

SIXTY-FIFTH SESSION

In re SCHMID

Judgment 918

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Rudolph Schmid against the European Patent Organisation (EPO) on 20 October 1987 and corrected on 27 November, the EPO's reply of 12 February 1988 as corrected on 29 February, the complainant's rejoinder of 17 March and the EPO's surrejoinder of 20 May as corrected on 22 July 1988;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 13(1), 51, 52, 93, 106(2) and 108(2) 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. The complainant, a citizen of the Federal Republic of Germany born in 1951, joined the EPO's General Directorate 1 (DG.1) at The Hague on 1 February 1981 as a search examiner. His first probation report called for improvement in his performance; the last one found improvement and gave him a general rating of 3 ("good"). Mr. Peeters, who took over as supervisor in July 1983, wrote a fairly bad staff report on him for the second half of 1983 but gave him 3; the countersigning officer reduced it to 4 ("adequate"). In a report for the first five months of 1984, which he challenges in his second complaint (see Judgment No. 919) Mr. Peeters gave him a general rating of 5 ("unsatisfactory").

He was given training at headquarters in Munich and moved to a service where it was thought he might find the work easier. But in a report for 1984-85, which he challenges in his third complaint (see Judgment No. 920), a third supervisor, Mr. Pasturel, again rated him 5. Though the complainant made general but not specific objections to both reports, the countersigning officer upheld them. On 1 June 1985 the complainant was transferred to another department, where his supervisor was Mr. Schoofs. In a letter of 23 January 1986 to the President of the Office he accused Mr. Schoofs of unfair treatment and harassment and said that if the reply did not satisfy him his letter should be treated as an internal appeal. In a minute of 13 February Mr. Schoofs explained that though he did constantly reject the complainant's work the reason was that it was not up to standard; the complainant would be best advised to find another job.

On 24 April 1986 the Vice-President of DG.1 wrote to the Principal Director of Administration suggesting dismissal for professional incompetence under Article 52 of the Service Regulations. In a letter to him of 14 May the President observed that all his difficulties were due to poor performance and suggested awaiting the next staff report. On 21 May 1986 Mr. Schoofs drafted a report for the last seven months of 1985: the rating was again 5 and the conclusion that no improvement could be hoped for.

By a letter of 22 May 1986 to the Principal Director of Administration at The Hague the complainant offered to resign on 31 January 1987. The Director accepted his offer in a letter of the same day, and on 1 August 1986 the President took a formal decision to that effect. On 30 January 1987, however, the complainant wrote to the President seeking to withdraw his resignation, which he said he had been driven to by unfair treatment and arbitrary reporting; if the President did not agree, he wished to lodge another internal appeal.

Both appeals went to the Appeals Committee on 26 February 1987. In its report of 23 June 1987 the Committee unanimously recommended rejecting both of them as irreceivable and the one against acceptance of his resignation as in any event devoid of merit. By a decision of 31 July 1987, the one impugned, the President rejected both appeals.

B. The complainant observes that according to Article 51(2) of the Service Regulations "The appointing authority shall take its decision confirming the resignation within one month of receiving the letter of resignation" and that according to Article 13(1) the appointing authority in his case was the President. The letter of 22 May 1986 from

the Principal Director of Administration, who was not the appointing authority anyway, merely acknowledged receipt of his offer of resignation. The President did not take a decision within one month of getting that offer. Moreover, Article 106(2) states: "Where the authority is the President of the Office, he shall notify the person concerned of his reasoned decision within two months from the date on which the request was made. ... If at the end of this period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it". In this case the complainant made his "request" - the offer of resignation - on 22 May 1986. Its rejection was therefore implied by 22 July 1987 and his appointment remained in force.

Besides, he was under stress due to threats of disciplinary action and arbitrary and unfair reports on his performance.

He asks the Tribunal to declare his resignation invalid and his appointment still in force.

C. In its reply the EPO contends that the complaint is irreceivable under Article VII(1) of the Statute of the Tribunal because the complainant failed to exhaust the internal means of redress: he did not lodge his internal appeal until 30 January 1987, over eight months after the decision of 22 May 1986 by the Principal Director of Administration to accept his resignation, i.e. after the three-month time limit set in Article 108(2) of the Service Regulations. The Director did not merely acknowledge receipt of his offer of resignation, but accepted it. He had duly delegated authority to do so under Article 51(2), and the President's later issuing a formal decision did not mean he did not. Indeed the complainant believed him to have authority: otherwise he would have written to the President instead.

Besides, the complaint is devoid of merit. The complainant was not under threat of disciplinary action: there was merely a proposal to dismiss him for professional incompetence because his staff reports had been bad. He did not offer resignation under duress. Nor were the staff reports "threats", but assessments his supervisors had the right and duty to make of his performance. If he objected he could have challenged them under the appeals procedure.

The treatment of him was fair. Several supervisors did their utmost to help, giving him training and trying him out in several areas of work. He resigned of his own free will and the fact that he rued it afterwards is immaterial. He does not explain why he did not act before 30 January 1987. He was granted eight months' full pay in compensation.

D. In his rejoinder the complainant discusses his staff reports and states his objections to them. He enlarges on his submissions of unfair treatment. He contends that the President himself was required by Article 51(2) of the Regulations to accept the resignation within one month and failed to do so; the Director's letter of 22 May 1986 did not suffice; and he was driven to resign by the threat of some "undefined action hanging over him". He presses his claims.

E. In its surrejoinder the EPO develops its pleas on irreceivability and on the merits, which it submits that the complainant says nothing in his rejoinder to refute.

CONSIDERATIONS:

1. On 22 May 1986 the complainant tendered his resignation as from 1 February 1987 to Mr. Stein, the Principal Director of Administration at the Organisation's office at The Hague. The quality of his performance as an examiner had been in question for some time and Mr. Delorme, the Vice-President of the Office, had suggested to Mr. Stein dismissing him under Article 52 of the Service Regulations for professional incompetence. In his letter of resignation the complainant referred to an agreement he had reached with Mr. Stein that after using up his leave entitlements he would be released from duty until the date of his departure. In comments which he added to the text of the letter on the same day Mr. Stein accepted his resignation and confirmed his release from duty. The complainant likewise acknowledged receipt of Mr. Stein's comments and immediately treated his resignation as operative and as releasing him from all duties. His salary was paid in accordance with the terms agreed.

2. By a decision dated 1 August 1986 the President of the Office, the "appointing authority" for the complainant, citing Article 51 of the Service Regulations and his letter of 22 May 1986, ordered that his resignation should take effect from 1 February 1987.

3. Article 51 provides:

"(1) A permanent employee who wishes to resign shall state unequivocally in writing his intention to terminate his service at the Office.

(2) The appointing authority shall take its decision confirming the resignation within one month of receiving the letter of resignation. The appointing authority may, however, refuse to accept the resignation if disciplinary proceedings against the employee are in progress at the date of receipt of the letter of resignation or if such proceedings are started within the following thirty days.

(3) Resignation shall take effect on the date specified by the appointing authority; that date shall not be more than three months after the date proposed by the employee in his letter of resignation in the case of employees in Categories A and L, and not more than one month in the case of employees in the other categories."

4. On 30 January 1987 the complainant wrote asking the President to declare his letter of resignation null and void and saying he had tendered his resignation under stress due to harassment by his supervisors and in a state of declining health. He appealed to the internal Appeals Committee, which recommended rejecting his appeal both as irreceivable and as devoid of merit. On 31 July 1987 the President rejected his appeal, and that is the decision impugned.

5. The Organisation submits that that was a decision not to reverse the earlier one to accept the resignation and that the complainant may not re-open the possibility of appeal after the time limit has expired simply by asking for a new decision on the same facts. It is therefore necessary to determine whether the resignation was accepted.

6. The complainant's first argument is that Mr. Stein only "received" the resignation and did not "accept" it. Mr. Stein wrote "Die Kündigung wird angenommen". The Organisation translates that "Your resignation is accepted", the complainant "The resignation has been received". The former rendering is the correct one. The verb "annehmen" has the connotation of taking up or accepting. The complainant himself, when acknowledging receipt of Mr. Stein's comments used "erhalten" to mean "received". Further, in a comment of 30 March 1987 on his staff report for 1984-1986 he used "annehmen" to indicate that he did not "accept" the assessment in the report. Accordingly the Tribunal is satisfied that the resignation was accepted by Mr. Stein on 22 May 1986, not merely received.

7. The complainant's second argument is that Mr. Stein was not the appointing authority and not competent to accept his resignation under Article 51.

8. The Organisation answers that the Principal Director of Administration at The Hague has always accepted and agreed on the terms of resignation on the President's behalf, as indeed the Appeals Committee agreed.

9. Even though the Organisation has not shown how, when or to what extent the President had delegated authority to the Director, the Director's decision in his endorsement of the letter of 22 May 1986 is the relevant one for reckoning the time limit. As the Tribunal held in Judgment 647 (in re Andres), provided a communication takes the form of a decision, its lawfulness is immaterial to the reckoning of the time limit: to hold otherwise would impair the stability of the parties' position in law, which is the purpose of the time limit.

10. The Tribunal is satisfied that the communication from the Director took the form of a decision. The complainant dealt with Mr. Stein as the person with whom to negotiate the terms of his resignation, which were more favourable than if he had been dismissed for professional incompetence. For over eight months he treated Mr. Stein's acceptance of his resignation as an effective decision, and indeed it was because all the terms were fulfilled by the Organisation.

11. His third argument is that because he had been threatened in April 1986 with disciplinary action by Mr. Delorme and because under Article 51(2) the appointing authority may refuse resignation if disciplinary proceedings are in progress he had good reason to believe that no decision on his resignation had been taken. The argument is not tenable. Dismissal for professional incompetence is not disciplinary action: Article 50, which deals with termination of service, distinguishes between dismissal for incompetence under Article 52 and dismissal as a result of disciplinary measures under Article 93.

12. Since the complainant failed to respect the time limit of three months for lodging an internal appeal under Article 108 against the decision of 22 May 1986, his complaint is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner