

## SEVENTY-SECOND SESSION

*In re B.*

### Judgment 1161

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. A. B. against the European Patent Organisation (EPO) on 9 January 1991 and corrected on 28 January, the EPO's reply of 12 April, the complainant's rejoinder of 6 August and the Organisation's surrejoinder of 9 October 1991;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 13 and 106 of 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. The complainant, a Greek who was born in 1953, joined the staff of the EPO at its headquarters in Munich on 1 November 1988. He held grade A2 and was assigned to Department 4.2.1, which is in charge of budget administration, and put on a post in internal auditing. He was required to serve one year's probation under Article 13 of the Service Regulations.

Article 13(2) says that not less than a month before the expiry of each period of six months within the period of probation "a report shall be made on the ability of the probationer to perform his duties and on his efficiency and conduct".

The complainant's first probation report, dated 20 March 1989, was favourable, described his knowledge of German as "adequate" and rated his progress satisfactory. But his second probation report, dated 25 September 1989, said he had "failed to make the necessary progress"; in particular "An inadequate knowledge of the German language hampers his ability to deal with material in German (about 80-90% of the total)". The reporting officer suggested transferring him to another department and recommended extending his probation by six months. He submitted comments in writing on 29 September. By a letter of 9 October 1989 the Director of Personnel informed him that the President of the Office had decided to extend his probation by six months.

In a letter he wrote on 16 March 1990 to the Principal Director of Personnel he applied for a transfer.

The reporting officer signed a third probation report on 20 March 1990. It was again unfavourable and went into greater detail: he was "not sufficiently capable of performing the Category A job assigned to him", needed constant guidance and failed to "organise his work efficiently"; his "drafts usually required extensive reworking"; and despite the "generally positive initial impression" that his interest and sense of commitment had given he was not doing the "independent and reliable work" expected. The recommendation was that his appointment should not be confirmed.

The Principal Director of Personnel wrote to him on 26 March refusing transfer. On 2 April he appealed to the President under Article 106 of the Service Regulations against the refusal of transfer to a "proper job" in which he could show his mettle. On 27 April the Principal Director informed him that the President found his work inadequate and dismissed him under Article 13 as from 1 May 1990.

In a letter of 30 April he filed another internal appeal against the refusal of transfer and of proper training and against dismissal.

In its report of 20 September 1990 the Appeals Committee, to which the President had referred his two appeals, held that there had been failure to give him adequate training and he had been "told far too late of the precise grounds for the prolongation of his probation and his eventual dismissal". In the Committee's view each omission amounted to an especially serious or glaring flaw that warranted reversal of the decision. While holding that he had no right to transfer, the Committee recommended allowing the appeal against dismissal. But by a letter of 12

October 1990, the decision he is impugning, the Principal Director of Personnel informed him that the President had rejected his claims.

B. The complainant observes that although he told the EPO at the outset that he knew no German it put him in a job in which most of the work was in that language. He was given neither enough time in which to study German nor proper training. The favourable first report misled him into giving up for good his previous employment. He was warned neither of the criticisms that were to appear in his second report nor of the ones in the third.

He alleges disregard of circular 172 of 19 September 1988, which sets guidelines on basic and further vocational training for EPO staff, and especially of article 2, which prescribes induction, the teaching of languages and specialist instruction. The Organisation committed a breach of good faith. He was entitled to expect it to help him to learn German. It discriminated against him since it has given many other employees proper training.

By extending his probation it led him to believe that if his German improved he would be kept on.

It failed to observe the rules on notice and on non-confirmation of appointment.

He seeks the quashing of the decision of 12 October 1990, confirmation as a permanent employee as from 1 May 1990 or, failing that, reinstatement for a new period of probation of at least six months and damages equivalent to full pay from 1 May 1990 up to reinstatement, and 5,000 Deutschmarks in costs.

C. In its reply the EPO supplies the text of a note which the Vice-President in charge of Legal/International Affairs, also a Greek citizen, wrote to the President of the Office on 6 November 1990. The complainant, she said, had telephoned her in "further pursuit of his appeal" and threatened to "expose the alleged vices and shortcomings of the EPO management, particularly those of his former superiors in DG 4.2, unless the Office agreed to buy his silence". He asked for at least six months' salary and in return "undertook both to keep quiet and to desist from pursuing his claim before the ILO Tribunal".

He also made uncalled-for criticisms of management staff in his internal appeal of 2 April 1990 so as to blame them for his dismissal. His attempts at blackmail show that in any event he lacks the discretion and honesty expected of an international civil servant.

In his internal appeal he disregarded the reason for dismissal - his own incompetence - and criticised management instead. The Appeals Committee took up his criticisms and so based its recommendation in his favour on irrelevant issues.

The President properly exercised the wide discretion he enjoys under Article 13(2) of the Service Regulations to dismiss the complainant for poor performance. The second report showed that the complainant had not made the progress expected of a probationer: he had failed to turn to account the experience he had gained in the period of induction and he had not done enough to bring his knowledge of German up to par. He failed to use the further six months' extension to make good the many shortcomings in the quality and quantity of his work. Confirming his appointment was neither in the EPO's interests nor in his own. He never formally contested the charges of incompetence in his second and third probation reports.

He was given due warning of his supervisors' dissatisfaction. Once he had got the second report he could no longer doubt that his competence was at issue and he was allowed another six months in which to improve. Moreover, in a note of 6 July 1990, which the EPO appends to its reply, his supervisors describe the many discussions they had with him and the help they gave him to come up to standard, and deny that he got no training. Besides, someone with his qualifications and experience should not have found it hard to adjust to his work.

He knew from the outset that his duties would require a passive knowledge of German. According to Article 3 of the 1988 guidelines he cites, the staff member has primary responsibility for learning. He was allowed to attend courses at the EPO and outside in 1989-90, including an intensive one in January and February 1990. In the additional six months most of his work was in English, which he knew much better.

In his application for employment at the EPO he left blank the spaces where he ought to have put the number of the post he was interested in. But he knew what his duties might be since at an interview before recruitment he said he could accept either of two posts in Department 4.2.1 that were suggested, and they included the one he was later put on.

Lastly, no suitable post could be found for him outside Department 4.2.1, and he had no right to a transfer anyway.

D. In his rejoinder the complainant rejects the Organisation's charge, for which he says the only evidence is a personal note from a Vice-President. He never threatened, either in the telephone conversation with her at the end of October 1990 or on any other occasion, to utter derogatory remarks about management if he was refused payment. He gives his own account of their conversation and submits written testimony from someone in Athens who was present when he made the call from there. The Vice-President's note is for several reasons unreliable anyway. He applies for the hearing of witnesses to bear out what he says. In any event the charges are irrelevant to the lawfulness of the impugned decision, which was taken before the alleged attempt at blackmail occurred. The levelling of such empty charges shows up the weakness of the EPO's case.

The Organisation's comments on his performance are largely mistaken. He describes what he had to do and says that only by hard grind was he able to get through, although most of his work was in German, even in the further six months. He made worthwhile progress in German.

The second report gave no substantiated warning of his supervisors' dissatisfaction: all he could have been expected to gather from it was that his knowledge of German was not yet good enough. Just before and just after he got that report his first-level supervisor told him time and again that he had no cause for worry about confirmation and indeed gave oral evidence to that effect to the Appeals Committee. So there has been breach of trust and of his legitimate expectations.

The note of 6 July 1990 from his supervisors is an item he has never seen before and it was not put to the Committee. There was breach of due process in not giving him an opportunity to comment on it.

A probationer cannot tell what sort of training his post requires or what training courses he should follow: it is the Organisation's duty to tell him and his supervisors' to watch his progress and help him. There was breach of those duties in this case. Only the complainant's supervisors knew what his post required; he did not get a post description until April 1989; and they never told him how they wanted him to improve.

E. In its surrejoinder the EPO states that the rejoinder contains no new argument that makes it change position. It points out several mistakes of fact, develops its earlier pleas and presses its charge of blackmail.

#### CONSIDERATIONS:

1. As is stated above, under A, the complainant joined the staff of the EPO in Munich on 1 November 1988 as a permanent employee in grade 2 of category A. He was put on a post in internal auditing in Department 4.2.1. In accordance with Article 13(1) of the EPO Service Regulations he had to serve one year's probation, up to 31 October 1989.

As a probationer he was subject to Article 13(2), which provides that "Not less than one month before the expiry of each period of six months within the probationary period, a report shall be made on the ability of the probationer to perform his duties and on his efficiency and conduct in the service"; that "A probationer whose work has not proved adequate shall be dismissed at the end of the probationary period"; but that "the President of the Office may decide, in exceptional cases, to extend the probationary period before taking a final decision".

Article 13(5) further states that "At the end of the probationary period, the appointment of a probationer who has not been dismissed and who has not submitted his resignation under the terms of this Article shall be confirmed".

2. After a satisfactory first probation report, dated 20 March 1989, the complainant's supervisors became less pleased with his progress in German and in other respects. In a second probation report, dated 25 September 1989, they described his shortcomings in some detail and recommended extending his probation by six months. By a decision of 9 October 1989 the President of the Office extended his probation by the six months, to 30 April 1990, in accordance with Article 13(2).

But his third probation report, dated 20 March 1990, was also unfavourable: it criticised him for lack of knowledge of German and many other shortcomings and recommended not confirming his appointment. The President accepted that recommendation and he was informed of his dismissal in a letter of 27 April from the Principal Director of Personnel.

He filed two internal appeals, one on 2 April 1990 claiming transfer to a job that would suit him better, and the other on 30 April challenging his dismissal. The Appeals Committee recommended rejecting the first of his two appeals and allowing his appeal against dismissal, but by letter of 12 October 1990 the Principal Director conveyed to him the President's decision to reject both of them.

