

## SIXTY-FOURTH SESSION

### *In re* BOERSMA (No. 2)

#### Judgment 887

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gerard Boersma against the European Patent Organisation (EPO) on 20 July 1987, the EPO's reply of 5 October 1987, the complainant's rejoinder of 4 March 1988 as corrected on 18 March and the EPO's surrejoinder of 13 May 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 32 and 106 to 113 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 Belgian citizen, is a permanent employee of the EPO at its office in Munich. In October 1985 he consulted his personal file in the Personnel Department and numbered the pages of the contents. On 19 December he wrote a minute to the Principal Director of Personnel alleging that some 90 pages relating to his periods of service with the International Patent Institute and at the EPO were missing from his file. He asked that his file be completed and that he be given a copy. In a letter of 17 February 1986 the head of Personnel answered that he had had the complainant's numbering and several papers removed from the file: "Article 32 of the Service Regulations describes what a personal file should contain and the papers which were deleted from it do not, in my opinion, fall under that definition". He appended copies of those papers. On 11 November 1986 the complainant wrote again to the Principal Director of Personnel asking that papers he listed under nine heads be put back in his file. On 3 December the head of Personnel confirmed his reply of 17 February; the items listed under heads 1, 2, 3, 4 and 7, though already in his personal records with the Remuneration Department, would be filed also with the Personnel Department; he was asked to supply copies of the items under 5, 6, 8 and 9 so that the head of Personnel could decide whether to add them to the file. On 24 February 1987 he lodged an appeal challenging what he saw as a decision not to file a document about his nationality and other "letters" and "certificates". In a letter of 5 March the head of Personnel answered that there were already official papers stating his nationality and that no decision about the "letters" and "certificates" could be taken until he had identified them.

B. The complainant submits that, having received no decision on his appeal of 24 February, which was not referred to the Appeals Committee, he had no choice but to lodge his complaint in accordance with Article 109(2) and (3) of the Service Regulations and Article VII(3) of the Statute of the Tribunal.

He alleges that, though the head of Personnel pretends not to know what items he means, they are the ones he himself found in his file in October 1985 and wrote numbers on. He alleges breach of Article 32 of the Service Regulations: "(1) The personal file of a permanent employee shall contain: a) all documents relating to his administrative position and all reports relating to his ability, efficiency and conduct;

b) any comments by him on such documents and reports". He asks the Tribunal to order the EPO to complete his file as Article 32 requires and to award him 2,000 Deutschmarks in costs.

C. In its reply the EPO contends that the complaint is irreceivable. It distinguishes three sets of papers. There are those of which copies were appended to the letter of 17 February 1986 and which had been removed from the file. Since the complainant did not challenge that letter in the time limit in Article 108 of the Service Regulations, he failed to exhaust the internal means of redress. Secondly, there are papers that had been kept in the Remuneration Department but were put also in his personal file. Having obtained satisfaction, he has no cause of action. Thirdly, there are the papers the head of Personnel asked him by letters of 3 December 1986 and 5 March 1987 to identify.

Since by failing to do so he himself is to blame for the absence of a final decision, he may not rely on Article VII(3) of the Statute of the Tribunal. The letter of 3 December 1986 was not a final refusal: it asked him to say what the papers were because his description had been too vague.

In any event his complaint is devoid of merit. The EPO discusses the various items that form the subject of his internal appeal and contends that they are all already in his file insofar as they are admissible under Article 32(1) of the Service Regulations and that he has failed to show that any others are, whatever they may be.

D. In his rejoinder the complainant points out what he sees as mistakes and misrepresentations in the EPO's version.

He submits that his complaint is receivable. The letter of 3 December 1986 showed the head of Personnel's bad faith and unwillingness to pursue the matter. He had to file his internal appeal because, the head of Personnel not having followed up that letter, he had to respect the time limit of three months in Article 108 of the Service Regulations. The head of Personnel was wrong not to pass on the internal appeal to the Appeals Committee when he was himself implicated in the case.

As to the merits, he discusses in detail each of the documents he says are missing. The head of Personnel, who was familiar with the nature of the papers, either does not know what he is doing or else has abused his authority by tampering with the file. Some 90 pages the complainant had found in the file on 23 October 1985 were missing on 25 October. He objects to the way in which the papers in the file are numbered, and which he says allows of cheating. In his view it is unscrupulous of the head of Personnel to take out papers and then ask him to say what they were: the burden is on the head of Personnel to refute the charges against him.

E. The EPO's surrejoinder enlarges on its submissions both on receivability and on the merits. It says that the complainant's internal appeal was irreceivable because it did not challenge any adverse decision and that the head of Personnel was, quite properly, awaiting the complainant's answer to his letters of 3 December 1986 and 5 March 1987 before resuming the discussion on the matter in dispute. The complaint is, besides, devoid of merit because all the head of Personnel did was to go through the complainant's personal file to check that it was constituted in keeping with Article 32 of the Service Regulations, even though, to meet the complainant's wishes, he added several texts Article 32 did not warrant filing.

#### CONSIDERATIONS:

1. The complainant, a former official of the International Patent Institute, was taken over by the European Patent Organisation, which employed him in Personnel at its office at The Hague and later transferred him to headquarters in Munich. He contends that his personal records are not in order and is asking the Tribunal to have the EPO complete them as required by Article 32 of the Service Regulations.

2. On going through his personal file the complainant believed it to be incomplete and he addressed a claim to the Principal Director of Personnel. In the ensuing correspondence he asked that his file include papers about his marital status and nationality. They were, it seems, already in his records with the Remuneration Department and were later put in his personal file. He also asked for the filing of letters and certificates which he did not identify but which he said had been taken out of his file as made up by the Institute. The EPO's answer was that the papers appeared to be of a kind that the Service Regulations did not warrant putting in a personal file.

3. The complainant lodged an internal appeal on 24 February 1987 repeating his grievances and the Organisation replied by a letter of 5 March 1987 asking him to identify the papers he had in mind.

4. Instead of doing so he filed this complaint on 20 July 1987 challenging what he took to be an implied decision under Articles 106(2), 107(1) and 109(2) and (3) of the Regulations. Alleging that the EPO has done away with records about him and tampered with his file, he seeks an order for the completion of it in compliance with Article 32. He claims an award of 2,000 Deutschmarks in costs.

5. The EPO's main plea is that the complaint is irreceivable: it is premature because at the date of filing the Administration had shown willingness to correct the records but the complainant had failed to identify the items he meant. In its submission he acted in bad faith, there being at the date of filing no express or implied decision within the meaning of Article 107.

6. On the merits the EPO observes that, though it was difficult to put his records in order because of his transfers from the Institute and to Munich, they do comply with Article 32, which says that the official's personal file must contain "all documents relating to his administrative position and all reports relating to his ability, efficiency and conduct" and any comments he has made thereon. The papers in dispute are, says the EPO, of kinds that according to the Service Regulations do not belong in the file.

7. It is plain from the rules on internal appeals in Articles 106 to 113 that appeal will lie either against an express decision, described as an "act adversely affecting"

the official, or against rejection inferred from failure to answer a claim.

8. In the latter case, where the decision is implied, the prerequisite is the lodging by the official of a formal appeal with the Administration. Certainty of the position in law requires the complainant to state clearly what it is he wants. If the Administration fails to reply the Tribunal will then know what the dispute is about and what exactly are the claims it is being asked to rule on.

9. Neither the claim in the complainant's letter of 24 February 1987 headed "internal appeal" nor this complaint meets those requirements. At no time has the complainant clearly stated the nature of the papers he wants to have in his file, proved his allegations that items were removed or tampered with, or shown any actionable wrong. In its present state the complaint is an abuse of the right of appeal under the Tribunal's Statute.

10. The complaint, including the claim to costs, fails because it is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, 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 30 June 1988.

(Signed)

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner