NINETY-FIRST SESSION

***In re* Meyer (No. 2)** **Judgment No. 2056**

The Administrative Tribunal,

Considering the second complaint filed by Mr Thomas Paul Christian Meyer against the European Patent Organisation (EPO) on 24 September 1999 and corrected on 14 April 2000, the EPO's reply of 14 July, the complainant's rejoinder of 31 October 2000 and the Organisation's surrejoinder of 22 February 2001;

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. Facts relating to the complainant's employment at the European Patent Office, the EPO's secretariat, are set out in Judgment 2055 also delivered this day, in which the Tribunal ruled on his first complaint. At the material time he was assigned to Directorate-General 2 (DG2). On 1 January 1998 he transferred from directorate 2.3.12 to 2.3.09.

In a document headed "Job Performance Review 1996", dated 4 February 1997, the Director of directorate 2.3.12 criticised aspects of the complainant's way of working and specified two courses of action that were to be adopted. One of those measures entailed no longer allocating him "oppositions" (to the granting of patents) as "first member" of an examining division; those he had started would be reallocated. The situation was to be reviewed after six months. In a note of 27 August 1997 the Director warned the complainant that since there were no signs of improvement he would have to withdraw specific patent applications from him and reallocate them to another examiner. So he did on 28 October and 4 November.

The complainant wrote to the Director on 12 December 1997 asking to be allowed to inspect certain files. He said he wished to take note of the working practice expected of him and be able to inspect the files relating to applications withdrawn from him. He sent a copy of the same request to his Principal Director. The latter replied on 15 December 1997 that permission was not granted, and on 13 March 1998 the complainant appealed to the President of the Office against that decision. On 13 May the Administration informed him that the President could not meet his request and was referring it to the Appeals Committee. It was registered as appeal No. 31/98.

By letters dated 27 May and 19 June 1998 the complainant requested, pursuant to Article 128 of the European Patent Convention and as a national of a contracting state, to be able to inspect certain files relating to European patent applications. By letters dated 24 and 25 June the complainant lodged further "appeals" because these requests were not processed within the required ten days. They were subsequently registered as internal appeal No. 79/98.

The Director of Personnel Management informed him on 1 July 1998 that his request for inspection had been allowed, but he made it clear that, if the complainant used the material so obtained against any of his colleagues, disciplinary action would ensue. In view of the authorisation the Administration had given the complainant, it assumed that his appeals had become without subject. On 20 August 1998 the complainant indicated that his appeals could not be regarded as settled because his request for inspection also related to Patent Cooperation Treaty (PCT) applications and the European Patent Convention did not provide for an opportunity to inspect these. He therefore maintained his appeals.

The Appeals Committee reported on 16 June 1999, stating that it was not competent to decide on appeal No. 79/98 and recommending the rejection of appeal No. 31/98 as unfounded. On 23 June 1999 the Director of Personnel Development informed the complainant that the President had endorsed the Committee's recommendation and

rejected his appeals. The complainant impugns that decision.

B. The complainant submits that it was his former director's duty to allow him to inspect the files in question. He was denied the opportunity to treat them as sample solutions, i.e. as a model for future files which he would have to process. Instead, the files were "hidden" from him. He was also denied the opportunity of using them as counter-evidence on the matter of the alleged shortcomings in his performance.

He points out that, in his capacity as "citizen" and as allowed by Article 128 of the Convention, he had been able to inspect the public part of some of the files that had been withdrawn from him, but such inspection was subject to payment of fees. By intimating that he could face disciplinary action if he uses information gleaned from the inspections against colleagues the Administration has placed him in a position where he is unable to defend himself against the slander campaign set in motion against him (at issue in his first complaint) and unable to produce the necessary counter-arguments in his submissions to the Tribunal.

He asks the Tribunal to rule that: (1) it was inadmissible in 1997 to deprive him of his right to inspect files which he had previously begun to process; (2) he should have been granted permission, in 1997, to inspect files of fellow examiners in directorate 2.3.12; (3) it was inadmissible to deny him access to files that he had begun to process because he needed them for evidence to support his appeal against his 1996-1997 staff report; (4) he was justified in seeking permission to consult files of fellow examiners as such files were also "relevant as evidence" in the context of that appeal; (5) he has the right to use copies of files - obtained against a fee - as evidence in his appeal challenging his staff report; (6) he should be granted the right to inspect and photocopy files that he had begun to process - particularly the non-public part; and (7) he should be granted the right to inspect and photocopy the files processed by fellow examiners in directorate 2.3.12 - particularly the non-public part. He also asks the Tribunal: (8) to award him moral damages in an amount which at least corresponds to his expenses - he suggests the sum of 20,000 German marks; (9) to grant him any benefit arising from "any possible legal aspect of the matter"; and (10) to order that he be allowed to use any public information obtained under the European Patent Convention in any complaint he lodges with the Tribunal.

C. In its reply the Organisation notes that the complainant does not ask explicitly for the quashing of the impugned decision. It assumes, however, that the complainant is mainly seeking the quashing of that decision and subsidiarily the redress he claims.

It submits that the complaint is irreceivable in part. His claims relating to the inspection of files under Article 128 of the Convention and the reimbursement of the corresponding costs are not receivable since the Appeals Committee is not the competent body to decide on such requests; neither is the Tribunal. In his present complaint the complainant reiterates seven claims that he made on 27 May 1999 during the internal appeal procedure, after receiving the position paper of the Organisation. They constituted supplementary claims and were an inadmissible extension of the initial claims put forward in his appeal. Furthermore, since he made them some eighteen months after the initial decision was taken to refuse him access to the files, they have to be rejected as being out of time both in respect of his internal appeal and this complaint. The complainant did not seek damages in his initial appeal and so his claim for an award for moral injury is also irreceivable. His claim for the grant of all possible legal benefits is superfluous.

On the merits, the EPO argues that the complaint is unfounded. The question at issue is whether his former director was right, in December 1997, to refuse the complainant access to the files that had been withdrawn from him owing to his unwillingness to correct them in accordance with instructions given. Such a decision falls within the ambit of a director's discretionary power. The Administration feared that the complainant might use information gained from inspecting the files against the colleagues to whom his work had been reallocated, and so its decision to restrict his access to the files in question was fully justified. The complainant's argument that he wished to consult the files to learn from them is not credible.

Although he was made aware that misusing material obtained from files could make him liable for disciplinary action, that in no way restricted his right to present a proper defence. It was a reminder to him that, as a staff member, he has a general obligation to behave in line with the Organisation's interests.

D. In his rejoinder the complainant presses his pleas. On the issue of receivability he says that his first seven claims are "self-evident refinements of the same basic subject matter". After he changed directorate in January 1998 there was a shift in the grounds for his appeal and he no longer had any interest in inspecting files in order to discuss

matters arising therefrom with colleagues. He consequently made it clear in the claims submitted during the internal appeal procedure that the first two related specifically to 1997.

As in his first complaint, he wants the Tribunal, in considering his claim to moral damages, to take into account the translation costs he incurred.

E. In its surrejoinder the Organisation presses its objections to receivability. In connection with the requests to inspect files, made by the complainant on 27 May and 19 June 1998, it points out that it is the Legal Board of Appeal of the European Patent Office which is responsible for handling disputes relating to the inspection of files pursuant to Article 128 of the European Patent Convention.

CONSIDERATIONS

1. On 4 February 1997 the Director of directorate 2.3.12, in which the complainant then worked, drafted a "Job Performance Review 1996" in which he outlined the complainant's shortcomings and the measures he thought were necessary to remedy the situation. The complainant filed a complaint before the Tribunal against the review. That proceeding forms the subject matter of Judgment 2055, also delivered this day.

2. The complainant's staff report for 1996-1997 was handed to him on 19 March 1998; in it his performance was generally assessed as "unsatisfactory". The complainant filed an internal appeal against that report. At the material time that appeal was still pending.

3. In a note dated 27 August 1997 the Director informed the complainant that there had been no improvement in his performance with respect to quality and attitude at work, that there had instead been a deterioration in many of the cases he had treated, and that he would, therefore, have to expect an assessment of "unsatisfactory". The Director had decided therefore that the examining division would take back two applications from the complainant and reallocate them to another first examiner. On 28 October the Director informed the complainant that he had to withdraw four Patent Cooperation Treaty applications from him and reallocate them to other examiners because three of them had "exceeded their limit dates". On 4 November the Director discharged the complainant from the processing of ten further applications because of the uncertainty of the date of the complainant's return from sick leave.

4. On 12 December 1997 the complainant asked the Director to give him the opportunity to check all the files he wished to consult so that he could take note of the working practice demanded of him. He also requested permission "to inspect ... the files of the applications [that had been] withdrawn from [him]".

5. The complainant sent a copy of this same request to his Principal Director. The latter replied, on 15 December 1997, that he could not meet the requests. The complainant appealed the decision by an internal appeal sent to the President on 13 March 1998. It was subsequently registered as appeal No. 31/98.

6. The complainant, on 27 May and 19 June 1998, had also launched parallel proceedings pursuant to Article 128 of the European Patent Convention as a German national, and had asked to inspect eight files relating to European patent applications. By letters dated 24 and 25 June, the complainant lodged what he called "appeals" before the Appeals Committee (registered as appeal No. 79/98) because his request to inspect the files had not been processed within ten days. On 1 July 1998 the Director of Personnel Management informed the complainant that his request to inspect those files had been allowed.

7. In its report dated 16 June 1999 dealing with the two appeals (Nos. 31/98 and 79/98), the Appeals Committee correctly considered the disputes concerning the inspection of files pursuant to Article 128 of the European Patent Convention, as well as the reimbursement of costs generated by these inspections, as not falling within its competence. Insofar as the matter concerned appeal No. 31/98 the Committee recommended that the appeal be rejected as being unfounded. By a letter of 23 June 1999 the complainant was informed that the President rejected the two appeals. That is the impugned decision.

8. The complainant makes a number of claims as set out under B above; some of them are outside the scope of the litigation before the Tribunal.

9. Claims relating to the inspection of files pursuant to Article 128 of the Convention as well as to the reimbursement of the corresponding costs are clearly irreceivable since the Appeals Committee is not the competent body to decide on such requests.

10. The complainant alleges that the EPO, in the letter dated 1 July 1998, threatened to take "disciplinary action under Article 93 of the Service Regulations" if he "in any way whatsoever, either directly or indirectly", uses "any information obtained through this inspection [under Article 128 of the Convention] for making comments on the work of any colleague in the EPO". He alleges that he is thus prevented from presenting any "counter-argumentation" before the Tribunal and asks, in his tenth claim, for a declaration that:

"The complainant is allowed to use any public information legally obtained under the European Patent Convention before the present Tribunal within any legal complaint procedure, in particular in a complaint procedure arising [from] the possible rejection of [appeal No. 40/99, relating to his staff report for 1996-1997] which is still pending."

11. The complainant was notified that using information gained from inspecting files could make him liable to a disciplinary sanction but that in no way amounts to a restriction of his right to present a proper defence. This notification was only a reminder of the complainant's obligation as a member of the staff to behave in line with the interests of the Organisation. In any event, files obtained under the Convention could not have been used in the context of the present complaint, which purports to examine the legality of the Director's exercise of discretion. To the extent that it relates to the appeal pertaining to the 1996-1997 staff report, claim (10) is irreceivable in this matter.

12. Claims (3), (4), (5) and (8) are irreceivable since they were not part of the appeal on which the present complaint is based. As for Claim (9) it is superfluous.

13. Thus, the basis of the present complaint (see claims (1), (2), (6) and (7)) is the complainant's internal appeal No. 31/98, which in turn refers to his letter dated 12 December 1997 to his director, in which he requested to be allowed to inspect files that had been taken out of his hands as well as those processed by some of his colleagues.

14. The complainant made his request to be allowed to inspect the files on 12 December 1997 in the following terms:

"I hereby request you ...

1. to allow me to inspect all the files I wish in order to enable me to also take note of the working practice you demand of me.

2. but at least to enable me to inspect the condition of the files of the applications you have withdrawn from me ..."

15. The reply was sent in the following terms:

"I'm afraid I cannot comply with your requests for the following reason: unless an examiner is a member of the examining division it is not normally allowed to have access to cases of other examiners for comparison purposes unless the Director decides otherwise.

In this case I see no reason to make an exception."

16. The Appeals Committee determined that the complainant's wish to check his work independently by means of other files, upon consideration of his superior's instructions and demands, was basically justified. Furthermore, the Committee doubted the Administration's argument that an examiner does not, in principle, have the right of access to files processed by other examiners. In its opinion, it is "much more feasible for each examiner to be allowed access to all patent applications he requires to fulfil his duties". Nevertheless, the Committee held:

"The standpoint presented by the Administration that disagreements had to be prevented within a Directorate did, however, justify the limitation of free access to the patent applications of the Office on principle. Grounds for concern that such disagreements might arise had to be set forth in individual cases.

It is the superior's duty to decide freely, after due assessment of the circumstances, whether disputes may be feared

within the Directorate in this present case if the appellant is allowed to inspect files (which have been withdrawn from his responsibility). The decision of the Head of Principle Directorate 2.3 cannot be opposed in this case. The [job performance review] of 4th February 1997 contains specific evidence that allowing the appellant to inspect patent applications which are currently being processed by other examiners of his Directorate could lead to problems within the Directorate. The appellant particularly requests permission to inspect those files which have been withdrawn from his responsibility. The superior has ascertained reluctance on the part of the appellant to cooperate, not only in individual cases, but as a 'consistent pattern' ... The situation had not improved by August 1997 and it was ascertained in many cases that it had become worse. As a result, the appellant was not permitted to work on a number of cases. It cannot be objected to if the appellant is prohibited in this specific case from inspecting patent applications, the processing of which has been taken over by other examiners of the Directorate.

The argument put forward by the appellant is not convincing that he wanted the files in question as model solutions for reviewing and improving his work. In his statement in appeal proceedings [No. 49/97, at issue in Judgment ..... on his first complaint], he has stated the goal direction of this present internal appeal; the appeal is directed 'against the withholding of evidence'."

17. It appears that the Committee considered the Director's decision as being one which fell within his general discretionary authority to act in the best interests of the department. It was also clearly of the view that the complainant's request for access was colourable. In the circumstances, and whether or not the Committee was right in saying in its report that examiners have a general right of access to the non-public parts of files which are not under their immediate responsibility (as to which the Tribunal expresses no opinion), it has not been shown that the Director exercised his discretion wrongly.

18. The case law of the Tribunal is clear about the scope of its power of review of discretionary decisions. In Judgment 1969 (*in re* Wacker) under 7, the Tribunal held that:

"... the Tribunal will quash [a discretionary] decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence."

19. The complainant has not filed any evidence that would indicate that any of the grounds for review was present.

20. There being no grounds upon which the Tribunal could set aside the impugned decision, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet