

Registry's translation, the French text alone being authoritative.

FIFTY-EIGHTH ORDINARY SESSION

In re HOORNAERT (No. 2)

Judgment No. 722

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the European Patent Organisation (EPO) by Mr. Winfried Marie Emiel Hoornaert on 14 February 1985 and corrected on 9 April, the EPO's reply of 26 June, the complainant's rejoinder of 23 August and the EPO's surrejoinder of 15 November 1985;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles 14(1) and 47 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, who is Belgian, joined the International Patent Institute in 1972, was transferred to the EPO on 1 January 1978 at grade A3 and is employed as an examiner at The Hague. Annual staff reports are required under Article 47 of the Service Regulations. Filling up the complainant's report for 1980-81 in July 1982, the reporting officer, Mr. Duren, made unfavourable evaluations of his output, sense of responsibility, application, accuracy, time-keeping and reliability and said that his general performance was in the lower half of rating 3 ("good"). The complainant added his own comments, on 1 September 1982, rejecting the criticisms, but on 12 October Mr. Duren confirmed them, and on 13 October so did the countersigning officer. On 16 February 1983 the complainant lodged a protest but in the ensuing proceedings for conciliation, though some of the criticisms were altered and the ratings improved, the disagreement was not wholly resolved. The competent Vice-President of the Office recommended two amendments but found the report fair on the whole. The complainant added his own observations on 4 January 1984. On 17 January he submitted an internal appeal but on 17 February the Principal Director of Personnel replied that it was premature since the President had not yet taken any final decision. The President took that decision on 7 March and accepted the Vice-President's recommendations. The appeal then went to the Appeals Committee. In its report of 5 November the Committee observed that at the start of each year examiners were given a figure of output for the year which took account of the complexity of their work. The complainant's work in 1981 had been rated less complex than in 1980, but he had not been so informed until late in the year. The Committee held he should have been told sooner so that he could adjust his output accordingly, and it recommended sending the report back to the Vice-President for review of the comments

and ratings on output and general performance. The Committee sent copies of its report to the President and to the complainant on 20 November. The President having taken no decision, the complainant filed his complaint on 14 February 1985 challenging what he alleges to be an implied final decision to reject his appeal. On 13 February the President took his final decision, notified after the complaint had been filed, to reject the appeal.

B. The complainant relies on the flaw found by the Appeals Committee: he was not warned until 6 October 1981, and therefore far too late, of the change in the rating of the complexity of his work in 1981. He observes that in the report for 1979-80 he got high praise for his output and that the absence of warning, of which the President did not take due account, is the sole explanation of the sudden drop in his rating on that score. He invites the Tribunal to set aside the decision to confirm his report, grant the relief recommended by the Appeals Committee and award him costs.

C. The EPO replies that the complaint is devoid of merit. The decision challenged is in an area of the President's discretion in which the Tribunal does not normally entertain complaints. The complainant alleges no flaw of the kind that would enable the Tribunal to set the decision aside in the exercise of its limited power of review. Any error of judgment there might have been was remedied by allowing him to submit his observations on his staff report. Besides, the comments on the ratings in that report are fair and warranted. The complainant was duly

warned as early as 12 January 1981 by a minute from his reporting officer that his output needed to improve, his work being well-documented and not complex. That minute gave him ample opportunity to come up to standard. Besides, whether warned or not, he was bound under Article 14(1) of the Service Regulations to "carry out his duties ... solely with the interests [of the EPO] in mind" and to adapt his output to the complexity of his work, which he was experienced enough to assess for himself.

D. In his rejoinder the complainant enlarges on his original arguments, seeks to refute the EPO's pleas and discusses at length several issues of fact. He repeats that he was not informed until 6 October 1981, far too late, of the change in the assessment of the complexity of his work. There was therefore a miscarriage of justice.

E. In its surrejoinder the EPO states that it finds nothing in the rejoinder to cause it to alter the pleas in its reply, which it develops. It concedes, however, that the reporting officer's minute of 12 January 1981 expressing dissatisfaction with the complainant's output in 1980 was never actually shown but merely read to him.

CONSIDERATIONS:

The matter in dispute

1. The complainant joined the International Patent Institute on 1 July 1972 and was transferred on 1 January 1978 to the European Patent Office, where he is serving as an examiner on an A3 post.

The report drafted by his supervisor, Mr. Duren, on his performance in 1979 includes the following comments:

Under section I, A 1: "Productivity (after application of the weighting factor) slightly surpasses a very high target level". He was given mark 2, or very good.

Under section III: "... High output far better than the fairly poor performance in 1977 though there is room for further improvement. Quality of work uneven. Conduct at work improved, though perseverance and personal behaviour not yet up to expectation. Deserves 3 for his overall performance in A3."

On 23 July 1982 the same supervisor drafted a report for 1980 and 1981. He altered several points after the complainant had submitted comments, and the final text includes the following remarks:

Under I, A 1: "Same performance as in 1979, but now low in the range of 3 owing to a review of the complexity of his technical field." The mark is 3, or good.

Under III: "Output now low in the range of 3. Because of uneven quality of performance and a not entirely satisfactory attitude his overall performance is now in the lower half of 3."

On 7 March 1984 the President of the Office approved the amended text of the report for 1980-81. The complainant submitted an internal appeal against the decision and it was referred to the Appeals Committee. On 5 November 1984 the Committee recommended allowing the appeal insofar as it related to the remarks under I, A 1 and III on the grounds that in 1980 and 1981 the complainant had attained the production target set at the start of each of the two years and had not been told until mid-1981 of the change in the assessment of the degree of complexity of his technical field.

Having received no final decision from the President, the complainant filed this complaint on 14 February 1985 seeking review of the decision of 7 March 1984 as recommended by the Committee.

In point of fact on 13 February 1985 the President had rejected the appeal altogether, thereby turning down the Committee's recommendation, but the final decision was sent to a namesake and the complainant did not receive it until March.

Receivability

2. According to Article VII(3) of the Statute of the Tribunal an official may have recourse to the Tribunal where the Administration fails to take a decision upon his claim within 60 days. As the Tribunal has stated in earlier cases, an EPO official may file a complaint if the President fails to take a final decision within 60 days of receiving the Appeals Committee's report. The rule applies in this case, and the complaint is receivable, because the President

failed to notify a decision to the complainant within 60 days of 5 November 1984, the date of the Committee's report.

It is immaterial that the President's final decision is dated 13 February 1985 and the complaint was filed the day after. The decision did not reach the complainant until March and has no effect on receivability.

The Tribunal's power of review

3. The impugned decision to approve the complainant's report for 1980 and 1981 is a discretionary one and may be set aside only on limited grounds such as a formal or procedural flaw, a mistake of fact or of law, failure to take account of relevant facts, abuse of authority or the drawing of mistaken conclusions from the evidence.

How is such review to be exercised where the case is about a performance report? As a rule he who approves the report will grant the reporting officer great freedom of expression. In some cases the staff member's comments on the report may serve to remedy any error of judgment there may have been. It will be right not to approve a report only if the reporting officer made an obvious mistake over some important point, if he neglected some essential fact, if he was grossly inconsistent or if he can be shown to have been prejudiced. And he need not be deemed prejudiced just because his assessment for one period is not the same as another reporting officer's opinion of the same official for an earlier or later period.

If it shows any of those defects a decision to approve a report draws clearly mistaken conclusions from the evidence and cannot stand.

Lawfulness of the impugned decision

4. It appears from the evidence that at the start of 1980 and at the start of 1981 the complainant's production target was the same as for the year before. The Appeals Committee states in its report, and the EPO does not challenge it, that the complainant spent an average of 11.2 hours on each file in 1979, 11.2 in 1980 and 10.4 in 1981: his productivity was the same in 1980 as in 1979 and higher in 1981. As the complainant rightly observes, he attained his production target in 1980 and 1981. That is why he is alleging a discrepancy between the report for 1979, which said that his production had slightly surpassed a very high level, and the report for 1980-81, which said it was low in the range of 3, or barely up to "good".

5. The EPO's first plea is to cite a minute of 12 January 1981 in which the complainant's supervisor said his output was inadequate, particularly in the field of welding, and alerted him to the possible consequences. In its reply the EPO maintains that the actual text of the minute was handed over to him, but in its surrejoinder it acknowledges that the minute was simply read out and discussed. His supervisor confirms this version in a statement dated 2 August 1985.

The complainant says he does not remember having had any knowledge whatever of the minute: not until 6 October 1981 was he told to increase his output, or too late for him to be able to do so.

The two versions conflict and the Tribunal has no evidence at its disposal but the parties' submissions and the statement by the complainant's supervisor. The EPO could easily have prevented controversy by simply handing over to him the text of the minute of 12 January 1981. It is its own behaviour that has created the present difficulty, and the Tribunal will therefore reject its first plea.

6. The Organisation's second plea is that someone of the complainant's experience and qualifications ought to have seen for himself that up to 1979 his work was less complex than it looked and ought therefore to have increased his output of his own accord so as to discharge the duty stated in Article 14 of the Service Regulations. The Appeals Committee takes the view, however, that it is wrong to expect an examiner to attain a higher target than that set at the start of the year unless he is given due and proper notice.

Both views are to some extent sound. It is indeed only reasonable that an examiner need do no more than his supervisor asks. Yet where the target is obviously set too low he is under a duty to raise it of his own accord. The question is whether the EPO had reason to expect higher output of the complainant even if he was given no notice.

The EPO gives two reasons why it had. The first is that the reference material in the complainant's division was reorganised, the second that because of an increase in the number of dossiers examiners were able to deal with two

or more dossiers at once. The first reason is not convincing: the minute of 12 January 1981 makes plain the reorganisation of reference material began before 1979. And the Tribunal cannot tell of what relevance the second is because it has no specific evidence before it. It concludes that the complainant was under no duty to increase his output above the target level and that the report for 1980-81 does not square with the one for 1979.

7. The discrepancy is serious enough to warrant ordering that it be removed. The President therefore drew a clearly mistaken conclusion from the evidence in approving the whole of the report and he is required to have the remarks under I, A 1 and III altered to bring them into line with the corresponding comments in the report for 1979.

DECISION:

For the above reasons,

1. The complaint is allowed.
2. The impugned decision is set aside insofar as it approves the comments under I, A 1 and III in the report for 1980-81 and those comments shall be reviewed as stated in 7 above.
3. The EPO shall pay the complainant 1,000 United States dollars in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner