Registry's translation, the French text alone being authoritative.

SIXTY-FOURTH SESSION

In re CRECHET

Judgment 890

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 26 August 1987 and corrected on 11 September, the EPO's reply of 30 November 1987, the complainant's rejoinder of 30 January 1988 and the EPO's surrejoinder of 29 April 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 13(1), (2) and (5) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence;

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

A. The complainant, a Frenchman born in 1957, joined the EPO at The Hague on 1 May 1985 as an assistant examiner in the Search Department at grade A1. In accordance with Article 13(1) of the EPO Service Regulations he was put on probation for one year. Article 13(2) reads: "Not less than one month before the expiry of each period of six months within the probationary period, a report shall be made on the ability of the probationer to perform his duties and on his efficiency and conduct in the service. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing. A probationer whose work has not proved adequate shall be dismissed at the end of the probationary period. However, the President of the Office may decide, in exceptional cases, to extend the probationary period before taking a final decision ...". Article 13(5) says that "At the end of the probationary period, the appointment of a probationer who has not been dismissed and who has not submitted his resignation ... shall be confirmed."

A probation report on the complainant which the reporting officer, Mr. Oey, signed on 1 November 1985 concluded that he was "progressing satisfactorily", though it did urge "greater perseverance and application". But a further report signed by Mr. Oey on 27 March 1986 recommended against confirming his appointment: he had improved no further and his work was neither thorough nor accurate. The Principal Director of Search, Mr. Phillips, consulted Mr. Oey and the complainant's first-level supervisor, Mr. Six, and endorsed the recommendation on 8 April. The complainant's objections of 18 April were appended to the report. A minute of 28 April from the head of Personnel told him that because the first report had been good the President of the Office had decided, in accordance with Article 13(2) of the Service Regulations, to extend his probation by six months. The decision was notified to him by an express registered letter of 29 April which he got on 2 May. On 13 May he was transferred to another technical field and another supervisor. On 18 June he appealed against the extension of his probation. He had his appointment confirmed as from 1 November 1986 by a decision of 28 February 1987. In its report of 10 April 1987 the Appeals Committee recommended rejecting his appeal and by a letter of 27 May 1987, which he got on 4 June, the Principal Director of Personnel told him that the President had done so. That is the decision impugned.

B. The complainant alleges that early in 1986 Mr. Six's behaviour towards him became insulting and provocative and

that poor work was not the true reason for the recommendation against confirmation.

There was breach of Article 13(2) of the Service Regulations because the second probation report was not made one month before 30 April 1986, the end of the probation period; the Principal Director did not sign it until 8 April.

There was breach of Article 13(5) because by 30 April 1986, when the period ended, he had neither been dismissed nor resigned nor had his probation extended: he should therefore have had his appointment confirmed.

He seeks compensation for the injury he alleges.

C. In its reply the EPO observes that the recommendation was not a decision: only the President may decide whether to confirm an appointment, and here he decided at his discretion to extend the probation period. In doing so he duly took account of all the material facts and his decision shows no flaw.

There was no breach of 13(2). The material date is the one on which the reporting officer makes the report. Although the Principal Director of Search did not sign until 8 April 1986, Mr. Six wrote the report on 27 March, before the probation period expired. As is plain from Circular 146 of 10 February 1986 on the reporting procedure, all the senior official does is countersign. The purpose of probation is to give the probationer time to come up to standard and the reporting officer time to assess him properly. If the material date were that of the countersigning officer's signature the time would be less for both of them. Besides, the complainant made comments in ample time for the President to take them into account.

There was no breach of 13(5). No time limit is set in the Regulations for notifying the report to the probationer, for terminating his appointment or for extending the period of probation. All the Organisation need do is let him know the decision before it takes effect. The President took his decision on 28 April and did everything he could to let the complainant have it in time; but, fearing that a decision was imminent, he avoided formal notification of it by failing to let the EPO know his home address and by studiously avoiding his supervisor on the last few days of the probation period. Being himself at fault he may not plead that he did not get notice in time, and the decision may be deemed to have been duly communicated.

In any event he misconstrues 13(5), which cannot confer any right to automatic confirmation of appointment.

The EPO invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant cites passages of the Appeals Committee's report in support of his case. He alleges that his supervisors' attitude towards him was offensive and prejudiced. He describes the sort of work he was doing. His probation having been mismanaged to his detriment, the decision to extend the period showed fatal flaws: in particular it was not based on his professional shortcomings.

The material date is not the one on which the first-level supervisor signs the report. Since the countersigning officer may disagree with the reporting officer, the probationer may not comment on the report until it is countersigned. So the material date in his case was 8 April 1986 and the report was completed after the time limit laid down in 13(2). A minute of 27 August 1986 from the head of Personnel to his supervisor about his final probation report said that the text to be notified by the deadline should bear also the countersigning officer's comments.

Contrary to what the EPO says, he was at work on 28 and 29 April and at its disposal. The onus has never been put on other probationers to find out for themselves what decisions it has taken. There was no point in looking for him at home since he was at the office at the time. He had duly informed the EPO of his address; indeed it was the one the letter of 29 April was sent to. Due notification may not be presumed. Since Article 13(5) was not respected the probation period ended on 29 April 1986, 30 April being a public holiday in the Netherlands, and his appointment was by implication confirmed.

He alleges severe moral injury and presses his claim to redress.

E. The EPO submits in its surrejoinder that the rejoinder does not weaken the force of its reply, which it develops on several points. It maintains in particular that although the Appeals Committee found flaws in the complainant's second probation report it did not think them serious enough to warrant reversing the decision to extend his probation, which was correctly based on doubts about the adequacy of his performance; that the Service Regulations set no time limit for communicating the probation report to the probationer; that the complainant in fact got it in ample time to add his own comments; that he was himself to blame for the failure to notify the decision to him in time; and that in any event there is a general principle of law that says that time limits are automatically extended when they expire on a public holiday so that in this case the time limit did not expire until 2 May.

CONSIDERATIONS:

1. Article 13 of the Service Regulations of the EPO provides: "Permanent employees for whom the President of the Office is the appointing authority shall serve a probationary period. ... A probationer whose work has not proved adequate shall be dismissed at the end of the probationary period. However, the President of the Office may decide, in exceptional cases, to extend the probationary period before taking a final decision".

2. The EPO appointed the complainant as from 1 May 1985 as an assistant examiner on one year's probation. The first six months went well and an interim report made in November 1985 foreshadowed no difficulty over confirming his appointment. But the report made after the second six months was bad and actually recommended dismissing him. Because of the good first report the President decided to give him another chance and not to follow the recommendation but to extend his probation by six months. Indeed at the end of those six months he did have his appointment confirmed.

He lodged an internal appeal against the extension of probation and on the Appeals Committee's unanimous recommendation the President rejected it on 27 May 1987. He seeks an award of damages.

3. He alleges two procedural flaws.

The first is breach of Article 13(2) of the Service Regulations: "Not less than one month before the expiry of each period of six months within the probationary period, a report shall be made on the ability of the probationer to perform his duties and on his efficiency and conduct in the service. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing ...". The complainant's argument is that the second report was made on 8 April, that his probation ended on the 30th and that the one-month time limit was therefore not complied with.

The EPO's answer is that the material date was not 8 April.

The text of the "report on the probationary period" prescribed in Article 13 is in several parts. The first and longest is filled up by the first-level supervisor - the "reporting officer" - who describes the duties performed by the probationer, comments on his "ability", the "quality and quantity" of his work, his "conduct at work" and his knowledge of languages, makes "general comments" and concludes by recommending confirmation, extension of probation or termination, adding the date and his signature.

In this case the reporting officer signed the first part of the report on 27 March 1986, one month before the complainant's probation ended.But that is not the end of the procedure. When signed by the reporting officer the report goes up to a senior official who adds his own comments and countersigns. In the complainant's case the senior official did not countersign until 8 April, less than a month before his probation expired.

The probationer then gets the full text and may make his own comments. The complainant did so on 21 April 1986.

What then does 13(2) mean when it says that the report shall be made not less than one month before the expiry of probation? Read out of context the sentence is obscure, but the following one makes the meaning plain enough: "The report", it says, "shall be communicated to the probationer". It is obvious from the use of the definite article that "report" has the same meaning in both sentences and that the report that goes to the probationer must be the complete one. Since in this case the report was completed less than one month before the end of probation, the EPO's plea fails.

But that need not mean setting the impugned decision aside: where it finds a formal flaw the Tribunal will determine whether it taints the essence of the decision.

The purpose of the Article 13 procedure is to elicit comments from both sides, the probationer being plainly entitled to be given a full explanation of the assessment of his work in sufficient time to enable him to make comments of his own before the President takes a decision.

But Article 13 does not take care of those two points. What it does is set a deadline, not for communicating the report to the official, though that is all that really matters, but just for making it. Late communication therefore will not make the decision unlawful unless the probationer suffers injury. The complainant did not. The report was countersigned on 8 April and he does not deny that it was communicated to him at once. Since he added his comments on 18 and 21 April he had ample time in which to make them.

The President, too, who took his decision on 28 April, had time to study the case, as indeed is plain from his having given the complainant partial satisfaction.

The first plea fails: the EPO's failure to meet the deadline in 13(2) did not make the decision improper.

4. The complainant's second plea is also about a matter of timing, the material text being again Article 13: according to 13(5) "At the end of the probationary period, the appointment of a probationer who has not been dismissed and who has not submitted his resignation under the terms of this Article shall be confirmed".

The complainant points out that since he was appointed as at 1 May 1985 the year's probation expired on 30 April 1986; although the decision was taken on 28 April 1986 he did not get notice of it until 2 May and by then his appointment had been confirmed.

Article 13(5) is clear. If the EPO decides not to confirm an appointment it must see that the probationer is so informed before probation expires.

In this case its duty was to inform the complainant before 1 May 1986. It acknowledges that not until 2 May did he get its letter extending his probation but it maintains that the Personnel Department did its utmost to get the decision to him in time. It points out that though he knew the second report had been bad and must have been worried, he not only failed to find out but seemingly disappeared altogether on 29 April.

In law the Organisation must show not just that the complainant failed to act but that it gave him timely notice of the decision or else that his evasiveness prevented it from doing so.

In the Netherlands 30 April is a public holiday and the EPO treats 1 May as one. The decision having been taken and signed on the 28th, the Organisation sought in two ways to notify it to him on the morrow.

An EPO courier went to the address he had given the Personnel Department on appointment, only to be told that he had left two months before. Instead of telling Personnel of the change of address, as he had undertaken to do, he had told only his own department. Personnel realised that and got the right address from that department. Late in the afternoon of 29 April a letter was sent by express post, but it was not delivered to him until 2 May.

The Personnel Department also tried to reach him at work. A member of its staff telephoned him several times, to no avail. Two messages were left on his desk, one in the morning and one in the afternoon. Though he apparently picked up the first one, nothing came of all this. It is odd that, though he says he spent the whole day working in the library, he should not have returned to his own office before going off, if only to leave the papers he had been working on. There is a strong presumption that it was his own fault he did not learn of the decision on 29 April.

What is more, municipal courts commonly hold that a time limit which expires on a public holiday is extended to the next working day. If the Tribunal followed suit it would hold that the decision was duly notified on 2 May because both 30 April and 1 May were public holidays at the EPO.

For the foregoing reasons of fact and of law the Tribunal rejects the complainant's plea that the decision was out of time.

5. The Tribunal may review the lawfulness of a decision by the appointing authority to extend probation. But because of the nature of the decision the Tribunal will, short of finding a formal or procedural flaw - which it does not in this case - exercise only limited review. It will set the decision aside if there was a mistake of law or of fact, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority. The competent authority being allowed wide discretion, the complainant must show some especially gross or blatant mistake or irregularity.

6. All the complainant says in his original brief is that no reason relating to the quality of his work was given for the decision. In his rejoinder he is less terse and points out that the Appeals Committee, whose report the EPO has supplied, thought the errors in the second report serious enough to make it invalid. He says that on the whole the first report was favourable and he alleges - though the EPO denies - that there were serious shortcomings in his probation. But on that point there are only the parties' submissions and there is no evidence to support either view.The actual decision does not state the reasons for it and the second probation report too is unhelpful because the President did not endorse the recommendation in it. What does carry weight is the report of the Appeals

Committee, which, besides hearing witnesses, took up the case after the complainant had had his appointment confirmed.

The Committee found three serious flaws in the report endorsed on 8 April 1986 - lack of assessment of his output and two flaws connected with his relationship with his supervisor - and thought that they were serious enough to invalidate the report and that had the President endorsed the recommendation in it the termination would have been unlawful. Instead, seeing how different the two probation reports were, even though the supervisors were the same, the President decided to extend his probation and give him a new supervisor in another technical field. The Appeals Committee found that decision the more sensible because, though the first report had been mainly good, it did say he had shown inability to analyse problems in depth and had been reluctant to consult his supervisor. The Committee concluded that the President's decision was correct: the probationer must accept the risks inherent in any system of probation.

Since the complainant does not challenge the Committee's version of the facts the Tribunal will endorse its view of the case. There being no grounds for setting aside the President's discretionary decision, his claim to compensation fails, as does his application for the hearing of witnesses.

DECISION:

For the above reasons,The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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