

SIXTY-SECOND ORDINARY SESSION

***In re* HAKIN (No. 9)**

Judgment 820

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Robert Hakin against the European Patent Organisation (EPO) on 14 August 1986, and corrected on 1 October, the EPO's reply of 19 December 1986, the complainant's rejoinder of 28 January 1987, as supplemented on 16 February, and the EPO's surrejoinder of 15 April 1987;

Considering Article II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear under A in Judgment 724, which related to his sixth complaint. The complainant was a search examiner in the EPO's office at Rijswijk, was promoted from grade A3 to A4 on 1 January 1983 and held grade A4 until he retired, on 1 July 1986. What prompts this complaint is again the report Mr. Vandooren wrote on his performance in 1979.

B. The complainant maintains that, besides the operative part, there are passages of Judgment 724 on which the EPO should have acted. Since it did not do so within sixty days of the publication of the judgment he may, under Article VII(3) of the Statute of the Tribunal, challenge its omission to act and he has duly done so. Although the Tribunal did not quash the decision by the President of the Office to endorse the report on his performance in 1979, it gave to understand that something should be done. The complainant goes into his submissions on the merits, enlarging on his plea that Mr. Vandooren was prejudiced against him. He asks the Tribunal to order (1) that comments by Mr. Vandooren be deleted from the report; (2) that his promotion to A4 be backdated to 1 January 1981 or, failing that, that the competent promotion committee review his case; (3) that he be granted access to items of evidence which the Tribunal said, in paragraph 6 of Judgment 724, that there was no reason he should not see; and (4) to award him moral damages amounting to 2,000 United States dollars, and costs.

C. In its reply the EPO submits that claim (1) is irreceivable as *res judicata*: the Tribunal examined the challenged report, held in Judgment 724 that the comments were not flawed and in the operative part rejected the same claim. In any event the claim is devoid of merit for the reasons the EPO put forward in the earlier case: see Judgment 724, under C.

Claim (2) is irreceivable because the complainant has failed to exhaust the internal means of redress as Article VII(1) of the Statute of the Tribunal requires. After Judgment 724 confirmed the report for 1979 he should have asked the President of the Office to take a decision in the light of the report on his retroactive promotion. Besides, his claim is unsound: until the normal procedure for promotion is over and a decision has been taken on the matter of his retroactive promotion no pleas may be put forward on the merits.

Claim (3) is time-barred: he should have claimed disclosure of the items of evidence in an internal appeal. Besides, the Tribunal could have ordered the disclosure in the earlier proceedings; yet it did not do so. In any case the items are not material to the report for 1979.

Claim (4) is irreceivable because it is *res judicata*: in Judgment 724 the Tribunal awarded moral damages on account of the report for 1979. It is also devoid of merit, the complainant having failed to adduce any evidence of further moral injury.

D. In his rejoinder the complainant presses his claims, all of which, in his submission, are both receivable and

sound. Since he is alleging failure to give full effect to Judgment 724 his claim (1) - to deletions from the report - is receivable: he had no need to go through the internal appeal procedure. He develops his allegations about the malice of Mr. Vandooren and the unfairness of the comments in the report for 1979, which he again discusses in detail. He cites the pleas in the rejoinder he filed on his eighth complaint: see Judgment 806, under D.

Claim (2) is receivable: the EPO's plea wrongly makes the proper exercise of the President's authority conditional on a purely formal move by the complainant. He cannot be accused of failing to exhaust the internal means of redress when his claim to promotion formed part of an internal appeal he filed as long ago as December 1982 and which led nowhere. It is absurd to say that the "normal procedure for promotion" for 1981 is not yet over.

Claim (3) is not time-barred: it is too much to expect him to bring an internal appeal every time he is refused something. He invites the Tribunal to order disclosure of the items because, in his view, they will serve to establish Mr. Vandooren's prejudice against him.

Claim (4) is not *res judicata* since the moral damages he was awarded in Judgment 724 related to Mr. Vandooren's first draft, not the second one.

In a supplement to his rejoinder the complainant produces and discusses the text of further correspondence with the EPO about his claim to retroactive promotion.

E. In its surrejoinder the EPO submits that there is nothing in the rejoinder to weaken the pleas in its reply, which it develops. It rejects the complainant's charges of malice and the construction he puts on Judgment 724; it is the operative part of that judgment that calls for action, not the reasoning. The Organisation answers further points in some detail and concludes by inviting the Tribunal to dismiss the claims as irreceivable and, subsidiarily, as devoid of merit. It adds that the competent promotion committee, which reported on 31 March 1987, decided not to recommend that the complainant's promotion to A4 take effect two years earlier, as from 1 January 1981, the reason it gave being that the assessment of his performance in 1980-81 did not warrant the earlier promotion.

CONSIDERATIONS

Mr. Vandooren's comments

1. The complainant asks the Tribunal to order the striking out of Mr. Vandooren's comments in the report on his performance in the last four months of 1979, but without changing the general rating "good". That report formed the subject of the complainant's sixth complaint. As is said in Judgment 724, of 17 March 1986, the complainant worked for the first eight months of 1979 under Mr. Pasturel and for the last four under Mr. Vandooren. The President of the Office approved the original assessments of him but later withdrew them because of a procedural flaw and ordered a new staff report comprising the comments of both the reporting officers. On 19 June 1984 he approved the new report, the general rating still being "good".

2. The complainant challenged the decision to endorse Mr. Vandooren's report for the last four months of 1979. In Judgment 724 the Tribunal went into the text in some detail and held that the disagreement between the two reporting officers could be accounted for. There is no need to repeat the reasoning in point 5 of the judgment: the upshot was that there was no fatal flaw in the decision and the claims failed.

3. The complainant is not applying for review of that judgment. Indeed it affords the basis of his contention that the President ought to have taken a new decision striking out Mr. Vandooren's "malicious" comments or at least making the text consistent.

Since in Judgment 724 the Tribunal declined to declare the President's decision unlawful the matter is *res judicata*. He was not required to make any new decision. The decision the complainant objects to is therefore final in all respects whether essential or incidental. Though the Tribunal had doubts about the soundness of some of Mr. Vandooren's comments and the complainant had asked to have them struck out, it did not so order. It observed that in dealings with an employer "everyone is bound to run into difficulties which he must just put up with and for which he can expect no compensation". Only in exceptional circumstances - such as it found in Judgment 182 - will the Tribunal have comments struck out of a performance report, because the exercise of discretion demands broad freedom of speech.

The claim fails.

The date of promotion

4. The complainant asks that his promotion to A4 be backdated to 1 January 1981 and claims an award of damages on that account. He has a subsidiary claim that the promotion committee review the matter, which has been before it since 1980, against the reports it did not have at the time.

By a decision of 21 February 1984 he was promoted to principal examiner at grade A4 as from 1 January 1983. In ruling on his eighth complaint in Judgment 806 the Tribunal held that it had no challenge to that decision before it.

It did, however, rule in Judgment 806 on the lawfulness of the staff report for 1980-81 and it dismissed the complaint. The judgment having been handed down on 13 March 1987, the competent promotion committee again took up the matter of the date of promotion since Judgments 724 and 806 had upheld the staff reports once and for all. The committee reported on 31 March, and on 15 April the Principal Director of Personnel told the complainant the President had confirmed the date to be 1 January 1983.

The Tribunal was so informed in the EPO's surrejoinder, but the complainant has not yet commented and the Tribunal will not now rule on the lawfulness of the decision of 15 April 1987.

5. That decision does not necessarily render void an earlier claim relating to the date of the complainant's promotion.

The complainant argues that his complaint is receivable on the grounds that he is challenging the decision implied in failure to answer his internal appeal, a failure that has gone on for years because, says he, the President so ordered.

He did file an internal appeal in 1983 claiming promotion, among other things, but he got satisfaction in the decision of 21 February 1984 to promote him and so the appeal has lost its substance.

The evidence before the Tribunal also includes a letter he wrote on 19 October 1984 and in which he referred to the decision of 21 February 1984. But the letter is really about his internal appeal against his report for 1980-81 and may not be taken as challenging the decision of 21 February 1984. The Tribunal therefore allows the EPO's plea that the claim is irreceivable.

6. Before the close of the written proceedings on this complaint there was the new decision, dated 15 April 1987, about the date of the promotion, and it does not just confirm the one of 1983. The 1983 decision was founded on the special report by Mr. Zimmer, the latest one on the reports the Tribunal has ruled to be valid. The complainant may therefore still challenge both the lawfulness and the financial consequences of the decision.

The disclosure of evidence

7. In Judgment 724, on the sixth complaint, the Tribunal acknowledged that the complainant had been "unable to get hold of papers there was no reason he should not see". It took account of that wrongful omission, among other things, in its award of damages but did not order disclosure.

The EPO pleads that the claim is irreceivable, but there is no need to rule on the plea. No purpose would be served in the circumstances by enlarging on the passage in Judgment 724: the items the complainant wants to see are about the drafting of reports for 1979 and the time is past for any challenge to the lawfulness of those reports.

Moral damages

8. Judgment 724 awarded damages for moral injury and there is no evidence before the Tribunal that would warrant any further award under that head.

The hearing of witnesses

9. The hearing of witnesses would not afford any further material evidence.

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 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
E. Razafindralambo
A.B. Gardner