3. The complainant is seeking:

- (a) the quashing of the President's final decision of 12 October 1990 rejecting his internal appeals;
- (b) confirmation of his appointment as a permanent employee as from 1 May 1990 or, failing that, reinstatement for a new period of probation of at least six months;
- (c) damages equivalent to the amount of his full pay from 1 May 1990 up to the date of his reinstatement; and
- (d) an award of 5,000 Deutschmarks in costs.

The non-confirmation of the complainant's appointment

4. As the case law makes plain - for example, Judgments 687 (in re Delangue) and 736 (in re Michael) - a decision not to confirm a probationer's appointment is a matter of discretion for the President and the Tribunal will not substitute its own judgment for the Organisation's in matters that require such exercise of discretion.

Although the Tribunal may review the lawfulness of dismissal of a probationer, the nature of the decision is such that its power of review is limited. It will set aside the decision only if there was a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority.

The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the Organisation. The competent authority will determine on the evidence before it, and possibly after extension of the probation as in the present case where doubt still lingers, whether to dismiss the official or to confirm the appointment.

It must indeed be allowed the widest measure of discretion in determining whether someone it has recruited shows the highest level of qualifications required for a post in the particular field in which he is to be working.

5. The Tribunal is satisfied that in this case the President of the Office made proper exercise of the wide discretion he enjoys under Article 13(2) to decline, on the grounds of poor performance, to confirm the complainant's appointment.

The complainant's second probation report stated his supervisors' belief that he had not made the progress expected of him: he had failed to turn to account the experience he had gained in the period of induction and to bring his knowledge of German up to par. The highly unfavourable comments by his supervisors in his third report bear out his failure to use the six months' extension to make good the many shortcomings in the quality and quantity of his work. The reporting officers believed him to be unable to work independently and reliably and to make practical use of his university education and professional experience; indeed he had not produced satisfactory results even when working in the field he knew best.

In point of fact he did not contest in his internal appeals the charges of incompetence in those two reports, and he does not seek to refute them in his complaint. Yet in themselves they afford ample grounds for the President's decision not to confirm his appointment.

6. It is on different grounds that he challenges the decision. He pleads, first, that he was given no warning of the criticisms that appeared in the second and third reports; secondly, that he was assigned to a department in which most of the work was in German, though the Office was aware of his weakness in that language and gave him insufficient time and opportunity to study it; and thirdly, that he was given work for which he was not suited in a unit for which he had not been recruited.

For the reasons stated below each of those pleas is unsound.

7. The second report contained criticisms of all the main shortcomings which he was charged with in the third one. By the time he got it, if not before, he therefore had full warning of the reasons for his supervisors' dissatisfaction with him and could no longer doubt but that his competence was at issue and that that was why he was being given another six months' probation.

8. Secondly, as to his proficiency in German, he knew even before taking up his appointment that it would call for at least a passive knowledge of that language. According to the 1988 guidelines on basic and further vocational training for staff, which he cites, the Administration shares the responsibility for training with the individual staff member, who must call attention to his needs, play an active role in the learning process and be willing to pursue further training on his own account. The EPO discharged its own responsibility in the matter by letting him attend internal and external courses in German in 1989-90. Besides, in the additional six months' probation he was allowed to work mainly in English, a language he was much more familiar with; yet he still failed to come up to standard.

9. Thirdly, in his application for employment he left blank the space in which he was asked to state the number of the post he was interested in. But that does not mean he was unaware of the duties he was to be given since the EPO assigned him to one of two posts in Department 4.2.1 which he had said during a pre-recruitment interview that he could accept.

The complainant's claim to transfer

10. The Organisation tried to find him a suitable post in another department. That it failed to do so is immaterial, however, since he had no right whatever to transfer under the Service Regulations.

The note of 6 July 1990

11. The complainant objects in his rejoinder to the Organisation's citing, in its reply to his complaint, a note of 6 July 1990. In this note, which the Organisation says was drawn up for the purpose of preparing its pleadings to the Appeals Committee, his supervisors describe the many discussions they had with him and the help he was given, including training, in the hope of bringing him up to standard. He maintains that since he has not seen the note before there has been breach of his right to defend his interests. He asks that it should not be "used" against him in the present proceedings.

The answer to his objections is, first, that that note, which dates from July 1990, can have had no effect on the original decision not to confirm the complainant's appointment, which was notified to him in the letter of 27 April 1990; and secondly, that he affords no evidence whatever to suggest that it influenced in any way the President's final decision.

The Tribunal's ruling

12. Since for the foregoing reasons the impugned decision must stand, the complainant's claims fail in their entirety. The Tribunal need not therefore entertain the EPO's allegations of blackmail against the complainant. Nor would any useful purpose be served by its hearing the witnesses whom the complainant wants to give evidence in support of his case.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux  
Mohamed Suffian  
P. Pescatore

