

## **FORTY-FIRST ORDINARY SESSION**

### ***In re* PEETERS (No. 2)**

#### **Judgment No. 352**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Patent Institute by Mr. Stefaan Bernard Peeters on 3 October 1977, the Institute's reply of 14 November, the complainant's

rejoinder of 12 December, the Institute's statement of 22 December that it did not wish to file a surrejoinder, and the complainant's communication of 27 December producing, among other things, two further appendices to his written submissions;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the Institute Staff Regulations, particularly Articles 23 and 90, and the "marking rules" relating to the method of drafting staff members' annual reports;

Having examined the documents in the dossier and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant has been an examiner at the Institute since 1 April 1968 and was appointed to grade A6 with effect from 1 April 1971. The draft report on his performance in 1975 by the leader of his group gave him the general assessment "very good". But the group leader and the chief of division could not agree on that assessment and resorted to arbitration in accordance with Article 5(2) of the "marking rules". The arbitrator took the view that the chief of division had made the right assessment in describing the complainant's performance as "good". The complainant disagreed and appealed to the Reports Committee in accordance with Article 6 of the marking rules. The Reports Committee recommended the Director-General to endorse the draft report, assessing his performance in general as "good". By a decision of 25 January 1977 the Director-General accepted that recommendation and so informed the complainant.

B. By a letter of 11 February 1977 the complainant told the Director-General that he disagreed with the Reports Committee and asked to be given the general assessment "very good" proposed by the group leader. "Should his request be refused", he added, "his letter should be regarded as an application to file an internal appeal". On 4 March the Director-General replied that he could not "amend the performance report drawn up" for 1975 and that he was therefore forwarding the appeal to the Appeals Committee. He explained, however, that the Committee would "consider only the legal aspects of the case". In its report of 30 June 1977 the Appeals Committee said that it had "found no flaw ... which entitles it to interfere" and recommended the Director-General "to delete from the performance report the reference to the reasons given by the arbitrator and to uphold his decision as to the remainder of the report". In view of the Committee's report the Director-General on 13 July 1977 took his final decision, and the one now impugned, which was to confirm the performance report but reject the Committee's recommendation to delete from that report the reference to the reasons given by the arbitrator.

C. The complainant asks the Tribunal to declare that the Reports Committee may not give an opinion *ultra petita*; to quash the Director-General's decision on the complainant's general assessment; to grant the complainant a "very good" general assessment; to award him 500 guilders as costs; and if necessary to order the Institute to pay the costs of hearing the witnesses.

D. The Institute asks the Tribunal to dismiss the complaint in its entirety.

**CONSIDERATIONS:**

As to the defendant:

1. The complainant joined the staff of the International Patent Institute on 1 April 1968 and filed the complaint against the Institute on 3 October 1977. By an agreement signed on 3 October 1977 the Institute was integrated into the European Patent Office, the secretariat of the European Patent Organization (EPO). Having recognised the jurisdiction of the Administrative Tribunal of the ILO, with the agreement of the ILO Governing Body, from 1 January 1978 the EPO replaced the Institute in disputes with its staff members still pending at that date before the Tribunal. Thus in this case the EPO has become the defendant.

As to the system of marking performance:

2. In accordance with Article 23 of the Staff Regulations the Director-General has issued so-called "marking rules" which lay down the procedure for assessing the performance of officials. The procedure consists of several stages:

First, the official's immediate supervisor writes a draft report after discussing it with him (Articles 2.1 and 5.1).

Secondly, the group leader and chief of division together decide on the "general assessment" (Article 5.2).

Thirdly, if they fail to agree they refer to an official appointed by the Director-General and generally known as the "arbitrator" (Article 5.2).

Once the draft report is established with or without referring to the "arbitrator", the staff member may contest it in the Reports Committee. The Committee has four members, two appointed by the Director-General and two by the Staff Committee (Articles 6.1 and 7.1).

The report itself is finally endorsed by the Director-General. His decision may be referred to the Appeals Committee and, if the report is confirmed, to the Administrative Tribunal (Articles 2.1 and 7.4).

As to the complainant's pleas:

3. The impugned decision, which relates to the assessment of an official's performance, is of a discretionary nature. Hence the Tribunal may quash it only if it was taken without authority, or tainted with a flaw of form or of procedure, or based on an error of fact or of law, or if essential facts were overlooked, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

4. The complainant alleges only procedural flaws. He says that his group leader and the chief of his division disagreed only about his "output" and by that criterion alone the group leader proposed giving him "very good" and the division chief giving him "good" as his general assessment. He contends that the "arbitrator" was wrong to take account of his assessments for "independence" and "quality of work" as well as "output" in recommending "good" as his general assessment. He also says that the Reports Committee was wrong to recommend "good" as his general assessment and at the same time assess his "output" as "very good". He concludes that the "arbitrator" and the Reports Committee took account of facts irrelevant to the subject of the disagreement between the group leader and division chief and so acted ultra vires. In other words he alleges a breach of the rule non ultra petita, whereby a judicial body should disregard points of fact or of law not raised by the parties.

5. The complainant's arguments are irrelevant. It is immaterial whether or not the functions of the arbitrator and the Reports Committee are judicial in the sense in which the complainant uses the term. What matters is that they have advisory functions and make proposals or recommendations to the Director-General and that he alone may determine an official's assessments and take the real decision. In exercising his authority the Director-General is not bound by the recommendations of the advisory bodies. He is indeed quite free to determine the general assessment in the light of the whole file and even to alter the assessments agreed on by the official's own supervisors. The bodies while advise the Director-General therefore enjoy just as much freedom as he to assess the official's performance. If they were less free, then the duty to refer to them would often be a pointless formality which would merely hold up the procedure. It is therefore open to them, if they wish, to dissent from an opinion shared by the group leader and division chief. Hence in the present case the "arbitrator" and the Reports Committee did not disregard any procedural principle in taking account of criteria other than "output", which is the only subject of the alleged disagreement between the group leader and the division chief.

6. Moreover, the complainant does not contend that the Director-General drew mistaken conclusions from the facts. He is right not to do so. He did get four "very good" assessments in his report for 1975, and under important heads too, but he also got 13 "good" assessments, including six for "general ability" and two for "performance". In the

circumstances the Director-General did not abuse his discretionary authority in giving the complainant "good" as a general assessment.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice- President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 13 November 1978.

(Signed )

M. Letourneur  
André Grisel  
Devlin

Roland Morellet