

EIGHTY-SECOND SESSION

In re Nies

Judgment 1590

The Administrative Tribunal,

Considering the complaint filed by Mr. Guy Léon Nicolas Nies against the European Patent Organisation (EPO) on 20 June 1995, the EPO's reply of 5 September, the complainant's rejoinder of 16 January 1996 and the Organisation's surrejoinder of 10 April 1996;

Considering Articles II, paragraph 5, and VII, paragraph 3, 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 citizen of Luxembourg born in 1951, accepted a probationary appointment with the European Patent Office, the Secretariat of the EPO, for a "translator (terminologist)" that the Director of Personnel had offered him on 1 October 1991. He took up duty on 1 November 1991. According to the letter of appointment dated 14 October 1991 he was to serve in the Language Service of Directorate-General 4 (DG4) in Munich as a translator at grade A3. After extending the period of probation by six months the EPO granted him a permanent appointment on 1 May 1993.

By a note of 30 November 1994 the Director of the Service told the staff that someone else was to take over the complainant's duties as a terminologist and that he would thenceforth be working as a translator in the French section.

By a letter of 23 January 1995 he asked the President of the Office to reverse that decision or else treat his letter as an appeal.

In a letter of 15 February the Vice-President in charge of DG4 explained that the reason why the Director had set him to other duties was that his work on terminology was below par; so did he still want to appeal? In letters of 9 May to the President and of 10 May to the Vice-President the complainant answered that he did. By a letter of 21 June the Director of Staff Policy told him that his appeal of 23 January had been registered. By a letter of 3 July the chairman of the Appeals Committee informed him that it had got his appeal of 9 May on 21 June. But on 20 June he had filed this complaint with the Tribunal.

B. The complainant observes that by the date of filing he had had no "confirmation" of his internal appeal. So he believes he has exhausted his internal remedies. The EPO has wrongfully prevented him from exercising his right of appeal.

The Director of the Language Service acted *ultra vires*: she was not free to change his duties. In any event her note of 30 November 1994 neither amounted to the written communication of an individual decision which Article 106(1) of the Service Regulations requires, nor vouchsafed any explanation.

The announcement of his "transfer" was "vexatious" and impaired his professional reputation both inside the Office and outside it. He was not recruited to do translations and is not qualified for such work.

He asks the Tribunal to reinstate him in his post as "terminologist", quash all the decisions confirming the one he originally challenged and award him damages for material, professional and moral injury and 2,000 German marks in costs.

C. In its reply the EPO denies preventing the complainant from exercising his right of appeal. It points out that he

has omitted to mention the letter that the Vice-President of DG4 sent him on 15 February 1995.

The Director of the Language Service did not act *ultra vires*, having been empowered by delegation to change his duties. The work he did on terminology was not what the translators and revisers needed; so he had to be assigned to another job in the Organisation's interests.

The description of the translator's post which he was recruited to refers to "manifold duties in the relevant field of language". That is why he came to be given the work on terminology. The letter of appointment dated 14 October 1991 shows that he was appointed translator, not terminologist. Besides, his personal records show that he did translations from 1986 to 1991; so how can he make out that he is not qualified for his new duties?

The Director of the Language Service had several talks with him to explain the reasons for the decision. The Vice-President too set them out in his letter of 15 February 1995. The complainant is wrong to regard as vexatious the announcement of his new duties since the note sent on 30 November 1994 to the staff of the Language Service did not give the reasons for the change.

D. In his rejoinder the complainant develops his arguments. He submits that a set of particular and consistent circumstances, which he recounts, shows that when the EPO took him on it wanted a terminologist. It did not, as it says, just give him new duties; it transferred him from the post for a terminologist, to which he had been recruited, to one for a translator. The duties of a terminologist are stated only in the description of a reviser's post, not that of a translator's.

In support of his plea that the impugned decision was unexplained he submits that, even if meant to explain it, the Vice-President's letter of 15 February 1995 contained inconsistent and wrong assertions. It cited a report on his performance in 1992-93, which is still subject to "conciliation" and therefore may not be relied on. The reason why the decision was taken was that the Director disliked him.

E. The Organisation presses its pleas in its surrejoinder and says that nothing in his rejoinder makes it alter them.

CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 November 1991.

By a decision of 14 October the President of the Office granted him a probationary appointment "as a translator at Directorate-General 4 in Munich" at grade A3. After having the probation extended by six months he got a permanent appointment. In an official document supplied by the defendant the post of a grade A3 translator is described as follows:

"To carry out his duties the official must have broad professional practical experience and a university education qualifying him to perform duties in the relevant field of language. He will be working mainly on his own within a team.

He will be expected to carry out language work under general instructions. He must do any research required and produce good accurate translations that call for little revision.

He may be called upon to coordinate the work of a small group."

The complainant had applied for the post in answer to a newspaper advertisement. It said that the Office had openings for English, French and German translators and revisers and that one of them required a keen interest in computers for work on terminology, among other things. The complainant had a relevant university doctorate and experience and had done translation. From the outset he worked as a terminologist to set up a database, but the description of his post was never changed.

There was disagreement over what he should be doing. He leaned to an academic approach whereas what the translators and the Director of the Language Service wanted was a means of helping them to do their work. The Director decided, while keeping him on his post, to set him to translation in the French section. She told him so on 25 October 1994 but he objected. By a note of 30 November she told the staff of the Service that thenceforth Mr. Jean-Noël Blancard, who had been with the Office for years, would be in charge of terminology and the complainant would be working as a translator into French.

By a letter of 23 January 1995 he asked the President of the Office to set aside the Director's decision. He said he

had "at least" three objections: the Director had acted *ultra vires*; the decision had not been notified properly and in person; and it was unexplained. He said that, if the President refused, his letter was to be treated as notice of appeal.

In a letter of 15 February the Vice-President in charge of DG4 gave him the reasons for the change in his duties, one being that his work had not come up to expectations, and asked whether he still intended to appeal.

On 10 May 1995 the complainant replied that he did. He had pointed out the day before in a letter to the President that the deadline in Article 109(2) of the Service Regulations had long gone by and he had said that if he got no notice of referral to the Appeals Committee under Article 109(1) he would be appealing to the Tribunal. On 21 June the Director of Staff Policy wrote to say that his letter of 23 January 1995 had been registered as an appeal, and the Chairman of the Appeals Committee informed him on 3 July that on 21 June it had received a copy of his appeal of 9 May.

2. In his original brief the complainant puts the same three pleas to the Tribunal. He therefore asks it to set aside the implied decision rejecting his appeal, order his reinstatement as a terminologist and award him damages for material, professional and moral injury and costs.

In its reply the Organisation admits that he has exhausted his internal remedies. It refutes all his pleas: the Director of the Language Service did have authority to give him other duties on the same post; he was himself told of the decision, both orally and in writing; and it was properly accounted for, since the Organisation told him the reasons for the change of duties. The EPO explains that his poor performance required the change.

In a rejoinder of 73 pages he retorts that his work was beyond reproach and the criticisms of him unfounded and he restates his objections to the decision.

In its surrejoinder the Organisation submits that in his rejoinder he is relying on new facts and pleas that appeared neither in his internal appeal nor in the original brief he addressed to the Tribunal.

3. It is common ground that the complaint cannot be declared irreceivable because of any failure on his part to pursue the internal appeal procedure. It is indeed receivable under Article VII(3) of the Tribunal's Statute.

Although he might at the outset have challenged the decision on the merits, only in his rejoinder has he done so. Yet the case law allows the submission of new pleas both in the complaint and in the rejoinder: it is only new claims that may not be made: see for example Judgments 429 (*in re* Gubin et Nemo) under 1; 522 (*in re* Nielsen) under 18 and elsewhere; 960 (*in re* Cuvillier No. 2) under 8; and 1019 (*in re* Barahona No. 2 and Royo Gracia) under 10. Both in his internal appeal and before the Tribunal the complainant has claimed the quashing of the decision to change his duties. He claims no more in his rejoinder, even though some of his pleas are new. Those pleas are therefore receivable.

4. A strong line of precedent has it that a decision determining a staff member's duties is at the discretion of the executive head of an organisation and as such is subject to only limited review by the Tribunal. It may be set aside only if it is *ultra vires* or in breach of a rule of form or procedure, or shows some mistake of fact or of law, or has overlooked some essential fact, or if some obviously wrong inference has been drawn from the evidence, or if there is misuse of authority. Moreover, the Tribunal will be especially cautious in this area and will not seek to replace an organisation's assessment of a staff member's abilities with its own: see for example Judgments 1496 (*in re* Güsten) under 7 and 1556 (*in re* Leprince No. 2) under 5. Further caution is called for, too, where the issue is not transfer but the determination or alteration of the duties to be performed on a given post. Here the duties required of the complainant are not different from those provided for at the date of recruitment, the Organisation enjoying the widest discretion in matching duties to needs.

It is true that what the letter of 1 October 1991 offered the complainant was a "probationary post as translator (terminologist) at Directorate-General 4", and what the Office then had in mind for him was work in terminology. Yet there was no change in the description of the post: so much is clear from the text of the advertisement, the letter of appointment and the document quoted in 1 above describing a translator's duties.

5. Judgments 1103 (*in re* Schulz No. 2) and 1146 (*in re* Galichet) ruled on issues raised by a change in a translator's duties, but not in his post, in the EPO's Language Service. What they said has a bearing on this case too.

The complainant contends that what the impugned decision entailed was really transfer and a change of post. He is mistaken. The duties of a post are determined by the description of it in the letter of appointment and by any later changes: see Judgments 1103 under 3 and 4 and 1146 under 4 and 7.

The complainant's letter of appointment said that he was to perform the duties of a translator. The description of his post was not changed thereafter. The table of EPO posts does not include any for a terminologist. He says that the parties' clear intent was to put him on such a post. Again he is wrong. He must have realised that the Organisation creates a post by express decision, and that he himself was put on a translator's post even though he was set, at least to begin with, to work on terminology. The post description made it plain that the Organisation might give him other duties without changing his post. The Organisation would obviously not have wanted to forfeit the possibility of doing so, should its interests so require, without changing the post description, which would have meant a decision by the competent authority.

6. Since the change of duties, still on the same post, was no transfer Article 12(1) of the Service Regulations did not apply and the Director of the Service did have authority to take the decision: see Judgment 1146 under 4 and 7. The description of the duties of a director at grade A5/L5 includes authority to "manage an administrative unit covering several specialised areas of work" and "the issuance of instructions on the running of the unit".

7. Article 106(1) of the Service Regulations says that any decision adversely affecting a person shall state the grounds on which it was based: see also Judgment 899 (*in re* Geisler No. 2 and Wenzel No. 3) under 17. But that provision does not require the Organisation to state them in the actual text notified to the staff member. All that is required is that he be aware of them so that he may -- for one thing -- challenge them on appeal. He may learn of them from some other document, or from prior proceedings, or orally, or even later in answer to his objections: see for example Judgments 544 (*in re* Bordeaux), 675 (*in re* Pérez del Castillo), 946 (*in re* Fernandez-Caballero), 1128 (*in re* Williams), 1154 (*in re* Bluske) and 1298 (*in re* Ahmad No. 2).

In this case the requirement was met: the Director explained the reasons orally to the complainant and they tallied with earlier comments, including some in reports on his performance. The Vice-President in charge of DG4 confirmed them in his letter. Indeed the complainant himself does not accuse the Organisation of withholding the reasons for the decision.

The plea therefore fails.

8. For the same reasons so does his plea that the decision was not properly notified: it was conveyed to him orally and in writing and confirmed by the Vice-President later.

9. He contends that it was improper of the Organisation to accuse him of unsatisfactory work without bringing disciplinary proceedings which would have afforded him safeguards; he was denied his right of reply and suffered a hidden disciplinary sanction.

The Organisation has never accused the complainant of any sort of conduct warranting disciplinary action but merely of poor performance. So the change in his duties did not amount to a hidden disciplinary sanction: see for example Judgments 1496 under 8 and 1546 (*in re* Randriamanantenasoa) under 13.

10. As to the merits the complainant argues that the Organisation promised him permanent assignment to work on terminology and was therefore in breach of good faith. The plea is without merit. As was said in 5 above the description of his post was not changed. As he must have realised, it was not in the Organisation's interests to forgo the possibility of giving him more useful duties. Besides, there is no evidence to suggest that the EPO made him any such specific promise.

11. Judgments 1103 and 1146, which were also about the EPO's Language Service, upheld decisions by the Head of the Service to allot by rotation among the staff the duties of head of each language section. It ruled that the exercise of those duties did not confer tenure and there had been no misuse of authority in so organising the work. This case is comparable. The Director switched the duties of two members of the Service by setting another translator to work on terminology and the complainant to translation proper. That may not have been what he wanted, but his supervisors had good reason to believe that it was what the Organisation's overriding interests demanded.

12. The gist of the complainant's case is that there was misuse of authority: the Director and a senior colleague who was supervising him acted against the Organisation's interests from a spiteful urge to harm him by ouster.

Though the burden is on him to show such misuse of authority, he offers not a jot of evidence of it. He may have thought his performance beyond reproach; but, whatever the reports said on his performance, his supervisors kept within the broad bounds of their discretion in coming to the view that the change was needed for the sake of efficiency. Indeed the Director's own supervisor had approved it. The plea is without merit.

13. Since his main claim fails, so must the others. In argument since there was neither an unlawful decision nor any especially serious injury, the complainant is not entitled to moral damages.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner