SIXTY-FIFTH SESSION

In re VAN DER PEET (No. 14)

Judgment 935

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourteenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 4 May 1988, the EPO's reply of 25 July, the complainant's rejoinder of 8 August, the EPO's surrejoinder of 26 September, the complainant's application of 17 October for oral proceedings and the EPO's comments thereon of 26 October 1988;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles 47 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and dismissed the complainant's application for oral proceedings;

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

A. The complainant is employed by the EPO in Munich as a substantive examiner and was promoted to grade A3 on 1 January 1985. Article 47 of the Service Regulations requires the making of staff reports. In the complainant's staff report for 1985 his supervisor rated him 3 ("good") for "productivity" and "quality" and gave him the same general rating. In comments dated 12 May 1986 he said he deserved a higher general rating; his many disputes with the Organisation had caused him stress, cost him much of his free time and kept down his output; and the EPO had been in breach of its general duty to enable its staff to work properly. In further observations of 17 July 1986 he applied for the procedure for conciliation which is prescribed in disputed cases, but on 7 December 1986 the President of the Office endorsed the report.

On 8 April 1987 the complainant lodged under Article 108 of the Service Regulations an internal appeal which was referred to the Appeals Committee on 19 May. In its report of 23 December 1987 the Committee held that there had been a procedural error in refusing conciliation and it recommended allowing the appeal and following the procedure. The chairman of the Committee passed its report on to the President on 8 January 1988. By a letter dated 3 March 1988 the Principal Director of Personnel informed the complainant that the President had cancelled his endorsement of the report and that the procedure for conciliation was to be followed.

B. The complainant observes that, the Committee's report having been submitted on 8 January, the President ought to have notified his final decision within 60 days, by 7 March 1988. Since the complainant did not get until 9 March the letter dated 3 March the President acted too late. Besides, what he got was not a final decision on the outcome of conciliation but mere notice that the procedure was to go ahead. So there is an implied rejection of his appeal which he may challenge under Article VII(3) of the Statute, indeed must, if he is to safeguard his rights.

As to the merits, he contends that conciliation is pointless anyway because the Administration will pervert the procedure to its own ends. Though aware of the toll his disputes were taking of his time and energy, his supervisor was never officially informed of them and so could not make allowances for them in the general rating.

He asks the Tribunal to order the EPO, "binding it over" in the sum of 100,000 Deutschmarks, to change to 1 ("outstanding") his ratings for "productivity" and "quality" and his general rating. He seeks financial compensation and moral damages in amounts he reserves. He claims DM 5,625 in costs.

C. Having applied for and obtained from the President of the Tribunal permission to address only the issue of receivability, the EPO submits that, though the decision of 3 March 1988 was not notified to the complainant until 9 March, over 60 days after the Appeals Committee had reported, the complaint is irreceivable because there is no final decision yet on the internal appeal. The conciliation procedure, which started on 27 May 1988, does not form part of the appeal proceedings and is subject to no time limit: in that respect this complaint differs from the one the Tribunal declared receivable in Judgment 852 (in re Benze No. 5). No final rejection of the appeal was to be inferred from the expiry of the 60 days' time limit for the President's decision. Any such inference that might have been drawn was rebutted anyway by the decision of 3 March.

Besides, the complaint serves no purpose since endorsement of the report has been withdrawn.

D. In his rejoinder the complainant objects to the grant of the defendant's application for permission to reply only on receivability and seeks disclosure of the correspondence on that matter between the President of the Tribunal and the EPO.

To his mind the express decision made known to him on 9 March 1988 did not remedy the failure of the President of the Office to act in time; indeed the conciliation proceedings ought to have been over by then. After getting that decision he waited in vain for the EPO to act, but by 4 May thought it only prudent to go to the Tribunal, especially since he knew how vindictive the Organisation could be. Though the EPO says the conciliation procedure began on 27 May 1988 - long after the expiry of the 60 days - it has not stated its position beyond repeating the plea it put on 19 May 1987 to the Appeals Committee, namely that it was inappropriate to take up his comments of 17 July 1986. Its tactics are devious and show bad faith.

