

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

FIFTY-EIGHTH ORDINARY SESSION

In re HAKIN (No. 7)

Judgment No. 725

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed against the European Patent Organisation (EPO) by Mr. Robert Edouard Marie Hakin on 15 March 1985 and corrected on 22 April, the EPO's reply of 15 July, as supplemented on 30 July, the complainant's rejoinder of 30 August and the EPO's surrejoinder of 29 November 1985;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case appear in Judgment 724, under A. On 12 August 1982 the complainant's supervisor, Mr. Vandooren, drafted a report on his performance for the period from 1 January 1980 to 31 December 1981. The report said his output was too low, he lacked initiative, was a shirker, difficult to get on with, careless and untidy, and the general assessment was no better than "adequate". The report was passed on to the complainant and on 8 November he submitted detailed objections. The report was signed on 11 November. The matter was held up because the question of his report for 1979 had not yet been settled, and so not until 27 July 1984 did the President of the Office endorse the 1980-81 report, which was notified to him in final form on 20 August. On 19 October he lodged an internal appeal against the President's decision, objecting both to the general assessment and to the various criticisms of his performance. No decision having been taken on his appeal within the two months prescribed in Article 109(2) of the EPO Service Regulations, he is challenging what he alleges to be an implied decision to reject it. In its report of 26 June 1985 mentioned in Judgment 724, under A, the Appeals Committee recommended rejecting his internal appeal against his report for 1980-81, and by his letter of 23 July the President of the Office informed him that he accepted that recommendation.

B. The complainant contends that the impugned decision is tainted with several flaws. (1) The President took until 27 July 1984, or over twenty months, to approve the report, and the delay was wilful and quite unwarranted. The consequence was that the promotion committees for 1980 and 1981 had before them as a basis for their recommendations for promotion only Mr. Vandooren's original, and later cancelled, report for 1979. (2) The report by Mr. Vandooren suffers from flagrant and malicious errors of fact. There is a striking contrast both with the earlier reports by his predecessor, Mr. Pasturel, and with reports by his successor, Mr. Zimmer, on the complainant's performance in 1982 and 1983. Besides, there is no evidence to support Mr. Vandooren's criticisms. Despite the harassment he was subjected to, the complainant's output was as satisfactory in 1980 and 1981 as it had been in 1979, and the other criticisms are equally mistaken. (3) The procedural delays, the Administration's tendentious attitude and the whole way in which the reporting system is applied, to which the complainant states detailed objections, 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 by at least two years and he was wrongly paid lower mission expenses during that period. He asks the Tribunal to set aside the President's decision of 27 July 1984 endorsing Mr. Vandooren's report and to award him damages equivalent to six months' salary, financial entitlements as an A4 examiner for a two-year period from 1981 to 1983, with the corresponding increase in the amount of mission expenses refunded, and costs.

C. The EPO replies that insofar as the complaint is challenging the President's decision of 27 July 1984 to endorse the report it is irreceivable. When he filed the complaint, on 15 March 1985, his internal appeal was still pending before the Appeals Committee, to which it had been referred on 3 January 1985, by a decision of the President's of 20 December 1984, and he therefore failed to exhaust the internal means of redress. Subsidiarily, the EPO submits

that the complainant's objections to the report are devoid of merit, the President's decision not being tainted with any of the flaws that entitle the Tribunal to set aside a discretionary decision of that kind. It seeks to refute in some detail the arguments summarised in B(1), (2) and (3) above.

The claim to compensation for the delay in promotion is also irreceivable on the grounds which the EPO advances in its reply to the complainant's sixth complaint and which appear in Judgment 724, under C.

D. In his rejoinder the complainant contends that his complaint is receivable. The President was required to take a decision on his internal appeal within the two-month time limit set in Article 109(2) of the EPO Service Regulations, and once the case was referred to it the Appeals Committee was required to report within a reasonable lapse of time. The letter of 20 December 1984, written in standard terms and not even signed by the President, merely said that the appeal was provisionally rejected and was referred to the Appeals Committee, and it did not amount to a decision within the meaning of Article VII(3) of the Statute of the Tribunal. Besides, the letter was sent over two months after the complainant lodged his internal appeal of 19 October.

As to the merits, he puts forward arguments similar to those referred to in Judgment 724, under D, and discusses further points raised in the EPO's reply.

E. In its surrejoinder the EPO discusses at length the Tribunal's case law with reference to the issue of receivability. It enlarges on its submissions, maintaining in particular that the President's decision of 20 December 1984 amounted to a decision within the meaning of Article VII(3) and that the time the Appeals Committee took to report -- from 3 January 1985, when it received the appeal, until 26 June 1985 -- was reasonable. It takes up the points raised in the rejoinder on the merits. It again invites the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, as devoid of merit.

CONSIDERATIONS:

The application for the quashing of the impugned decision

1. On 12 August 1982 Mr. Vandooren, the complainant's supervisor, drafted a report on his performance in 1980 and 1981. The countersigning officer signed it on 8 December 1982 and the President of the Office approved it on 27 July 1984.

On 19 October the complainant submitted an internal appeal against the President's decision. On 20 December 1984 the Principal Director of Personnel told the complainant that his appeal had been rejected and was referred to the Appeals Committee.

On 15 March 1985 the complainant filed the present complaint. He takes the view that since the President failed to give a decision on the internal appeal within two months there was an implied decision to reject his appeal which he might challenge before the Tribunal at any date up to 19 March 1985.

On 26 June 1985 the Appeals Committee recommended rejecting the appeal and the President did so in a decision of 23 July.

2. According to Article VII(3) of the Statute of the Tribunal a staff member may file a complaint where the Administration fails to take a decision upon his claim within 60 days. In this case the President did not take a decision within the time limit, which expired on 18 December 1984. As is stated above, however, the Principal Director of Personnel informed the complainant on 20 December that his internal appeal had been rejected and was referred to the Appeals Committee. That was an express decision which precluded the existence of an implied one. To comply with the rule in Article VII(1) of the Statute that he must exhaust the internal means of redress the complainant ought to have awaited the conclusion of the internal appeal proceedings, i.e. the Appeals Committee's report and the President's final decision, before filing his complaint. Filed on 15 March, before the end of the internal proceedings, the complaint is premature and therefore irreceivable.

3. After the filing of the complaint the Appeals Committee reported and the President took his final decision. It is not too strictly formal an approach to declare the complaint irreceivable and suggest that the complainant challenge the President's final decision if he so wishes. There are two reasons why that is the proper course. The first is that in his submissions the complainant has not addressed the Committee's report or the President's latest decision. The other is that the parties may alter their stand in view of the Tribunal's ruling on the sixth complaint.

As long as his case was pending before the Tribunal the complainant was not bound to comply with Article V11(2) of the Statute, i.e. file his complaint within 90 days of getting the President's decision of 23 July 1985. The Tribunal will deem the time limit to be respected provided he files a new complaint within 90 days of the notification of this judgment.

The claims to payment of six months' salary and to financial compensation

4. The general rule is that identical claims may not be submitted to two different bodies. At the date of filing these claims were before the internal appeals body and they are therefore irreceivable. Nor may the same claims be twice submitted to the same instance. The complainant is asking for six months' salary and financial compensation in both his sixth and seventh complaints. The claims in this one, the later, are therefore irreceivable.

Joinder

5. The complainant asks that his sixth and seventh complaints be joined. The EPO suggests in its reply that they be joined insofar as they relate to his promotion and consequent financial entitlements but in its surrejoinder it adds that, if the Tribunal declares the challenge to the report for 1980 and 1981 receivable, it will waive its objections to full joinder.

The Tribunal has consistently held that it will join complaints and deliver a single decision only if the substance of the claims is the same. Since the sixth and the seventh complaints impugn two different decisions they cannot be joined.

It is immaterial whether partial joinder such as the EPO suggests is admissible. The Tribunal will join cases only if it deems fit. The Tribunal has given different rulings on the claims the EPO proposes joining, joinder would not simplify matters and the Tribunal rejects it.

DECISION:

For the above reasons,

The complaint is 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