

SIXTY-FIRST ORDINARY SESSION

***In re* HAKIN (No. 8)**

Judgment 806

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Robert Edouard Marie Hakin against the European Patent Organisation (EPO) on 15 June 1986 and corrected on 27 June, the EPO's reply of 19 September, the complainant's rejoinder of 28 October 1986 and the EPO's surrejoinder of 23 January 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Facts relevant to this case appear in Judgments 724 and 725, under A. The complainant is challenging a staff report which his supervisor, Mr. Vandooren, wrote on 12 August 1982 on his performance in 1980-81 and which prompted his seventh complaint. On 19 October 1984 he lodged an internal appeal against the decision the President of the Office had taken on 27 July 1984 to endorse that report. His case was referred to the Appeals Committee and in its report of 26 June 1985 it recommended rejecting the appeal. The President did so on 23 July. On 15 March the complainant had filed his seventh complaint. The Tribunal dismissed the complaint on 17 March 1986 in Judgment 725 on the grounds that the President had since taken a final decision and that alone was challengeable. The Tribunal said that the complainant might file another complaint to challenge the decision, if he so wished, provided he did so within 90 days of the notification of Judgment 725. That is the purpose of his eighth complaint.

B. The complainant's pleas on the merits are the same as in his seventh complaint and they are summed up in Judgment 725 under B. He further alleges that his supervisor, Mr. Vandooren, refused to start the procedure for conciliation that is provided for in the event of disagreement over a staff report. Mr. Vandooren's supervisor and senior officials who supported him were guilty of abuse of authority in that they tampered with the reporting procedure for the sole purpose of thwarting his upgrading to A4. He set great store by the upgrading because he was shortly to retire, and it was held up for two years.

He asks the Tribunal to quash the President's decision of 23 July 1985 finally endorsing Mr. Vandooren's report for 1980-81 and to award him 2,000 United States dollars in moral damages and \$1,500 in costs.

C. In its reply the EPO explains that the reason why the staff report on the complainant for 1980-81 was shelved was that something might have come of his internal appeal challenging his report for 1979, which formed the subject of his sixth complaint to the Tribunal. In any event it was a matter not of "upgrading" but of promotion. The absence of a final report for 1980-81 had nothing to do with the decision not to promote him to A4. If substantial changes had to be made in that report the EPO would consider granting him retroactive promotion in accordance with the ordinary procedure for promotion.

The assessments of his work did vary throughout his career. But, as the Tribunal said in Judgment 724, it is not enough, in order to show prejudice, to say that supervisors made different assessments at different times. For reasons the EPO sets out in detail the complainant's output was below par in 1980-81, as he acknowledges to some extent. He himself refused conciliation. His charges of breach of the principles of sound management and abuse of authority are groundless.

There is no merit in his claim to damages. Having been promoted to A4, he got a pension based on that grade.

Moreover, he has already been awarded compensation under Judgment 724 for the handling of the matter of his report.

D. The complainant rejoins that the only purpose of the minutes and staff reports written about him was to cause him injury and to spoil his prospects of promotion at the end of his career. Contrary to what the EPO maintains, the only reason why conciliation failed was Mr. Vandooren's stubborn refusal of it. The difference between Mr. Vandooren's comments and those of his predecessor, Mr. Pasturel, is not warranted: his output in 1980-81 far surpassed what any experienced examiner of average competence could have achieved in the face of the difficulties he was experiencing at the time. He explains why he believes the comments and the comprehensive rating - "adequate" - to be unfounded and unfair and the President's final decision of 23 July 1985 to approve the report - which he took without the least thought - to be tainted with a fatal flaw.

As to his claims, which he presses, he points out that Judgment 724 awarded him damages only for procedural flaws in the drafting of the first report for 1979 and did not rule on the question of his entitlement to further compensation in respect of the report for 1980-81.

E. In its surrejoinder the EPO enlarges on the pleas in its reply and seeks to refute the arguments in the rejoinder, which it considers either irrelevant or unfounded. It again invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. On retirement the complainant was a grade A4 official in the European Patent Office. He was employed as an examiner and was in charge of search and document processing for the mining industry. For years he was at loggerheads with the EPO over the reports on his performance in 1979 and 1980-81 and, on that account, over the matter of his promotion to A4 as well.

The matter in dispute

2. In his sixth complaint the complainant challenged his staff report for 1979. In Judgment 724 of 17 March 1986 the Tribunal dismissed his objections to the report but awarded him damages because of anomalies in the reporting procedure.

3. In Judgment 725 of the same date the Tribunal dismissed as premature and therefore irreceivable his seventh complaint challenging his report for 1980-81.

4. He was also at odds with the EPO over his promotion to A4, which he believed was being held up by the disputes over the two reports. The matter being in doubt, the President of the Office called for a special report on him, and on 26 October 1983 Mr. Zimmer, who was by then in charge of his group, made such a report. By a decision of 21 February 1984 the complainant got promotion to A4 as a principal examiner and the matter may be treated as settled.

5. That being so, though the complainant dwells at length on his report for 1979 and on his promotion, his complaint relates only to his report for 1980-81 and the President's decision of 23 July 1985 finally endorsing it.

The background to the dispute

6. The report was written by Mr. Vandooren, the leader of the complainant's group at the time, and approved by Mr. Phillips, the countersigning officer.

7. The complainant was rated "good" for the quality of his work, "penetration", judgment, application, accuracy and self-expression. But his productivity, responsibility, commitment, relationship with others and reliability were only "adequate", his time-keeping and general conduct at work "unsatisfactory".

8. The report contained the following comments:

"Output far below what an experienced A3 examiner can manage ...

Not very enterprising ...

A shirker who falls short of what may be expected of a senior examiner in dealing with files and documents.

Very careless, especially in handling documents; has received a minute from Mr. Phillips calling him to order ...

Lazy and indifferent, as is plain from the unspeakable untidiness of his office ..."

9. The general rating was "adequate" with the comment: "He lacks enthusiasm for his work and it shows up in low output and slackness in processing documents". The countersigning officer endorsed the comments but said he did have all the makings of an examiner and hoped he would manage to do better.

10. Though the complainant signed the report he said he would be lodging an appeal and added: "However, in view of Mr. Vandooren's attitude, I see little point in the procedure for conciliation [on reports]". He appended a long minute seeking to refute the criticisms.

11. The Appeals Committee, to which his appeal was referred, reported on 26 June 1985. It said that after thorough study of the evidence it found no reason why the President should not endorse the report and it unanimously recommended rejecting the appeal.

12. The President accordingly gave final approval to the report on 23 July 1985, the decision now impugned. The complainant seeks 2,000 United States dollars in damages for moral prejudice and 1,500 dollars in costs.

The merits

13. The complainant pleads procedural flaws, flagrant errors, breach of the principles of sound management and abuse of authority.

14. Before taking up those pleas the Tribunal will observe that according to precedent (Judgment 599 of 12 April 1984: in re Morley) a report on performance will serve some purpose only if the reporter is granted freedom of expression. Normally he must be trusted to form his own opinion and make a fair appraisal.

15. As the Tribunal said in Judgment 724, on the complainant's sixth complaint, a decision on a staff report, being a discretionary one, may be set aside only on limited grounds such as a procedural or formal flaw, a mistake of fact or of law, failure to take account of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence. The review will be the more limited here because the EPO has a procedure for conciliation on staff reports and the Service Regulations entitle the staff member to appeal to a joint committee of people closely familiar with the running of the Office.

16. The procedural flaw the complainant alleges is that the EPO wilfully let the appeal proceedings drag on so as to thwart his hopes of promotion. The plea fails. The EPO may not be taken to task for awaiting the Tribunal's ruling on the earlier complaint. The above account of the facts also shows that, being aware of the delay in resolving the dispute with him, the EPO resorted to an extraordinary procedure so that his chief claim, the promotion, was satisfied.

17. He founds his allegations of flagrant errors on differences between Mr. Vandooren's report and both earlier reports by his former supervisor, Mr. Pasturel, and a later one by Mr. Zimmer, and he concludes that Mr. Vandooren committed a blatant mistake in rating his work only "adequate". In his view the report is "inconsistent and prejudiced" and "malicious throughout". He objects in particular to the standards Mr. Vandooren applied in weighing his output and submits several papers which he believes embody the proper standards for determining an examiner's output.

18. This plea too fails. There are several reasons why a staff member may be differently assessed at different times. The quality of his performance may vary from one period to the next, and indeed it seems that the complainant's did, to judge from the comparative data the EPO gives on his successive staff reports.

19. Contrary to what the complainant contends, Mr. Vandooren showed no prejudice: he acknowledges the complainant's merits - technical competence, an analytical mind and judgment - and finds fault only with his low output, lack of enterprise and poor working methods.

20. As for the complainant's charges of breach of the principles of sound management and abuse of authority, they

seem to rest on the notion that the EPO has secretly prescribed rules to tighten up reporting so as to tamper with staff members' eligibility for promotion. The Tribunal will not go into the matter further. The comments in the challenged report show that the final general rating is based on a proper appraisal of his merits and that his supervisors had no need of secret rules to form an opinion of him.

21. The Tribunal concludes that the complainant's claims must be dismissed in their entirety.

DECISION:

For the above reasons

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 13 March 1987.

(Signed)

André Grisel
Jacques Ducoux
Pierre Pescatore
A.B. Gardner