

NINETIETH SESSION

In re Hijzelendoorn

Judgment No. 2033

The Administrative Tribunal,

Considering the complaint filed by Mr Johannes E. H. Hijzelendoorn against the European Patent Organisation (EPO) on 18 October 1999 and corrected on 1 November 1999, the EPO's reply of 19 January 2000, the complainant's rejoinder of 5 April and the Organisation's surrejoinder of 26 June 2000;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, who is of Dutch nationality, joined the staff of the former International Patent Institute at The Hague in 1975. In January 1978 the Institute was incorporated into the European Patent Office, the secretariat of the EPO, as Directorate-General 1 (DG1). The complainant became a formalities officer I at grade B4 on 1 December 1989.

In November 1992 a policy of diversification and decentralisation of tasks for support staff was introduced at DG1. Formalities officers were called upon to perform tasks other than the treatment of patent application files. Search Assistance Services (known as SAS Units) were set up in DG1 and the complainant was assigned to SAS Unit 6.

In his staff report for 1992-93 the complainant obtained the overall rating "very good". Having been on sick leave from mid-December 1994 to mid-February 1995 he then worked part-time for a period of two months before resuming full-time work.

In a note of 24 July 1995 the manager of SAS 6 informed the complainant that he would need to increase his level of production. In October 1995 he was transferred, at his own request, to another SAS unit. In his staff report for the period from 1 January 1994 to 15 October 1995 his overall rating was "good". On 27 September 1996 he contested the report on the grounds that it did not take into account all the duties he had been performing, and in late October he requested a conciliation procedure.

As a result of that procedure his report was amended. The new version listed other duties he had carried out, including those of an examiner's clerk for a month in mid-1994. However, the ratings stayed the same. The President of the Office endorsed it on 20 March 1998. On 8 June the complainant wrote to the President asking him to review that decision or otherwise treat his letter as an internal appeal. He wanted the full range of his duties, including those deriving from diversification, to be taken into account in the evaluation of his work so that the "good" ratings could be upgraded to "very good". On 30 July 1998 the Director of Personnel Development told him that the President had referred his appeal to the Appeals Committee. In the absence of a decision on his internal appeal, the complainant is challenging the implied rejection of his claims.

B. The complainant contends that there were procedural flaws in the reporting process, and the amended report signed by the President "remains flawed and seriously deficient". There was delay in drawing up his initial report: under the relevant guidelines a report must be drawn up "immediately" when a staff member is transferred, but in his case the reporting officer waited until the end of the general reporting exercise for 1994-95. Consequently, he received his report nearly a year after his transfer had taken place. Furthermore, this officer did not give him the opportunity to review the duties he had performed while under his supervision.

He also contends that there were substantive errors. The report omitted essential facts concerning his activities. The reporting officer failed to assess the complainant's performance in the context of diversification and failed to take

into account that during the reporting period he continued to "provide training and daily support" to other colleagues requiring assistance. Indeed, during the conciliation procedure the reporting officer denied that the complainant had been involved in training. He had a legitimate expectation that he would be fully appraised with regard to all aspects of his work. The report was further flawed because it made no mention of his sick leave and the fact that he had worked only part-time for a further two months.

The wording of a letter received from the President in March 1995 gave him a further legitimate expectation that his full contribution to diversification would be recognised. The President had said in the letter that staff members "willing to help out where there is a need within the team" were of value to the Office and he would consequently ask reporting officers and the Promotion Board to draw his "special attention" to such cases.

Lastly, the complainant claims that he suffered injury because of the delay in the conciliation and appeal proceedings. The conciliation procedure took nearly one year to complete. In addition, it has been more than fourteen months since he filed his appeal, and the Appeals Committee has not yet heard it.

He asks the Tribunal to: quash the President's decision of 20 March 1998; order that the contested report be referred back to both the reporting and countersigning officers to be fully revised; set a time limit of one month from the date of the present judgment for carrying out the revision; and order that the Promotion Board, on the basis of the revised report and in conformity with the President's promise, "recognise favourably" the full contribution he made "in the context of diversification". He also seeks awards of moral damages, firstly on account of the delays that occurred in producing the report and during the conciliation and internal appeal procedures, and secondly because of the "untruthful statements" made by the reporting officer in the report and during the conciliation procedure.

C. In its reply the Organisation objects to the receivability of the complaint. The complainant filed it before the Appeals Committee heard his case; so, the internal means of redress have not been exhausted. It rejects his claim about issuing an instruction to the Promotion Board as irreceivable since his internal appeal centred on his staff report and not on promotion.

Subsidiarily, on the merits, it says that the complaint is unfounded. There were no procedural flaws. The general guidelines on reporting contained in circular 188, in force during the reporting period were adhered to since they merely stipulated that, when a staff member is transferred, a separate report will be "drawn up"; that occurred in his case, even though he did not receive it until September 1996.

The Organisation produces an e-mail dated 13 January 2000 which indicates that in an interview with the complainant on 21 March 1994, held prior to issuing the 1992-93 staff report, his supervisor told him that the intensive staff training was over and that, because of a backlog of patent applications, the complainant was to revert to "production" work.

The EPO denies that there were substantive errors. In the period covered by the contested report the complainant would have given "simple advice" which cannot be likened to training. Although the matter of his sick leave was not mentioned explicitly in his report it was automatically taken into account in reckoning his output.

D. In his rejoinder the complainant submits that the facts contained in the e-mail of 13 January 2000 are "erroneous" and he disagrees with the Organisation's version of what was said during the interview of 21 March 1994.

In his opinion it was simply "untrue" to say that training was reduced to the level of "giving advice".

As for his claim regarding the Promotion Board, he stresses that he merely wishes the Board to review his performance in the context of diversification on the basis of an "accurate and complete" staff report.

E. In its surrejoinder the Organisation observes that the complainant paid no heed to the warning his reporting officer gave him on 21 March 1994. He is wrong to give the impression that there was a need for "massive on-the-job training" in 1994-95.

There was nothing out of the ordinary in the "delays" in the reporting process or in the conciliation and appeal procedures: the complainant suffered no particular disadvantage in comparison with other EPO staff. There was not a one-year delay in producing the report. The statutory interview with the complainant, prior to the issuing of the

1994-95 report, took place on 6 March 1996 and the reporting officer wrote his report on 10 April 1996. Moreover, delays arising from litigation about a report that is accurate cannot be considered as a valid ground for awarding damages.

CONSIDERATIONS

1. The complainant, an employee of the European Patent Office, objects to a staff report in which he was given an overall rating of "good" for the period from 1 January 1994 to 15 October 1995, compared with "very good" for the preceding reporting period.
2. The complainant, who was transferred to another unit on 16 October 1995, received the report on 27 September 1996. It had been signed by the reporting officer on 10 April 1996 and by the countersigning officer on 19 June 1996.
3. On 23 October 1996 the complainant asked for conciliation proceedings, alleging both procedural and substantive errors in the disputed report. The first meeting, scheduled for 12 February 1997, was cancelled because of the inability of the countersigning officer to attend; so was the next. After five sessions, all of them held in 1997, the conciliation procedure ended on 17 October 1997 and resulted in the amendment of the report.
4. The President of the Office endorsed the amended 1994-95 report on 20 March 1998. On 8 June the complainant wrote to him expressing disagreement with that decision on the ground that the report was not an objective or "truthful" evaluation and inadequately covered some aspects of his performance. He pointed out the harm he had suffered because of the "unacceptable delays" in the conciliation procedure and accordingly asked that it be referred back to the reporting officers for revision in line with the request he had made for the ratings to be upgraded. In the event of an unfavourable reply, he asked that his letter be considered as the lodging of an internal appeal under Articles 106 to 108 of the Service Regulations.
5. In a letter dated 30 July 1998, the Director of Personnel Development informed the complainant that the President of the Office could not grant his request and had referred his letter of 8 June 1998 to the Appeals Committee for an opinion.
6. On 30 September 1999 the complainant wrote to the Appeals Committee calling attention to the fact that fourteen months had lapsed since his appeal had been lodged and that he had not received any communication from either the Administration or the Committee. He concluded by stating that if he did not receive the position of the Administration within ten working days, he would address his complaint directly to the Tribunal.
7. Having heard no more from the Administration, on 18 October 1999 the complainant lodged this complaint with the Tribunal, asking *inter alia*: that the President's decision of 20 March 1998 be quashed; that the contested staff report be "referred back to the reporting and countersigning officers for a full revision in the light of the grounds, facts and evidence" that he had put forward; that he be awarded moral damages for the delays in drawing up his report and completing the conciliation procedure, and for the EPO's inaction on his internal appeal, as well as for the fact that he had "suffered from the untruthful statements made by the reporting officer".
8. The EPO submits that the complaint is irreceivable because of the failure of the complainant to exhaust the internal means of redress. Even before any action was taken by the Appeals Committee, to which his letter to the President dated 8 June 1998 was referred, the complainant appealed to the Tribunal, contrary to Article VII, paragraph 1, of its Statute which provides: "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations."
9. Regarding the complainant's contention that he filed the complaint with the Tribunal because of the excessive period of time that had elapsed, the Organisation justifies this delay on the ground of "the plethora of internal appeals" that the Appeals Committee had to deal with at that time.
10. Whether a delay is reasonable depends on the circumstances of each case (see Judgment 408, *in re* García and Márquez). Also, a complainant cannot sit back and do nothing when an appeal is lodged; he must pursue his appeal diligently (see Judgment 1970, *in re* White). In the present case, the complainant did nothing until he contacted the

Appeals Committee on 30 September 1999 giving it ten days to send him a copy of the position of the Administration. He did not contact the EPO after that. In the circumstances, the Tribunal holds that the delay was reasonable and the complaint is premature.

The complainant appealed to the Tribunal before the Appeals Committee rendered its opinion. Therefore, there is no final decision for the complainant to impugn: no recommendation has been made by the Committee and no final decision has been taken by the President.

11. In light of the foregoing, there is no need to address the merits of the case.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

Flerida Romero

Catherine Comtet