EIGHTIETH SESSION

In re SCHORSACK

Judgment 1488

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Barbara Schorsack against the European Patent Organisation (EPO) on 25 October 1994 and corrected on 25 November, the EPO's reply of 15 February 1995, the complainant's rejoinder of 17 May and the Organisation's surrejoinder of 22 June 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, is in Munich and is responsible in the main for the substantive examination of patent applications.

Since 1990 the EPO has been receiving many more applications for international preliminary examination under Chapter II of the Patent Cooperation Treaty, which are known as "PCT applications", and subsequent applications for patents with European designations, which are known as "Euro-PCT applications". The fees the EPO was charging for PCT applications covered only part of the costs; so standard patent applications, for which the fees were higher, were indirectly subsidising PCT applications. The Administration and staff representatives started discussions on 12 June 1992 about how to lower the costs of processing them.

By a notice of 1 September 1992 the Vice-President in charge of DG2 informed the staff of measures, which were to take effect at once, to streamline the PCT procedure, change the Euro-PCT procedure and have examiners spend less time on each case. The Vice-President announced that he would set up a working party, including staff representatives, to discuss reform. He did so, and the working party reported on 27 November 1992.

By a note of 26 January 1993 the Vice-President gave examiners in DG2 notice of further reforms in PCT and Euro-PCT procedures and of changes in the Office's system of what it calls "points". For the patent applications an examiner processes he gets a number of points that determines in part his productivity and his general ratings. The changes lowered the value of each examination from 1 full point to 0.75 for a PCT application as from 1 February 1993 and to 0.55 for a Euro-PCT application as from 1 January 1994.

The complainant, who is German, is employed by the EPO in DG2 as an examiner at grade A3. On 5 March 1993 she and several hundred other staff members lodged internal appeals against the Vice-President's note of 26 January. In the edition of the EPO's Gazette for 1 June 1993 the Director of Staff Policy announced that the President of the Office had referred the appeals to the Appeals Committee. In its report of 1 June 1994 the Committee recommended by a majority that the President should allow the appeals. By a communiqué issued in the EPO Gazette in August 1994 the Director of Staff Policy informed the staff that the President had decided to reject the appeals. That is the decision under challenge.

B. The complainant submits that by consulting neither the General Advisory Committee nor a local one before the note of 26 January 1993 went out the Organisation was in breach of Article 38 of the Service Regulations. The measures announced in the note, since they apply to all examiners, concern "the whole or part of the staff to whom these Service Regulations apply" and accordingly had to form the subject of the prior consultation required by Article 38. It is immaterial that the Administration informed the staff of its plan to raise standards of productivity and "discussed" the matter with staff representatives on the Staff Committee: informal contacts of that sort do not dispense with the need for such consultation.

The change in the reckoning of points has affected many examiners adversely: lower ratings were the penalty for anyone who failed to meet the new standards of output. The reforms were the more objectionable for coming into force in the middle of a reporting period and being therefore retroactive. They offend against the principle of equal

treatment since they bear most hardly on examiners who process the highest number of preliminary examinations.

The time-saving measures are neither lawful nor practicable and in no way warrant breach of the EPO's duty of consultation.

The complainant seeks the quashing of the decision on the reckoning of points for processing PCT and Euro-PCT applications as announced in the note of 26 January 1993 and a return to the old system. She wants the figures of productivity for "every examiner affected" to be corrected accordingly and their appraisal reports for 1992-93 and 1994-95 to be made or, if necessary, remade on the strength of the old system. She claims 10,000 German marks in costs.

C. In its reply the EPO contends that the complaint is irreceivable because it shows no cause of action. Having got a "very good" general rating for 1992-93, the complainant suffered no injury from the impugned decision.

In subsidiary argument the Organisation pleads that the President acted in the exercise of the administrative authority conferred on him by Article 10 of the European Patent Convention, which empowers him to adopt "administrative instructions" to ensure the functioning of the Office. Such measures are not covered by Article 38(3) of the Regulations. Why indeed did the staff representatives, who knew full well of the intended measures, wait until 26 January 1993 to ask for referral to the General Advisory Committee? At all events the Administration did seek, at meetings it held as early as 12 June 1992, to involve staff representatives, in keeping with Article 36(1), in the assessment of appropriate measures. Such consultations were anything but "informal".

As for the effect on examiners' ratings, the EPO stresses the importance of changes in the reckoning of points. Output is no longer the only factor of the general rating: quality now counts just as much. Besides, the saving of time due to the reforms of the PCT and Euro-PCT procedures has more than made up for any adverse effect on performance appraisal: since examiners have to spend less time on each application they should be able to process more. The old system was unfair because it did not grant points for actual work and was too generous to examiners who dealt with a higher number of PCT and Euro-PCT applications.

D. In her rejoinder the complainant maintains that because of the reforms an examiner's work takes longer. Lowering the number of points for PCT and Euro-PCT applications did not preclude a "very good" rating altogether but did make it harder to achieve. So the impugned decision was to her detriment.

In her submission Article 38 confers on the staff a fundamental right to consultation in the General Advisory Committee.

E. In its surrejoinder the EPO contends that she has failed to show that the time-saving measures did not lessen the time needed to examine a PCT or Euro-PCT application.

CONSIDERATIONS:

1. This complaint raises a single substantive issue: whether the Organisation should have consulted an advisory committee before sending all EPO patent examiners a note dated 26 January 1993 about their processing of PCT and Euro-PCT applications. (The terms are explained in A above). The note set out what it described as "streamlining measures" and a new system of granting points to examiners for processing such applications.

2. The background to the note was as follows. A standard European patent application does not take so long for an examiner to process as one for international preliminary examination in accordance with Chapter II of the Patent Cooperation Treaty, known as a "PCT application". The procedures the EPO follows are not the same for the two sorts; and the fees that the Organisation charged for standard processing used to cover more of actual costs than the fees it charged for the PCT one. The number of PCT applications rose from 3,700 in 1990 to 6,660 in 1992 and to 8,650 in 1993. In June 1992 the President made a proposal to the Administrative Council for an increase of the fees that the EPO charged for a PCT examination from 2,800 to 3,600 German marks. But the Council agreed to increase the fees only to 3,000 marks as from 1 October 1992. So the Organisation then set about reducing costs by "streamlining" the procedure and having its examiners spend less time on PCT applications.

3. By a staff notice dated 1 September 1992 the Vice-President of the Office in charge of Directorate-General 2, which is responsible for substantive examination, announced the first changes and the intention of setting up a working party, including representatives of the staff, to look into further measures and in particular to review the

number of points that examiners were to be awarded for PCT applications. The significance of the points system is that an examiner's output, which matters in the periodic appraisal of his performance, is determined according to the number of points earned. The Administration believed that the points should be reduced from 1 to 0.75 for a PCT application and to 0.55 for a Euro-PCT one. In its report dated 27 November 1992 the working party, or "group", made further suggestions for "streamlining the procedure" but none for any change in the points system.

4. At a meeting with the Administration in mid-December 1992 the staff representatives expressed the wish that the EPO offset any reduction in points for applications by the grant of more points for other areas of work; alternatively, it could keep the same number of points as before by way of incentive to higher output. The upshot was that the management of DG2 agreed to hold over until February 1993 any change in the number of points awarded so as to allow time for principal directors to hold meetings with the staff. Such meetings took place in January 1993. But on 26 January the Vice-President issued the note referred to in 1 above, thereby provoking internal appeals from the complainant and many other examiners. The Appeals Committee was divided. In its report dated 1 June 1994 the majority recommended allowing the appeals and the minority rejecting them. The President followed the minority and announced rejection in a communiqué dated 22 July 1994 which was published in the EPO Gazette in English on 1 August and in French and German on 29 August 1994. That is the decision impugned.

Receivability

5. The Organisation raises the preliminary objection that the complaint is irreceivable because the complainant has no cause of action: since her staff report for 1992-93 gave her a "very good" general rating she has suffered no detriment as a result of the decision she is challenging. Her answer is that the total number of points that an examiner has to earn to warrant such a rating has never been reduced; so the EPO's unilateral decision to award fewer points for processing the same number of applications means that the examiner must work harder and longer to achieve the same rating as before.

6. Although the Organisation observes that the examination is not the same after "streamlining" as it was before, the complainant is right. The decision to reduce the number of points does not apply just to the year 1992-93 but holds good and so continues to affect the complainant's interests. She has a cause of action in that the reduction will continue to have a bearing on the determination of her general ratings in performance reports. Her complaint is therefore receivable.

The merits

7. The complainant argues that the note of 26 January 1993 was issued without previous consultation of the General Advisory Committee or of any Local Advisory Committee and that that constituted a breach of the EPO's obligation under Article 38 of the Service Regulations, of which (3) and (4) read as follows:

"(3) The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

- any question of a general nature submitted to it by the President of the Office;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36.

(4) Each Local Advisory Committee shall be responsible for giving opinions on:

- any proposal to make rules and, in general, except in cases of obvious urgency, any proposal which concerns solely the whole or part of the staff at the place of employment concerned;

- any question of a local nature submitted to it by the President of the Office or his representative;

- any question submitted to it for an opinion by the General Advisory Committee;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

In the complainant's submission the reduction in points adversely affected many examiners and amounted to substantive alteration of their working conditions in that their failure to meet the requirements of higher output would earn them a lower rating in staff reports and so have adverse effects on pay, on prospects of promotion and on pension entitlements. The measure was therefore one which - to quote Article 38(3) - "concerns the whole or part of the staff to whom these Service Regulations apply".

8. The Organisation's reply is that the Vice-President in charge of DG2 did hold consultations on the subject with staff representatives at meetings on 12 June, 25 September, 13 November and 17 December 1992; that the proposal to reduce the number of points was mentioned as early as June 1992; and that the staff were represented on the working party that held some ten meetings to discuss the topic and reported on 27 November 1992. In the Organisation's submission the staff knew the Vice-President's intention full well before they saw the note of 26 January 1992. There was, it maintains, no breach of Article 38 because the decision came under the prerogatives of the President, who is responsible for the sound management of the Office as a whole: decisions of that kind that merely affect the way in which the Organisation's tasks are to be carried out do not fall within the scope of Article 38(3). Its interpretation of that provision is that consultation of the General Advisory Committee is required only where a decision affects the legal situation of staff as laid down in the Service Regulations or Pension Scheme Regulations. It concludes by observing that since the processing of applications had been improved it was only reasonable and indeed inevitable that the number of points to be awarded should be reduced accordingly.

9. The construction that the Organisation puts on Article 38(3) is too narrow. Article 38(3) does of course, as the EPO says, apply to cases where the Service Regulations and Pension Scheme Regulations are to be amended or "implementing rules" are to be made, and the legal status of staff is thereby to be affected. But it goes further: it applies to cases where "any proposal" is made "which concerns the whole or part of the staff". So it casts a wide net that goes beyond mere changes in legal provisions.

10. Article 38(3) does not interfere with the President's exercise of his decision-making authority, but seeks to ensure that the proposal shall go through a formal process in which the staff have a right to be consulted through the General Advisory Committee. Indeed it makes for good relations between staff and administration not just to empower but to require that body, set up under the Service Regulations to represent both sides, to give "a reasoned opinion". It does not matter that management may have consulted the staff on the subject in other ways. What was lacking in this case was what Article 38(3) required: the formal consultation of the General Advisory Committee and the submission of its reasoned opinion before the decision was made.

11. The Organisation pleads that staff representatives were closely involved in the decision-making process and had ample time in which to make suggestions in accordance with Article 36(1) a) of the Service Regulations, which says that the Central Committee of the Staff Committee "shall be responsible for ... making, at the request of the President of the Office or on its own initiative, suggestions relating to the organisation and working of departments or the collective interests of the whole or part of the staff". That is beside the point. The powers and duties of the General Advisory Committee under Article 38 are quite independent of those of the Central Committee under Article 36.

12. The conclusion is that the impugned decision was made in breach of the rules and must be set aside: the system of points that was in force before holds good. Although the Tribunal will not, as the complainant has asked, make any order that specifically refers to other members of staff, she is entitled to have the figures of her own output corrected in line with that system and her staff report for 1992-93 altered accordingly.

13. Since her complaint largely succeeds, she is entitled to an award of costs.

DECISION:

For the above reasons,

1. The impugned decision is set aside.

2. The EPO shall correct the figures relating to the complainant's output in accordance with the system of points as

in force before that decision took effect.

3. It shall alter her staff report for 1992-93 accordingly.

4. It shall pay her 2,500 German marks in costs.

5. Her other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.