The complainant further claims moral damages for the EPO's application for permission to limit its reply to receivability. He claims 3,500 United States dollars in costs.

E. In its surrejoinder the EPO comments on the complainant's objections to the grant of its application for permission to address only the issue of receivability.

It maintains that pending the outcome of the conciliation procedure the internal means of redress have not been exhausted. That procedure is a phase of the original reporting procedure, not an addition to the internal appeal proceedings. The President's decision is not the final one on the appeal, the purpose of conciliation being to produce a report purged of the procedural flaw. The President had authority to withdraw the challenged decision even after the expiry of the 60 days because he had good reason to do so and the complaint had not yet been lodged with the Tribunal.

CONSIDERATIONS:

1. In the report on his performance in 1985 the complainant's supervisor gave him a general rating of 3, meaning "good". He did not agree with that and in observations of 17 July 1986 applied for the procedure for conciliation, contending that the rating should be 1, "outstanding". On a mistaken view of the law held by the President of the Office that procedure was not followed as it should have been: instead on 7 December 1986 the President simply endorsed the report.

On 8 April 1987 the complainant lodged an internal appeal which was referred to the internal Appeals Committee. The Committee reported on 23 December 1987. It held that there had been a procedural error in refusing conciliation and recommended allowing the appeal and following the conciliation procedure. By a letter of 3 March 1988 the complainant was informed that the President had cancelled his endorsement of the report and that that procedure was to be followed.

Receivability

2. The complainant argues that his complaint is receivable because the President's decision of 3 March 1988 was not notified to him until 9 March, over 60 days after the Appeals Committee had reported.

His plea is mistaken. No final decision has yet been taken on conclusion of the conciliation procedure. As the Organisation observes in its reply, the conciliation procedure does not form part of the appeal proceedings and though it did not start until 27 May 1988 it is not subject to any time limit. In that respect this complaint is to be distinguished from Mr. Wolfgang Benze's fifth complaint, which the Tribunal declared receivable in Judgment 852.

That is why final rejection of the appeal may not be inferred on the grounds that the President ought to have taken his decision on the Appeals Committee's report within 60 days of the date on which it was notified. Any such inference that the complainant might have mistakenly drawn was rebutted anyway by the decision which the President actually took on 3 March and which set in motion the conciliation procedure.

In any event the complaint serves no purpose because by that decision approval of the report was withdrawn.

The merits

3. The complaint being irreceivable, there is no need to go into the merits.

Other matters

4. The complainant questions the impartiality of the President of the Tribunal on the grounds that the President allowed the EPO's application for permission to confine its reply to the issue of receivability.

The President took that decision by virtue of his general authority to direct proceedings.

Even when the President has granted permission to reply only on receivability the Tribunal may still declare a complaint receivable and order further pleadings on the merits, as indeed it did in Judgment 852.

The Tribunal confirms the President's decision, which did not prejudice the complainant's ultimate rights and therefore complied with the letter and spirit of the Tribunal's Statute and Rules of Court.

5. The complainant further demands disclosure of correspondence between the EPO and the Tribunal relating to the EPO's application. Since the President acted correctly in allowing the EPO to confine its reply to the issue of receivability the complainant's application serves no purpose and is rejected.

6. In his pleadings the complainant would be well advised to use language that addresses the material issues of his case instead of levelling personal accusations against the Tribunal or its members.

7. The dismissal of this complaint need not be the end of the matter. If the outcome of the conciliation procedure does not give him satisfaction the complainant may, if so minded, appeal to the Tribunal against the final decision.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Tun Mohamed Suffian, Vice-President of the Tribunal, Mr. Héctor Gros Espiell, Deputy Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Mohamed Suffian
H. Gros Espiell
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.