

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

FIFTY-EIGHTH ORDINARY SESSION

In re HAKIN (No. 6)

Judgment No. 724

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed against the European Patent Organisation (EPO) by Mr. Robert Edouard Marie Hakin on 21 January 1985 and corrected on 21 February, the EPO's reply of 17 May, as supplemented on 30 July, the complainant's rejoinder of 3 September and the EPO's surrejoinder of 25 November 1985;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Article 109(2) 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 born in 1926, joined the International Patent Institute in 1967 and was transferred to the EPO on 1 January 1978. As the material time he was a search examiner at grade A3 in the EPO's office at Rijswijk. His supervisor used to be Mr. Pasturel, whose reports on his performance were good. On 1 September 1979 he was moved from Mr. Pasturel's group to Mr. Vandooren's. On 3 September 1980 Mr. Vandooren drafted a report which described the complainant's performance in 1979 as merely "adequate". Not until 18 January 1982 did the complainant state his objections. Both Mr. Vandooren and the countersigning officer rejected them, and after further discussion the President of the Office approved the report on 17 September. In signing it on 5 October the complainant recorded his reservations and on 3 December he appealed against the decision of 17 September. On 7 June 1983 the President informed the Chairman of the Appeals Committee that he acknowledged a breach of the rules on reporting in that for the first eight months of 1979 Mr. Pasturel should have given his own assessment; a new report was to be written giving the views of both Mr. Pasturel and Mr. Vandooren. The case was withdrawn from the Committee. After further correspondence two drafts were produced, one by Mr. Pasturel and the other, for the last four months of 1979, by Mr. Vandooren. The latter is the subject of this complaint; though it describes the complainant's performance as "good", it expresses criticisms, particularly of his output, and records reservations. The complainant stated his objections, which are undated. The President endorsed Mr. Vandooren's new report on 19 June 1984, and the complainant lodged a second internal appeal on 20 August. No decision having been taken on the appeal within the two months prescribed in Article 109(2) of the EPO Service Regulations, the complainant is impugning what he submits is an implied decision to reject it. In its report of 26 June 1985 the Committee recommended rejecting the appeal and by a letter of 23 July the President informed the complainant that he did so.

B. The complainant contends that the impugned decision is tainted with several flaws. (1) Although on 17 September 1982 the President acknowledged he had been wrong to endorse the original report he wilfully held up the procedure and so delayed the complainant's promotion to A4, which required a "good" appraisal. (2) The report by Mr. Vandooren suffers from flagrant errors of fact. The contrast with the earlier reports by Mr. Pasturel is striking. There is no evidence to support Mr. Vandooren's criticisms. The complainant's output throughout 1979 was up to standard. (3) The procedural delays and the Administration's tendentious attitude are evidence of breach of the principles of sound personnel management.

The complainant alleges that the case has damaged his health and caused him serious moral injury. His promotion to A4 was delayed from 1 January 1981, the date when he ought to have got it; to 1 January 1983 and he was wrongly paid lower mission expenses for the two-year period. He asks the Tribunal to set aside the President's decision of 19 June 1984 endorsing Mr. Vandooren's report and to award him damages equivalent to six months' salary, financial entitlements as an A4 examiner for the period from 1981 to 1983, with the corresponding increase in the amount of mission expenses refunded, and costs.

C. The EPO replies that the President's decision to endorse the report is not tainted with any of the flaws that entitle

the Tribunal to set aside a discretionary decision of that kind. The complainant's objections under B(1) above are irrelevant because they do not relate to Mr. Vandooren's second report. As to (2), the supervisor is free to have his own expectations of a staff member and form his own opinion of his performance; there is no reason why Mr. Vandooren should agree with Mr. Pasturel or not care more about output. In any event he is not required to furnish proof of his assessment. The argument in (3) is misconceived.

Since the decision is sound there is no reason to award damages. Besides, the claim to compensation for the delay in promotion is irreceivable for failure to exhaust the internal means of redress. An internal appeal the complainant lodged on 4 February 1983 on that matter is suspended until there is a final performance report, and there cannot be any until he stops challenging his reports. In the meantime his eligibility for promotion at any particular date may not be determined. In any event in his internal appeal he claims promotion only as from 1982 so that his claim to promotion as from 1981 is irreceivable, again for failure to exhaust the internal means of redress. Subsidiarily, the EPO argues that the claim to earlier promotion is devoid of merit.

D. In his rejoinder the complainant gives an account of further facts he considers relevant. He explains that what he is objecting to is not the "good" assessment but the criticisms in the report. He seeks to distinguish his own case from others in which the Tribunal has refused to interfere with the exercise of discretion in the matter of reports. Though supervisors may of course differ, the degree of disagreement in this case suggests that one of them is mistaken or prejudiced. He enlarges on his allegations of procedural and substantive flaws. He cites the rules on reporting in Circular 68 of 7 July 1980 and submits that Mr. Vandooren infringed many of them. He reaffirms his claims. The material prejudice he suffered included the two-year delay in his promotion and on that account the date of promotion is relevant. He submits a medical certificate as evidence of the deterioration in his health since 1978. In his submission the Appeals Committee's report of 22 July 1985 is immaterial because the procedure followed was dilatory and improper.

E. In its surrejoinder the EPO discusses at length the further facts and arguments set out in the rejoinder. It enlarges on its original submissions, in particular those on the discretionary authority of the reporting officer and the President in the matter of reports. It contends that the allegations of breach of the rules on reporting, which it goes over in detail, are either irrelevant or unfounded. It again invites the Tribunal to dismiss all the claims as devoid of merit and some of them as irreceivable.

CONSIDERATIONS:

The application for the quashing of the impugned decision

1. The complainant, who was born on 16 June 1926, joined the International Patent Institute on 1 April 1967 and reached grade A5. When the Institute was merged with the EPO he became an EPO official at grade A3.

He served from 1973 to 1978 as an examiner in the engineering division under Mr. Pasturel. For the first eight months of 1979 he was still under Mr. Pasturel, for the last four under Mr. Vandooren. After consulting Mr. Pasturel Mr. Vandooren drafted a report on 10 September 1980 on the complainant's performance for the whole of 1979. On 17 September 1982 the President of the Office approved the report, and the complainant was accordingly given the general rating "adequate". On 3 December 1982 he lodged an internal appeal against the President's decision. The Appeals Committee sat on 14 April 1983. It wanted to hear witnesses and held that since it was prevented from doing so it could not report. The President of the Office thereupon decided, on 7 June 1983, to withdraw his approval of the report on the grounds that the procedure had been irregular because Mr. Pasturel had not been asked to state in writing his opinion of the complainant's performance for the first eight months of 1979. The President also ordered that a new report should be drawn up containing both Mr. Pasturel's and Mr. Vandooren's comments.

On 12 August 1983 Mr. Pasturel wrote his report covering the first eight months and Mr. Vandooren his comments covering the last four. The "countersigning officer", Mr. Phillips, noticed a difference of opinion between the two and proposed giving the complainant the general rating "good" for 1979. On 19 June 1984 the President endorsed the report and the "good" rating. On 20 August 1984 the complainant filed an appeal against the new decision: although he accepted the new rating he objected to Mr. Vandooren's comments, which he described as harassing and unfair.

Having received no final decision from the President, the complainant filed this complaint on 21 January 1985. On

the same day his appeal had been referred to the Appeals Committee, and on 26 June the Committee recommended rejecting it. The President accepted the recommendation on 23 July.

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 of its notification. As the complainant submits and as the EPO acknowledges, the rule applies since the President did not take a timely decision on the internal appeal of 20 August 1984.

It is immaterial that the case was referred to the Appeals Committee. For the complaint to be receivable all that is required is that at the date of filing no internal body had yet given a decision.

3. The complainant is challenging the President's decision to approve Mr. Vandooren's comments covering the last four months of 1979.

Being a discretionary one, that decision 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. The official's observations on the report may in some cases serve to correct any error of judgment that may have been made. 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 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.

4. Mr. Vandooren's comments in his second report do not withstand scrutiny.

(a) Comments under section I, part B, of the report

First, under each of points 3, 7 and 9 of IB the reporting officer rates the complainant "adequate". His comments are:

"Not very enterprising" (point 3);

"Very careless, especially in handling documents" (point 7);

"Lazy and indifferent" (point 9).

The very same remarks appeared in Mr. Vandooren's first report, covering the whole year. Yet whereas under section III the first report said that the complainant's output was too low, the second one says it is adequate. It is strange that the change in rating is not reflected in a change in the comments.

Does the complainant, whose output is said in the second report to be adequate, really deserve the criticisms it maintains?

Secondly, Mr. Vandooren's comments on the last four months of 1979 are at odds with Mr. Pasturel's on the first eight. Mr. Pasturel rates the complainant "good" under IB 3, 7 and 9, and "very good" under IB 4, 5 and 10, and actually describes his work as "well thought out" and "attentive to detail".

Thirdly, Mr. Pasturel's reports for 1974 to 1977 refer to him as someone with initiative, an examiner "perfectly able to do work on his own", "well-qualified", one who "seems to enjoy his work" and is "highly efficient". There are comments in similar vein in the report for 1982 and 1983 written by Mr. Zimmer, who was the complainant's supervisor from 1 January 1982. Mr. Zimmer's report says he is hard-working, and so good at organising his work that his performance is out standing despite the time he spends on staff union business. The praise he earns both before and after 1979 is at variance with the criticisms in Mr. Vandooren's second report.

(b) Comments under III

Mr. Vandooren sums up:

"If I disregard the rest of the year, output and productivity in the last four months of 1979 would warrant a 'good' rating.

But general performance throughout the year (102 files, at an average of 12.51 hours a file) is too poor to warrant 'good' and does not stand comparison with that of other examiners under my supervision rated 'good'...

The target set and attained for 1979 (100 to 105 files) is just another sign of the sort of slackness I will not put up with."

The complainant does not take up the first paragraph, but he objects to the second and third. He says that his own work is more complex than that of other examiners and should not be compared with theirs, and that the charge of "slackness", being levelled not at himself but at Mr. Vandooren's predecessor, is uncalled for.

5. Though all this suggests that Mr. Vandooren's second report is challengeable it does not follow that in approving it the President drew any clearly mistaken conclusion from the evidence.

At first sight there is something inconsistent about saying that the complainant did what he was supposed to do yet accusing him of lack of initiative, carelessness, shirking and indifference. But the inconsistency may be more apparent than real. If the reporting officer feels that the targets set for his staff are too low it is not illogical of him to believe they should want to do more.

Though striking, the disagreement between Mr. Pasturel and Mr. Vandooren can be accounted for. They are men of different temperament. Plainly Mr. Vandooren is a more demanding supervisor and there is not necessarily anything wrong with that. Mr. Pasturel's group was smaller than Mr. Vandooren's and so Mr. Pasturel could hardly make the comparisons Mr. Vandooren made. And, as was said in 3 above, a conflict in appraisal need not mean there was prejudice.

Like Mr. Pasturel, Mr. Zimmer thinks more highly than Mr. Vandooren of the complainant. But in a report he submitted to the promotion committee for 1983 Mr. Zimmer said that the complainant's output in 1982 and 1983 had been much higher than in earlier years, and that may explain the difference between his assessment and Mr. Vandooren's.

The comments in Mr. Vandooren's second report in the two last paragraphs of section III do not make the report invalid. The Tribunal does not have before it any precise evidence on the examiners' respective duties and cannot rule on the soundness of the comparison Mr. Vandooren drew. Besides, even if it is mainly Mr. Pasturel he is accusing of slackness his charge is intended to bear out his criticisms of the complainant and is not necessarily irrelevant.

To sum up, though open to question, the reasons for approving Mr. Vandooren's second report are still cogent enough. The Tribunal's conclusion is that the decision to approve it was not tainted with any fatal flaw and that to that extent the complaint must fail. In any event, in endorsing the general rating "good" the President gave greater weight to Mr. Pasturel's report than to Mr. Vandooren's, so that the latter's comments do not matter so much.

The claim to payment of six months' salary

6. The complainant is claiming the equivalent of six months' salary in damages for physical and moral injury because of the proceedings over Mr. Vandooren's first report and on account of the impugned decision.

The Tribunal rejects the claim insofar as it is based on impairment of health. The complainant's physician does say he had to undergo treatment because of conditions at work, but the medical certificate is not specific enough to support the claim to compensation. The complainant's own statements about the anxiety he felt and about the medical tests he underwent carry no weight as evidence.

Nor may the complainant found his claim on the impugned decision. Since the decision is not quashed it does not entitle him to damages.

The only question is whether he is entitled to damages for the moral injury he says he suffered on account of the whole business of Mr. Vandooren's original report. The Tribunal holds that he is. In social life in general, and in dealings with an employer in particular, everyone is bound to run into difficulties which he must just put up with and for which he can expect no compensation. An official of an international organisation may find that his supervisors do not give him full credit for the talents he sees in himself and that he does not get the promotion he thinks he deserves. That will not as a rule entitle him to damages for moral injury. Yet there may be an exception where the circumstances are unusual, and in this case they are. The procedure relating to Mr. Vandooren's first report lasted from 10 September 1980 until 7 June 1983, when the President went back on his decision to approve it. That was far too long. The procedure was halted by the refusal of a proper inquiry, the report was cancelled because of an irregularity and the complainant was unable to get hold of papers there was no reason he should not see. For these reasons, and also in view of his age and record, the Tribunal will award him moral damages which it sets *ex aequo et bono* at 2,000 United States dollars.

The complainant was not required to make a claim for compensation within the time limit for lodging an internal appeal reckoned as from the date of the decision to cancel the report, since that decision did not relate to any such claim. All the complainant was required to do was to act within a reasonable time, and he did so.

The claim to financial compensation

7. The complainant seeks payment of his financial entitlements as an A4 examiner for the period from 1 January 1981 to 1 January 1983, with the corresponding increase in the amount of mission expenses refunded.

The claim could succeed only if he had been entitled to promotion to A4 as from 1 January 1981, and that is a matter which is still pending. The President of the Office informed him on 30 March 1983 that the proceedings in his appeal against the decision not to promote him to A4 for 1982 were suspended for as long as his appeals against the performance reports for 1979, 1980 and 1981 were pending. He did not challenge the suspension of the proceedings, and it was fully warranted anyway since indeed his promotion depends on the challenged reports. The claim to financial compensation is premature and irreceivable.

DECISION:

For the above reasons,

1. The EPO shall pay the complainant 2,000 United States dollars in moral damages.
2. It shall pay him \$1,500 in costs.
3. His other claims are dismissed.

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