

Registry's translation, the French text alone being authoritative.

FIFTY-SEVENTH ORDINARY SESSION

In re DELANGUE

Judgment No. 687

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Paul Delangue on 31 January 1984 and corrected on 5 March 1985, the EPO's reply of 24 May, the complainant's rejoinder of 27 June and the EPO's surrejoinder of 13 September 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 13 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. On joining the EPO as a grade A1 examiner on 1 March 1983 the complainant had to serve the period of probation required by Article 13 of the Service Regulations. Two interim probation reports, dated 28 July 1983 and 19 January 1984, contained assessments by his supervisors of his fitness to perform his duties, and the Principal Director of Personnel informed him on 16 February 1984 that the President had decided in the light of those reports to extend the probation period by six months. Another report was made on 18 July 1984. By a letter of 24 August the complainant was informed that in view of the terms of that report he was to be dismissed as from 1 September under Article 13. On 8 September he appealed against the decision and, having received no answer, he is impugning the implied decision to reject his appeal.

B. The complainant gives a detailed account of the facts. He observes that from the outset he was given files dealing mainly with optics, a subject with which, being an electro-technologist, he was unfamiliar. That accounts for the doubts expressed about the quality of his work in the first report, but the other two reports allude to the efforts he made. He believes that mistaken conclusions were drawn from the facts and that essential facts were overlooked, there being no grounds for saying that he was not up to standard. He also alleges various procedural flaws. He seeks "the quashing of the impugned decision, and/or the execution of the obligation laid down in Article 13(5) of the Service Regulations, and/or ... damages for the injury sustained, and/or an award of costs up to 50,000 guilders equivalent to six months' salary...".

C. In its reply the EPO contends that since the final probation report did not confirm the complainant's fitness to perform his duties it was open to the President to decide at his discretion to dismiss him in accordance with Article 13 of the Service Regulations. Over such a decision the Tribunal has only a limited power of review, and the complainant has failed to establish the existence of any of the flaws which would enable the Tribunal to set it aside. The examiner will be assigned to one of the main technical areas of his specialisation, but sometimes he may be required to work in other areas. It was only reasonable to assign the complainant to optics, a subject which comes within the area of his specialisation. His output fell far below the average expected of an examiner, the quality of his work was also in several respects unsatisfactory, and even then the effort he had to put into his work was such that he could not have sustained it for long.

The EPO denies any flaws in the procedure followed: in particular he was given ample opportunity to comment on the probation reports. In sum, the President correctly took the view that the complainant had failed to show he had the right qualifications, and his decision therefore rested on a sound basis of fact. Lastly, as regards the claim to damages, the EPO observes that he was paid compensation for dismissal equivalent to two months' basic salary under Article 13(3). It invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant enlarges on his original pleas. After explaining how the technical work is allotted between the various divisions of the Office, he maintains that it is not customary to give an examiner work

in a field other than his own. Optics is a branch of physics and has nothing to do with electrotechnology. He dwells at some length on the question of his output and contends that during the extended probation period he met all reasonable requirements. The damages he claims are intended to compensate him for the unfair treatment he received.

E. In its surrejoinder the EPO develops the arguments put forward in its reply, rejects the complainant's various contentions, in particular with regard to his output, and again invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. Article 13 of the EPO Service Regulations provides that "permanent employees for whom the President of the Office is the appointing authority shall serve a probationary period" and that a probationer "whose work has not proved adequate shall be dismissed at the end of the probationary period". The President "may decide, in exceptional cases, to extend the probationary period before taking a final decision".

Implicit in these rules and in the general principles which govern the international civil service is the notion that the purpose of probation is to find out whether the official is capable of a satisfactory career in the organisation. The competent authority will determine on the evidence before it, and possibly after extension of the probation, whether to dismiss the official or to confirm his appointment.

2. Although the Tribunal may review the lawfulness of the dismissal, the nature of the decision is such that its power of review, where it finds no formal or procedural flaw, is limited. It will set the decision aside only if there was a mistake of law or of fact, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the evidence, or if there was abuse of authority. In a case of dismissal of a probationer the Administration should be allowed the widest measure of authority, and the decision will be quashed only if the mistake or the illegality is especially serious or glaring.

3. The complainant, who was formerly employed as a secondary school teacher in France, joined the EPO on 1 March 1983 as an examiner. In accordance with the provisions of Article 13 set out above he completed one year's probation, but after reading reports by his supervisors the President extended the probation period by six months. At the end of the six months the complainant was dismissed as from 1 September 1984. He lodged an internal appeal. The EPO did not reply, he filed the present complaint in accordance with Article VII of the Statute of the Tribunal, and it is receivable.

4. The interim report made after four months' probation and the one made towards the end of the year contained unfavourable comments about the complainant. But his supervisors did describe him as undoubtedly most conscientious, hard-working and anxious to please, and the second report added: "His rather reserved and unsure attitude is no doubt accounted for by difficulty in growing accustomed to a new kind of work." It was on the strength of those reports that the President extended the probation period.

5. The text of the decision does not state the reasons for the complainant's dismissal. In fact the reasons appear in his final probation report. This explains that by the end of the first 12 months it was thought that, however willing and hard-working he might be, he did not have the makings of an examiner. The report confirms that impression, though it again says he had worked extremely hard. It concludes with three points considered the most relevant: the impossibility of his keeping up such strenuous effort for any length of time, his refusal to try some other technically easier field and his statement that he would not stay long at the EPO.

6. The complainant denies he had any intention of leaving the EPO if he had his appointment confirmed. It appears that the reporting officer fastened on some small and insignificant incident. At any rate the EPO's reply to the complaint sheds no light on the matter, and it is only from the surrejoinder, and more particularly from the appended comments by the Principal Director, Search Department, that the Tribunal learns that the complainant made his statement in the presence of three directors. In fact that does not prove anything. The Tribunal concludes that either the President did not take this point into account or else, in the circumstances of the case, it afforded no grounds for the decision impugned. On either hypothesis it is immaterial.

7. No more telling is the allegation that the complainant refused transfer to another division. It is the Administration's responsibility to assign staff, even those on probation. There is no evidence to suggest that the

complainant was insubordinate, nor indeed does the EPO allege that he was. The reasonable explanation of his attitude is that he wanted to prove his fitness to perform his duties properly, and that is no valid reason for dismissal.

8. The main reason for the dismissal was in fact the complainant's low output.

This is a point that calls for closer scrutiny.

The final report states that during the extended period of probation the complainant dealt with a far greater number of files than is ordinarily expected of probationers. The EPO's submission that established staff deal with a greater number still is of no consequence: the complainant was not an established official and should have been treated throughout his probation period as a probationer. He actually surpassed the prescribed standards.

The report also acknowledges the quality of his work. His immediate supervisor said: "Mr. Delangue refused to treat the assessment in the probation report as final and wanted to prove -- particularly, he says, to himself -- that he was capable of good work in the technical field he had been assigned to, despite the difficulties mentioned in the probation report of 28 July 1985. It is quite clear he has managed to do so."

9. In such circumstances, when both the quality and the quantity of the work done are satisfactory, may account be taken of the effort the staff member had to exert?

The submissions do not address this question. All that the Organisation says is that the complainant had to make extraordinary efforts, and the report is no more explicit. There is no real discussion of the point, as there might have been had the case gone to the Appeals Committee. It is not enough to allege that "the complainant would have been unable to keep up for long without harm to his health and a great deal of overtime work" and to observe that the Service Regulations set strict conditions and limits on the overtime staff may be called upon to do. The Tribunal requires at least some evidence to support such a contention.

Nor does it matter that the complainant experienced difficulties in the first year of probation. In agreeing to extend the probation the President acknowledged that there might be improvement, and indeed there was. It was a serious abuse of discretion for him to overlook those facts unless the dossier contains evidence produced after the end of the normal probation period.

The EPO does say that the complainant's difficulties in achieving satisfactory results suggest that he would never have been capable of "the sort of versatility that is essential to thorough and sound research work". The argument is not a decisive one. What the EPO means by "versatility" in this context is normally the kind expected of an official within his own area of specialisation. There is no evidence which leads the Tribunal to believe that the complainant's knowledge of his own special field, electricity, was in any way inadequate. It is far likelier that the cause of his awkward start was the change in the nature of his employment. From his employment as a teacher he had acquired academic knowledge; on becoming an examiner at the EPO he had to adopt a quite different approach to work. This of course is only a supposition, and one for which there is no firm evidence. But the EPO ought to have looked into this more closely before extending the probation period, a step which constituted a commitment to the complainant in that it aroused expectation of confirmation provided his work came up to standard. All his supervisors found his work satisfactory by the end of the extended period of probation and he was by then entitled to confirmation.

10. The Tribunal concludes that the complaint must be allowed because the President drew clearly mistaken conclusions from the evidence.

The main claim is to reinstatement, and there is no reason not to allow it. Reinstatement will make the complainant whole, and he therefore will not be awarded damages. He is referred to the EPO for determination of his rights on reinstatement in its employ as from the date of his dismissal.

The Organisation shall pay him 3,000 guilders as costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed and the complainant is referred back to the EPO for determination of his rights on reinstatement.

2. The EPO shall pay him 3,000 guilders as costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 14 November 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner