

## **EIGHTY-SEVENTH SESSION**

### ***In re Böttger***

#### **Judgment 1865**

The Administrative Tribunal,

Considering the complaint filed by Mr Joachim Friederich Böttger against the European Patent Organisation (EPO) on 12 May 1998 and corrected on 26 May, the EPO's reply of 17 August, the complainant's rejoinder of 15 September, the Organisation's surrejoinder of 22 October 1998, the complainant's further brief of 13 January 1999 and the EPO's comments of 12 May 1999;

Considering Articles II, paragraph 5, and VII 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 German who was born in 1943, was an architect in the private sector before joining the EPO at its Directorate-General 4 on 1 September 1988 on a permanent appointment. He was assigned as a principal administrator to an A4 post related to two building projects. On 1 January 1992 he was promoted to grade A5.

One of the projects having being discontinued in the Spring of 1992, the complainant asked the President of the European Patent Office, the secretariat of the EPO, in a letter of 26 October 1992 to assign him to reserve status under Articles 46 and 114 of the Service Regulations.

On 3 December 1993 he signed an agreement with the President which stated that his post would be deleted from the 1994 budget. However, the EPO postponed assigning him to reserve status until 1 October 1994 to allow him to acquire certain social benefits. Meanwhile, he was to be entrusted with "special duties" in Directorate-General 4.

On 9 April 1996 the complainant sent a letter to the President saying that in accordance with Article 46(5) of the Service Regulations he wished to "make use of [his] priority for reinstatement" in a suitable post. The Vice-President in charge of Personnel Management replied in a letter of 10 May that reinstatement was not possible. In a letter of 6 December the complainant asked the President to make concrete proposals for his reinstatement. By a letter of 20 December 1996 the President confirmed what had been said in the letter of 10 May.

By a letter of 8 January 1997 the complainant lodged an internal appeal with the President against the decision of 20 December 1996. In a letter of 3 March the Director of Personnel Development told him that the President was unable to give a favourable response to his appeal and had referred it to the Appeals Committee. In its report of 16 December 1997 the Committee found the appeal to be receivable but recommended dismissing it. In a letter of 17 February 1998, which is the impugned decision, the Director of Personnel Development informed the complainant that the President endorsed this recommendation.

B. The complainant submits that, although Article 46 requires the EPO to explore all possibilities of reinstatement for a period of two years following assignment to reserve status, the right persists beyond this period of time. In short, the rule establishes a continuing duty of care on the part of the Organisation.

He adds that by commissioning an external firm for later building projects, the EPO denied him a fair chance.

The Organisation puts too narrow a construction on Article 46. It refused to reinstate him on the grounds that there were no suitable A5 posts, but it should also have explored the possibilities of putting him on an A4 post.

The EPO has always found "special solutions" for other cases, so it is strange that in his case it should adopt such a formalistic attitude and act in a dilatory manner.

He asks the Tribunal to order his immediate reinstatement in the Office in an A5 post or, failing that, an A4 post.

He also claims costs.

C. The Organisation replies that the complaint is irreceivable because it challenges a decision which merely endorses the one taken by the Vice-President on 10 May 1996. The complainant therefore exceeded the time limit for internal appeals.

It explains that the complainant has no "absolute right" to reinstatement. Article 46(5) grants only a priority right, limited to two years, if a post falls vacant or is created during this time. As an architect, he was not qualified for any of the administrative or other posts which fell vacant or were created. Therefore, his candidature could not be considered.

The work undertaken later in the various EPO buildings did not warrant creating a budget post, which is why the Organisation brought in an outside contractor.

As to its alleged failure in its duty of care, it recalls that his assignment to reserve status was postponed by nine months, that is to 1 October 1994, to give him access to certain financial and social benefits.

The Organization was bound to propose to him only A5 posts according to Article 46, which protects the rights of permanent employees assigned to reserve status.

By accepting to have those provisions applied to him, he waived his right to any further legal claims.

D. In his rejoinder, the complainant cites the report of the Appeals Committee and states that the decision of 10 May 1996 not being a final one, his complaint is receivable.

The fact that he was given a permanent appointment shows that the EPO expected him to perform administrative duties once the building projects on which he worked were completed. The later building projects are proof that it needed to recruit him.

He denies having relinquished any further rights by signing the agreement of 3 December 1993.

The EPO failed in its obligations towards him. The obstacles it cites as preventing his reinstatement are unconvincing.

E. In its surrejoinder the Organisation maintains that the complaint is irreceivable.

It rebuts the complainant's pleas and adds that the current building projects can be handled by someone of a lower grade.

F. In a further brief, the complainant refers to an article from the "*Süddeutsche Zeitung*" of 19/20 December 1998 which says that one of the buildings which he had been in charge of was being extended. He adds that the EPO has undertaken new building activities at its headquarters. It had earlier denied him any information on its intentions.

G. In its comments, the EPO states that the complainant's further brief does not introduce any new argument liable to modify its position. It points out that the Appeals Committee unanimously found that the Office was right to refuse to keep him abreast of its building projects.

## CONSIDERATIONS

1. The complainant, a German citizen, joined the EPO on 1 September 1988 as a principal administrator at grade A4 to take charge of two large building projects in Munich and in The Hague. On 1 January 1992 he was promoted to grade A5.

2. When the Organisation decided to abandon the project in The Hague, the complainant asked in a letter of 26 October 1992 to be assigned to reserve status as from 1 January 1995 under Articles 46 and 114 of the Service Regulations. In accordance with Article 46(3), the Vice-President in charge of Personnel Management consulted the General Advisory Committee, which concluded unanimously that the complainant's case met all the requirements for assignment to reserve status.

3. On 3 December 1993, the complainant signed an agreement with the EPO setting out the conditions of his assignment to reserve status. It said, among other things, that the assignment would start on 1 October 1994 and that he waived his right to any claims against the EPO.

The date of assignment to reserve status was determined so that the complainant could acquire entitlement to a pension and continue to benefit from the social protection scheme.

4. As he did not find employment in his occupation in the private sector, the complainant requested the President of the Office, in a letter of 9 April 1996, to reinstate him in a post commensurate with his qualifications. On 10 May 1996, the Vice-President replied that, in accordance with Article 46 of the Service Regulations, and after considering vacancies in other departments of the EPO, his reinstatement in a post at the same grade was not possible.

On 14 October 1996, the EPO sent the complainant a list of posts which had fallen vacant since November 1994. He was also informed that Article 46 of the Service Regulations had not yet been applied in other cases.

5. On 20 December 1996, the President confirmed the decision taken by the Vice-President on 10 May 1996 that his reinstatement was not possible. On 8 January 1997, the complainant lodged an internal appeal against this decision. The Appeals Committee reached the unanimous opinion that the appeal should be rejected. On 17 February 1998, the Director in charge of Personnel Development informed the complainant that the President had decided to dismiss the appeal definitively.

It is this decision which is impugned in the complaint.

6. The complainant asks the Tribunal to order his immediate reinstatement to a post at grade A5, or alternatively at grade A4, and the payment of costs.

7. Article 46(5) of the Service Regulations states that:

"For a period of two years from the date on which assignment to reserve status takes effect a permanent employee shall have priority for reinstatement in any post corresponding to his grade which may fall vacant or be created, provided that he possesses the necessary qualifications and ability."

In the material case, this period was from 1 October 1994 to 30 September 1996. The complainant requested reinstatement on 9 April 1996.

8. On 23 September 1996, one week before the expiry of the two-year period of priority envisaged in Article 46(5), the complainant informed the EPO that he did not rule out the possibility of accepting a post at a grade other than A5 as an "interim solution".

In view of the date on which this request was made, it was manifestly impossible for the EPO to take it into account.

9. The complainant accuses the EPO of adopting a restrictive and purely formal application of Article 46(5) by only taking into consideration his reinstatement at grade A5. He also contends that, in good faith, the EPO aggravated his situation by promoting him to grade A5, thereby making his reinstatement more difficult.

The Tribunal cannot allow this argument. The good faith of the EPO, which is recognised by the complainant, demonstrates that it in no way intended to prejudice him.

10. In this case, the obligation of the EPO is not to reinstate the official who has been assigned to reserve status, but to make all the necessary efforts for his reinstatement. In other words, it is not an obligation as to the outcome, but as to the means employed to achieve the outcome.

11. The complainant has not proved that posts that he could have filled, corresponding to his grade and qualifications, fell vacant while he was assigned to reserve status or that the EPO has in any way disregarded his priority right.

12. The complainant also submits that the EPO could have called on his services as an architect for construction

work after his assignment to reserve status.

The EPO was fully entitled to entrust construction work to outside contractors and had no obligation to create a post so that the complainant could be reinstated.

13. Although the complainant contends that the EPO failed to fulfil its duty of care towards its staff members, the written submissions show that the Administration made every possible effort to find the best possible solution for the complainant and therefore acquitted itself of its obligations towards him.

14. In 3 above, reference was made to the fact that the complainant had explicitly waived his right to any further claims against the EPO. In view of the conclusions reached by the Tribunal, it is not necessary to rule on this question, or on the EPO's objections to receivability.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

*(Signed)*

Michel Gentot  
Julio Barberis  
Seydou Ba

Catherine Comtet