongs to the duty of an examiner or a clear statement that for the purpose of an increased productivity norm, the quality can be lowered.

D) to condemn the Administration of the EPO for the breach of good faith and the abuse of power because it wilfully separated [his technical field], from the complainant because the complainant filed an internal appeal against the increased norm for [his field] an action which in fact constitutes a covert disciplinary measure against the complainant and to order compensation to the complainant of [10,000 guilders] for the material and moral harm suffered by the complainant by this covert disciplinary measure.

E) to condemn the EPO for the failure of the Internal Appeals Committee and therefore the breach of due process in law during the internal appeal procedure because the Internal Appeals Committee did not show a proper neutrality and did not perform a proper investigation and

to order compensation to the complainant of [5,000 guilders] for the moral damage suffered by this;

F) to order compensation of [10,000 guilders] for costs incurred."

C. In its reply the EPO submits that the complaint is irreceivable. The target that the complainant is objecting to had no adverse effect on him inasmuch as his rating for productivity in 1992-93 was "good". His objections to transfer in 1994 are irreceivable because he has failed to exhaust his internal remedies.

The Organisation contends that his complaint is in any event devoid of merit. The impugned decision, which is discretionary, shows none of the flaws he alleges. His criticism of the Appeals Committee is odd inasmuch as he delayed entering his own brief until the date of hearings.

D. In his rejoinder the complainant comments on several issues of fact and law in the reply.

CONSIDERATIONS

1. The complainant is a grade A3 patent examiner at the EPO's office at The Hague. The director of division sets the number of search files each examiner must deal with to qualify for a "good" rating for output in his staff report. In doing so the director takes account of the results obtained in previous years by examiners whose output has been rated "good" in the same technical field and of comparison of results obtained by examiners in technical fields of similar complexity.

2. The complainant was informed in a note of 3 April 1992 from his supervisor that the output in his then technical field was raised as from 1 April 1992 from 100 to 110 "weighted" files over 180 "search" days. In a note of 17 December to his supervisor he asked for conciliation on the matter. On 26 August 1993 the conciliation officer confirmed the target for his output at 110 files but because of the lapse of time lowered it for the last nine months of 1992 from 110 to 106.5. His new target of 110 therefore applied only from 1 January 1993. On 25 November 1993 he filed an internal appeal against that decision asking that the target be lowered to the old figure of 100.

3. He was transferred to a new technical field as from 1 January 1994.

4. In a report of 23 October 1995 the Appeals Committee recommended rejecting his appeal. The President accepted the recommendation and so informed him in a letter of 12 December 1995, the decision he is impugning.

5. In 1992 the complainant completed 44.25 searches over 80.5 days. That was the equivalent of 93.16 over the 180 days. After an internal appeal he had his rating for productivity raised to "good". In 1993 he did 69 searches over 122.5 days, or the equivalent of 101.38 over the 180 days and after conciliation was again rated "good" for output.

6. The Organisation submits that his complaint is irreceivable because only when an examiner is given a final rating in his staff report has the target any impact on his legal position; that until then it is just the figure to aim at; that since he had suffered no injury from the change in the target for his output the complainant's internal appeal showed no cause of action and was therefore irreceivable; and that for the same reason so too is his complaint.

7. The complainant retorts that when he appeals against the change of target the EPO tells him he is acting prematurely, whereas if he had awaited the rating to appeal it would no doubt have objected that he was out of time on the grounds that he should have appealed against the target itself.

8. The setting of the target is in itself an appealable decision: it may have an immediate adverse effect on an examiner because of the direct link between attainment of the target and the "good" rating for output in his staff report.

9. Yet only part of the relief that the complainant claims in the complaint form is the same as the relief he sought in his internal appeal, namely "C) a recalculation of the production norms for ... [his] technical field ... based on those figures which were valid till 1992".

10. On that score all that need be said is that the increased norm of 110 applied only for the year 1993: from 1994 on he was working in a different technical field. Since he was given a "good" rating for output for 1993 he has

failed to show any actionable injury attributable to the change in figure. Insofar as he is objecting to the change his complaint fails because it discloses no cause of action.

11. Claim D) seeks an award of damages for his being transferred on 1 January 1994 to a new technical field, a decision he sees as a "covert disciplinary action". That claim did not form part of the internal appeal he lodged on 25 November 1993, and he put it forward for the first time in his reply of 27 September 1995 to the Organisation's brief on that appeal. By that time the claim was time-barred anyway. Claim D) therefore fails under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress.

12. Claims A) and B) -- to the establishment of new "production norms for the technical fields" and to an award of damages for "arbitrary determination of the increased production norm" and for "excessive delays" -- are dismissed for the same reason: they did not form part of any internal appeal and so the complainant again has failed to exhaust his internal remedies.

13. Claim E) is to an award of damages for "the failure of the Internal Appeals Committee" and breach of due process in the appeal proceedings. It fails because the complainant's accusations are gratuitous.

14. Lastly, claim F), which is to costs, is disallowed because it is subsidiary and because the principal claims fail in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner