

## NINETIETH SESSION

*In re Skelly* (No. 2)

Judgment No. 2024

The Administrative Tribunal,

Considering the second complaint filed by Mrs Jacinta Marcy Skelly against the European Patent Organisation (EPO) on 6 August 1999 and corrected on 19 October, the EPO's reply of 17 December 1999, the complainant's rejoinder of 7 July 2000, and the Organisation's surrejoinder of 29 September 2000;

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, an Irish national born in 1948, is an examiner at grade A4 in Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat. DG2 is responsible in the main for the substantive examination of patent applications. The work of patent examiners at the EPO is rated by a system of points and fractions of points, which is used by the Office in the evaluation of an examiner's output. Originally, an examiner was awarded one point for processing a "demand for international preliminary examination" under Chapter II of the Patent Cooperation Treaty ("PCT Chapter II"). If this demand was subsequently converted into a European patent application ("Euro-PCT") another full point was awarded for a completed file.

In 1992 that system was reassessed and the staff were notified in a note of 26 January 1993 that the points awarded for a PCT Chapter II application would be reduced to 0.75 and those awarded for a Euro-PCT application would be reduced to 0.55. This reduction of points was successfully challenged in a complaint leading to Judgment 1488 (*in re Schorsack*) of 1 February 1996, in which the Tribunal found that the EPO had not consulted its General Advisory Committee (GAC) before announcing and implementing the changes. As a result of this judgment, the note of 26 January 1993 was withdrawn.

On 23 May 1996 the President of the Office notified all examining staff in DG1 and DG2 that, following consultations with the GAC and the Vice-Presidents of these two directorates, a revised points structure, awarding 0.75 points for PCT Chapter II and 0.55 points for Euro-PCT applications, would be implemented as from 1 June 1996. In August 1996 the complainant, along with 434 other examiners, lodged two appeals - Nos. 52/96 and 53/96 - against this decision. Both appeals sought to have the decision set aside and confirmation that the points system in force up to 31 May 1996 would continue to apply.

Staff dissatisfaction with the change led to lengthy discussions between the President and staff representatives in 1996 and 1997 and, following industrial action, on 12 September 1997 the President submitted a "compromise" proposal to the GAC for an opinion. The proposed changes, which were subsequently adopted, awarded 0.9 points for PCT Chapter II and 0.4 points for Euro-PCT applications; in certain cases a full point could be awarded for Euro-PCT dossiers. The new points system was to become effective as of 1 January 1998. On 6 November 1997 the President communicated this decision to the staff, along with the information that the system set out in the notice of 23 May 1996 would not be applied for the period from 1 June 1996 to 31 December 1997.

On 2 March 1998 a notice was published in the EPO *Gazette* in which the Administration stated that the President's decision of 6 November 1997 had the effect of withdrawing the decision challenged in appeals 52/96 and 53/96; consequently, the appeals were now considered to be "without subject" and the file would be closed. Appellants who disagreed were given three months to indicate why they intended to pursue the appeals. On 13 May 1998 the complainant wrote to the Director of Personnel Development saying that she was pursuing her appeals on the grounds that the decision of 6 November 1997 had not given her full satisfaction because she had requested that the points system in force up to 31 May 1996 be reinstated "without a time limit".

The Administration believed that her claim to reinstatement of the previous system "without a time limit" was a new claim and argued that her appeals were irreceivable; however, the Appeals Committee found them to be receivable. Nevertheless, in its opinion of 19 April 1999 the Committee unanimously recommended dismissing her appeals as unfounded. On 5 May 1999 the Director of Personnel Development informed the complainant that the President of the Office rejected her appeals. That is the impugned decision.

B. The complainant submits that her complaint addresses the question of "whether the new system fairly apportions points for the PCT procedure as a whole and also for each action within that procedure."

She argues that the changes to the points system were decided in an arbitrary and discriminatory manner. There is no evidence that the Administration carried out an objective examination of the work involved before it modified the points awarded. While she admits that the previous system was over generous, the new one does not take into account the fact that not all patent examiners have the same percentage of each type of application. Consequently, the system has created inequality of treatment between examiners in different fields. Although another remedy has been proposed by staff representatives, the Administration has rejected it without any reasoned argument. She also questions whether the required consultations took place prior to modifying the points system.

She requests the Tribunal to quash the President's decision rejecting appeals 52/96 and 53/96 contesting the system of the points for the PCT examination procedures, thereby "re-establishing the former points system, until a mutually agreed system can be found".

C. The EPO replies that the complaint shows no cause of action and is therefore irreceivable. The complainant received satisfaction on her appeals by the President's decision of 6 November 1997. In those she requested the withdrawal of the points system announced on 23 May 1996 and confirmation that the system in force up to 31 May 1996 would continue to apply. She did not request that the former system be maintained "without a time limit", nor did she request that it be maintained until a mutually agreed solution could be found. If she wished to challenge the points system that the President announced on 6 November 1997, she should have done so within three months of notification, but she did not. Even if her letter of 13 May 1998 could have been considered a "new" appeal, it was out of time and the Appeals Committee erred in considering it as coming under her "old" appeals.

Subsidiarily the Organisation contends that, given the fact that the President's decision of 6 November 1997 resulted in the withdrawal of the points system announced on 23 May 1996, there is no reason to consider the legality of that system. The Appeals Committee found that the system of calculating points was something that the Administration had discretionary authority to change. The fact that the new system was a result of a compromise between the staff and the Administration did not mean that it was unlawful or arbitrary.

D. In her rejoinder the complainant submits that the EPO has been misleading in its rendering of the facts. She asks the Tribunal to find her complaint receivable; the President has not truly rescinded his note of May 1996 because the overall number of points awarded has remained 1.3. Therefore, it cannot be argued that his note of November 1997 constitutes a new decision. Since the EPO objects to the part of her claim that the old system be maintained "until a mutually agreed system can be found" she now withdraws that part of it.

She agrees with the Organisation's argument that the old system lacked accuracy and therefore gave rise to unfair and unequal treatment. However, she argues that the new system has not remedied this situation. Furthermore, the EPO has not addressed her arguments but has resorted, in her view, to levelling personal criticism at her. Lastly, she contends that the President has broken his promise of obtaining staff consent, a requirement under the "compromise" proposal, and that consequently, the GAC consultation was fundamentally flawed.

E. In its surrejoinder the Organisation submits that the distribution of points changed between the old and new systems, even though the total number of points awarded remained the same. It presses its pleas on receivability. The complainant never filed an appeal against the decision of 6 November 1997. On the merits the EPO asserts that she has failed to establish that the new points system is not accurate.

## CONSIDERATIONS

1. At issue in this complaint are the changes in the points system of rating the output of examiners carrying out

examination work under Chapter II of the Patent Cooperation Treaty ("PCT Chapter II") and under the European Patent Convention ("Euro-PCT").

2. In addition to examining and granting European patent applications, the EPO receives international applications under PCT Chapter II and under Euro-PCT. For performance assessment purposes, the work of patent examiners is rated by a system of points and fractions of points. Originally, examiners were awarded one point for the processing of a PCT Chapter II "demand for international preliminary examination". If the demand was converted into a Euro-PCT application, the examiners were awarded another point.

3. The points system was reassessed in 1992 and by a note of 26 January 1993 it was amended. The points allowed were reduced to 0.75 for a PCT Chapter II procedure and 0.55 for a Euro-PCT one. These amendments were the subject of a complaint and in Judgment 1488 the Tribunal concluded that the impugned decision was made in breach of the rules. In fact, the Tribunal found that the General Advisory Committee (GAC) had not been consulted as it should have been. The decision to amend the points system was thus set aside and the previous system was reinstated.

4. The President of the Office then requested the GAC to give an opinion on the basis of the original note dated 26 January 1993. On 23 May 1996 the President issued a decision whereby he reduced the points to 0.75 for a PCT Chapter II procedure and 0.55 for a Euro-PCT one with effect from 1 June 1996.

5. In August 1996 the complainant, together with 434 other examiners, lodged two internal appeals (Nos. 52/96 and 53/96) against this decision. In both appeals, the complainants requested that the decision of 23 May 1996 be set aside and that the points system in force up to 31 May 1996 continue to apply. Subsequent to discussions with staff representatives in 1996 and 1997 and following industrial action, on 12 September 1997 the President submitted a new proposal concerning the rating system to the GAC for an opinion. On 6 November 1997 he issued yet another decision by which he informed examiners that as of 1 January 1998 they would be credited with 0.9 points for PCT Chapter II and 0.4 points for Euro-PCT procedures (and in certain cases, a full point instead of only 0.4). They were also informed that the points system set out in the notice of 23 May 1996 was rescinded and would not be applied from 1 June 1996 to 31 December 1997. Instead, the previous system would prevail.

6. On 2 March 1998 the Administration published a statement in the *Gazette* that appeals 52/96 and 53/96 had become "without subject". Appellants who disagreed were requested to indicate their disagreement within three months from the date of publication, at the same time stating their reasons for pursuing the appeal.

7. On 13 May 1998 the complainant responded by stating that she was pursuing her appeals because she considered she had not obtained satisfaction: in her view her appeals sought reinstatement "without a time limit" of the points system in force up to 31 May 1996. Appeals 52/96 and 53/96 were referred to the Appeals Committee for an opinion and the latter concluded that the appeal was receivable because it was directed against the new points system which had been introduced as from 1 January 1998. However, it recommended that the appeals be dismissed as unfounded. On 5 May 1999, the President rejected the complainant's appeals. That is the impugned decision.

8. In the present case, the complainant relies on the recommendations of the Appeals Committee as to the issue of receivability. The Committee was of the view that the purpose of the appeal against the President's note dated 23 May 1996 was to confirm that the points system in force up to 31 May 1996 continued to apply. A renewed appeal against changes to the former system, which was effective from 1 January 1998, was unnecessary as the publication in the *Gazette* requested that appellants indicate their reasons for pursuing the appeal. The Committee found that the statement in the *Gazette* should have been taken to mean that the pending appeals could be "pursued" if the new points system was not acceptable and the appeal was therefore not considered settled. The Committee also found that the statement in the *Gazette* opened up a renewed possibility for appealing, within a specified time limit, against the new points system which had entered into force on 1 January 1998. The Committee considered that the complainant's letter of 13 May 1998 was a new appeal within that time limit.

9. The Tribunal finds that there is no doubt that the complainant's appeal is irreceivable. In this appeal the complainant impugned the President's decision of 23 May 1996. That decision reduced the points awarded to 0.75 for a PCT Chapter II procedure and to 0.55 for a Euro-PCT procedure from 1 June 1996. It was revoked on 6 November 1997 when the President informed the examiners that as of 1 January 1998, 0.9 points would be credited for PCT Chapter II and 0.4 points for Euro-PCT applications. The note of 6 November 1997 clearly states

that the system set out in the note of 23 May 1996 would not be applied from 1 June 1996 to 31 December 1997 and that the previous system would be applicable. The decision of 23 May 1996 is, therefore, no longer in effect and has produced no consequences. Since her internal appeals filed in August 1996 requested that the 23 May 1996 decision be set aside, and that the points system in force up to 31 May 1996 continue to apply, the President's decision, published on 6 November 1997, clearly complies with these requests. Therefore, the complainant has received satisfaction and shows no cause of action with respect to the impugned decision.

10. As stated in Judgment 764 (*in re* Berte No. 2):

"A decision by an international organisation is challengeable before the Tribunal only if it causes the complainant injury."

11. In the present case no injury to the complainant has resulted as the 23 May 1996 decision was revoked, so there is no substantive dispute between the complainant and the EPO concerning it.

12. The Appeals Committee's finding that the complainant's letter of 13 May 1998 constituted a new appeal against the new points system which entered into force on 1 January 1998 is wrong. The statement in the *Gazette* did not create a renewed possibility for appealing against the new points system beyond the times fixed by the applicable rules. The statement simply sought to identify appellants who disagreed with the Administration's statement that it considered that appeals 52/96 and 53/96 no longer showed any cause of action and it intended to close the files. The *Gazette* did not make any reference to a right of appeal against the new system. Furthermore, in her letter the complainant did not assert a new right of appeal. What she did was to attempt to make an additional claim or amend the position which she had taken in her original appeals by adding the words "without a time limit". If the complainant wanted to appeal against the new system she could and should have done so in the normal way.

13. Since her internal appeal to the President was irreceivable, her complaint to the Tribunal is likewise and must for the same reason be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

James K. Hugessen

Hildegard Rondón de Sansó

Catherine Comtet