

## SIXTY-THIRD SESSION

### *In re* BENZE (No. 5)

#### Judgment 852

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 6 March 1987 and corrected on 6 April, the EPO's reply of 23 June, the complainant's rejoinder of 30 June and the EPO's surrejoinder of 17 September 1987;

Considering Article II, paragraph 5, and VII, paragraphs 1, 2 and 3, of the Statute of the Tribunal and Articles 47(1) and 106 to 113 of 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. The complainant joined the EPO's office in Rijswijk, which is known as General Directorate 1 (GD1), on 1 November 1980 as a search examiner at grade A2. He was later promoted to A3. Article 47(1) of the EPO Service Regulations prescribes the regular writing of "staff reports". On 6 March 1984 the complainant's supervisor, Mr. Zimmer, wrote such a report on him for 1983, and Mr. Phillips, the Principal Director of the Search Department, countersigned it on 22 March. It gave him a "good" general rating. He asked that that be changed to "very good" and that ratings for several aspects of his work also be improved. The procedure for conciliation led to lesser changes which did not satisfy him and on 30 July 1985 he lodged an internal appeal. The President of the Office referred it to the Appeals Committee on 8 October 1985 under Article 109(1) of the Service Regulations.

In its report of 24 October 1986 the Committee agreed with many of the complainant's objections and unanimously recommended sending his report back to the Vice-President of GD1 for review. By a letter of 1 December 1986 the Principal Director of Personnel told him the President had done so. On 17 March 1987 Mr. Zimmer wrote a new assessment changing the rating for "productivity" to "very good". On 26 March the conciliation officer passed it to the Head of Personnel of GD1 for approval by the countersigning officer and the Vice-President.

The complainant filed this complaint, also on 26 March, challenging what he took to be an implied final decision to reject his appeal. The President was informed on 20 May that his supervisors and the Vice-President took the view that rating his productivity "very good" did not require any change in the general rating. In a minute of 27 May 1987 the President informed the complainant that he endorsed that view. B. The complainant maintains that his work in 1983 was first-rate but that Mr. Zimmer, with whom he did not get on well, failed to recognise it. His output was underestimated, he was given a most difficult subject to deal with, and he was compared with much more experienced examiners. Although the Appeals Committee made mistakes in its report, it saw the justice of a higher rating for productivity. He submits that there is "no doubt possible that the correct mark must be 'outstanding'" and that it is "an obvious error to concede only mark 'very good'". Harassment by his supervisor has caused distress to him and his family and damaged his health, and he has needed stout resolve not to "give up or even resign".

He asks that his general rating be changed to "very good", that the Organisation disclose "all results of quality control checks" and that he be awarded "a fair percentage" of his total pay in damages.

C. In its reply, which the Tribunal authorised it to confine to the issue of receivability, the EPO contends that at the date of filing the complainant had not yet exhausted the internal means of redress and that his complaint is irreceivable under Article VII(1) of the Statute of the Tribunal. The case law does say that the President of the Office must take his final decision within sixty days of receiving the Appeals Committee's report, or there will be implied rejection. The Tribunal has drawn an analogy with the time limits in Article VII(3) of its Statute and

Article 109(2) of the Service Regulations. But it is implicit in the Tribunal's ruling that the President must be able to take a final decision on the strength of the Appeals Committee's report. In this case he was not. Since the Committee recommended review the President, on accepting the recommendation, could not take a final decision on the Committee's report but had to await the review. Article VII(3) of the Statute cannot apply where the President acts on the Committee's recommendation in the complainant's favour: all that the complainant can say is that he does not have to wait for an unreasonable time. In this case the lapse of time from the start of the review until the date of filing was reasonable.

D. In his rejoinder the complainant observes that his case did not reach the Appeals Committee until October 1985, some eighteen months after the staff report had been written, and the Committee did not report for over another year. He waited for another five months before filing, and by then the appeal had been dragging on for three years, which is utterly unreasonable. He does not remember getting the letter of 1 December 1986 from the Principal Director of Personnel.

As to the merits, he submits that the final decision rests on an obvious mistake and is grossly unjust.

E. The EPO's surrejoinder develops the submissions in its reply. It submits in particular that neither Article VII of the Tribunal's Statute nor the case law sets any firm time limit for the various stages of internal appeal proceedings, the time the Tribunal allows being "reasonable". It contends that the President's failure to take a final decision within sixty days of getting the Appeals Committee's report does

not make the complaint receivable because what he did was the only action he could reasonably be expected to take on the Committee's report within the sixty days.

#### CONSIDERATIONS:

1. The complainant, a grade A3 search examiner at the European Patent Office, is seeking the review of parts of a report on his performance in 1982-83. He filed the present complaint after lodging an internal appeal which took the course described below.

The internal appeal proceedings

2. The challenged staff report was written in March 1984. As soon as he had read his supervisors' assessment, the complainant stated, in keeping with the reporting procedure, his objections to the "overall marking": the reporting officer had given him only a rating of 3, or "good", and the countersigning officer had said he was "in the upper range of good". The complainant wrote in the appropriate box: "It is requested to review the staff report and to grant the overall mark 'very good' (2)". He set out his objections in detailed comments, observing in particular that it was wrong to rate his "productivity" and the "quality" of his work as only "good".

3. The ensuing conciliation procedure proved of no avail, and on 30 July 1985 the complainant lodged an internal appeal with the President of the Office. The Principal Director of Personnel replied in a letter of 8 October 1985 that the President had provisionally rejected his complaint and was referring it to the Appeals Committee.

4. The Appeals Committee reported on 24 October 1986. It went thoroughly into the case and concluded:

"The Committee unanimously recommends that Mr. Benze's staff report for 1983 be referred to the Vice-President of GD1 for amendment of the mark for productivity in I.A.1 and consequent review of the overall mark."

5. The President having agreed on 11 November 1986, a letter of 1 December 1986 from the Principal Director of Personnel informed the complainant: "... in the light of the Committee's findings the President has decided to refer the staff report to the Vice-President of GD1 for amendment of the mark for productivity in I.A.1 and consequent review of the overall mark".

The complainant says he did not get that letter.

6. The complainant filed this complaint on 26 March 1987. Its purpose and his claims are unclear but the Tribunal gathers the following from his pleadings.

(a) What he wants first and foremost is to have the general rating 3 ("good") replaced with 2 ("very good").

(b) His objections focus on the rating of his productivity. He submits that, though the Appeals Committee's report goes in the right direction by recommending 2, he deserves 1 ("outstanding").

(c) To his mind the quality of his work has been belittled and he wants full disclosure of the assessments of it.

(d) He seeks a fair amount in damages for the disruption of his work by the dispute and for "the effort necessary to defend his rights and integrity", and costs.

7. He declares in the complaint form that his complaint challenges the 1983 staff report and the President's failure to take a timely decision on the Appeals Committee's report of 24 October 1986, notified to him on 27 October.

8. Review of the report began in November 1986 and was not over until 20 May 1987. On 27 May - by which date the complaint had been filed - the President sent the complainant a minute saying he had consulted the reporting officers and decided to amend the report:

"1. The mark under I.A.1 is raised to 2.

2. As regards the overall marking in III ii, the comments on the reporting system in A.6.2 make it plain that it will be 2 only if performance far exceeds the average both in quantity and in quality. In your case it does in quantity, but I find no evidence to suggest that it does in quality as well, and a 3, albeit inclining to 2, corresponds to your general performance in the period under review."

9. The EPO filed its reply to the complaint on 23 June 1987 confining it, with the Tribunal's consent, to the issue of receivability. The Organisation submits that the complaint is irreceivable because it is premature: at the date of filing the internal means of redress had not been exhausted as Article VII(1) of the Statute of the Tribunal requires.

10. The EPO's case is that there was no implied decision to dismiss the internal appeal. Article 106 of the Service Regulations and Article VII(3) of the Statute of the Tribunal do say such a decision may be implied two months after the date of notification of the Appeals Committee's report. But, says the Organisation, the rule cannot properly apply where, as here, the President has endorsed the Committee's recommendation and agreed to the review of comments by reporting officers. He has to await the outcome, over which he has no control.

11. In such circumstances - so runs the argument - the EPO should be allowed a "reasonable" time before he may infer rejection: see Judgment 532 (in re Devisme). There was nothing unreasonable about the time that elapsed between the notification of the Appeals Committee's report of 24 October 1986 and the final decision of 27 May 1987, and the complaint should be dismissed as premature.

12. The complainant rejoins that his purpose in filing the complaint on 26 March 1987 was to safeguard his right of appeal: he knew he had to respect the time limit of five months from the date of completion of the internal appeal proceedings, which was 27 October 1986, when he got the Committee's report. The EPO's letter of 1 December 1986 telling him his staff performance report was to be reviewed is not in his records and he does not recall getting it. He submits that after going through internal proceedings that had lasted three years already he might reasonably expect to have a timely decision and not to have to await a decision indefinitely. The final decision of 27 May 1987 is "unsatisfactory" and an "obvious mistake".

13. In its surrejoinder the EPO discusses the time limits in the Regulations and the Statute and the time needed for internal appeal proceedings. It submits that no time limit can be set for the internal appeal proceedings as a whole since there can be one only for each stage. There being no firm deadlines, it is the Tribunal's rulings on the need to allow a "reasonable" time that should apply. Though there was unavoidable delay in this case, the time taken was not unreasonable.

#### Receivability

14. Material to the issue of receivability raised by the EPO are the procedural rules in the Statute of the Tribunal and in the Service Regulations.

15. Article VII(1) of the Statute reads: "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".

16. Article VII(2) sets a time limit of ninety days from the date of notification of an express decision and Article VII(3) a further time limit of sixty days where the Administration fails to take a decision.

17. Like VII(3), Article 106 of the Service Regulations says that where the Administration fails to answer an internal appeal within two months there is an implied decision to reject it.

18. The rules on internal appeals are in Articles 107 to 113 of the Service Regulations. According to 108 an appeal shall be lodged with the appointing authority within three months. Where the Administration fails to reply the time limit runs from the one stated in 106. According to 109(1), if the President of the Office considers that a favourable reply cannot be given an Appeals Committee shall be convened "without delay" to deliver an opinion on the matter, and the opinion is notified to the competent authority and to the appellant.

19. Article 109(2) provides that if the President takes no decision within two months of the date on which the internal appeal was lodged it shall be deemed to have been rejected; 109(3) that once the internal means of appeal have been exhausted a permanent employee may appeal to the Tribunal "under the conditions provided" in its Statute.

20. Thus the Service Regulations set no exact time limits either for the Appeals Committee proceedings or for action by the appointing authority on the Committee's report. But the Regulations and the Statute do set at three months the time limit for filing an appeal and at two months the time limit for awaiting an express decision from the Administration.

21. The time limits may not be applied indiscriminately to all stages of the internal appeal proceedings. Being, as it were, judicial in character, Committee hearings are not subject to deadlines, whereas stages of the proceedings that call for action by the Administration are. Thus there is a time limit not only for any express decision by the competent authority that adversely affects the official but also where the Administration fails to take any decision.

22. Such are the considerations that will guide the Tribunal in ruling on what had to be done in this case once the Appeals Committee had reported.

23. The Committee's report of 24 October 1986 was notified on 27 October, and the EPO ought to have acted by the end of December. It retorts that it need take a decision only within a reasonable period since the reporting officers are free to form their own opinion and the President has no control over them. The argument is unsound. Although the reporting officers are free to say what they think, they still have a duty to act within the time limits in the Service Regulations. In this case the matter was quite straightforward since the reporting officers were familiar with the facts and in any event had at their disposal a thorough and objective review of the case by the Appeals Committee. So the Administration may not plead that it could not meet the deadline.

24. The Administration having taken no decision by the end of December 1986, the complainant had exhausted all the means of redress available to him under the Service Regulations and it was only prudent for him to file so as not to be declared time-barred should the Administration still fail to act.

25. The final decision was taken on 27 May 1987, after the expiry of the time limits in the Service Regulations. The complainant could no doubt have challenged it in another complaint, to be joined to the first, and there would then have been no difficulty over receivability. But since the decision of 27 May 1987 forms part of the impugned decision, most of which holds good, there is no sound reason why it should not be brought within the scope of the present proceedings. The complainant has made it plain in his rejoinder that that is indeed what he intends, and no objection from the EPO will be entertained when it is itself to blame for the procedural difficulties at issue.

26. The EPO's objections to receivability fail. The proceedings shall therefore resume at the point at which the Organisation raised those objections and it shall now reply on the merits, the material issue being still the staff report as amended on the conclusion of the internal appeal proceedings. The matter of costs is reserved.

DECISION:

For the above reasons,

1. The Organisation's objections to receivability are dismissed.

2. The proceedings shall resume on the merits.

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

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner

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