

## SIXTY-FIFTH SESSION

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

#### Judgment 919

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Rudolph Schmid against the European Patent Organisation (EPO) on 27 May 1988, the EPO's reply of 26 July, the complainant's rejoinder of 7 September and the EPO's surrejoinder of 17 October 1988;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 47 and 108 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. As is stated in Judgment 918, under A, the complainant joined the EPO at The Hague in 1981 as a search examiner. Article 47 of the Service Regulations requires the regular appraisal of performance, and this case is about the complainant's report for the period from 1 January to 31 May 1984.

His supervisor, Mr. Peeters, who drafted the report on 10 September 1985, rated him 3 ("good") under five headings, 4 ("adequate") under five others, and 5 ("unsatisfactory") for "quality". The general rating, too, was 5. On 11 September the countersigning officer, Mr. Phillips, confirmed that rating. On 29 October the complainant recorded his general objections to the report under point VIII. Mr. Peeters replied on 31 October under point IX that he confirmed the assessment, the complainant having made no specific objections. Mr. Phillips signed on 1 November. The complainant said on 11 November under point X that he wanted to follow the procedure for conciliation. He asked that that procedure be applied also to the report drafted by Mr. Pasturel for the period from 1 June 1984 to 31 May 1985, which forms the subject of his third complaint. Conciliation having failed, on 24 April 1986 the Vice-President of The Hague office had both reports submitted to the President of the Office in Munich for confirmation. A report by Mr. Schoofs for the period from 1 June to 31 December 1985 also rated him 5.

On 22 May 1986 the complainant offered his resignation, and the acceptance of it forms the subject of his first complaint. On 31 January 1987 he left the EPO. The President endorsed the report by Mr. Peeters on 14 April 1987.

On 11 June 1987 the complainant lodged three internal appeals under Article 108 of the Service Regulations, one against each of the three staff reports rating him 5. In the Committee's report of 1 February 1988 on the report by Mr. Peeters the majority held that since it was the rating for "quality" that had prompted the general rating of 5 care ought to have been taken to justify it by providing samples of bad work done by the complainant in the report period. The majority recommended asking the reporting officer to provide, say, five such samples, appointing someone independent to look at them and reviewing the ratings. One dissenting member of the Committee saw no need for corroboration and recommended rejecting the appeal. By a letter of 4 March 1988, the impugned decision, the Principal Director of Personnel informed the complainant that the President had rejected his appeal.

B. The complainant contends that the reporting officer belittled the difficulty of the technical fields he had worked in in the report period. The number of patent applications he dealt with gave a poor idea of his output since the report covered only five months. In earlier years his output had been found satisfactory. He was neither warned that the quality of his work was falling short nor told how to improve it. It was not so consistently poor as to warrant 5. Mr. Peeters made no attempt to justify the assessment. The report was drafted far too late after the end of the period it covered. Coming together with another bad one, it sounded even worse. He asks that it be withdrawn and claims damages for injury to his professional career.

C. In its reply the EPO submits that the complaint is irreceivable because the grounds the complainant states for challenging the report are new: in the internal appeal proceedings he did not plead the flaws he is now alleging - or indeed any - and he has therefore failed to exhaust the internal means of redress as Article VII(1) of the Statute of

the Tribunal requires. His statement of the grounds for his complaint having no substance, his challenge to the report is unsupported.

The EPO's subsidiary plea is that his complaint is of no merit. He fails to show that Mr. Peeters underestimated the difficulty of his work. Besides, Mr. Peeters did not: a slight correction made in the description of his duties - to say that 5 out of 40 dossiers were in a different technical field - did not alter the general degree of difficulty. His output for the five months was properly reckoned: an examiner is supposed to work steadily, not in fits and starts, and when the report period is under a year the output due is reckoned pro rata. Five months is not too short a period for a report. Though he was given an opportunity to state his objections in detail, he failed to do so.

D. In his rejoinder the complainant contends that the EPO's objections to the receivability of his complaint are unsound. His complaint is, in his submission, an elaboration of his internal appeal, which forms part of it, and the statement of his claims matches in substance those he put forward in that appeal.

As to the merits, he observes that in the conciliation proceedings and before the Appeals Committee he was unable to defend himself against the criticisms by his supervisor, who offered no evidence in support of them. The purpose of the correction in the description of his duties was to recognise the much broader scope of his work, and the error shows how unreliable the report was. The work is too complex and difficult for an examiner to be able to guarantee a steady output; besides, he responded to criticism by taking greater care over each file and so slowed down.

He presses his claims.E. The Organisation reaffirms in its surrejoinder that the complaint is irreceivable because the complainant is alleging before the Tribunal flaws that he failed to plead in his internal appeal. It comments on the majority and minority opinions stated in the Appeals Committee's report, pointing out that he had a chance to make observations on his staff report before it went to the President for final decision. He was free in the conciliation proceedings to seek discussion with the reporting officer, but he did not; nor did he state his case, as he could have done, to the Appeals Committee: he left it to the Committee to find grounds for his appeal. His comments on the correction in his post description are unfounded and unsubstantiated; besides, he does not even say that it entailed a different assessment of his performance. He also fails to say why the target for his output was unreasonable.

#### CONSIDERATIONS:

1. The complainant took up duty with the Organisation in its office at The Hague on 1 February 1981 as a search examiner and his appointment was confirmed a year later. Three supervisors, Mr. Peeters, Mr. Pasturel and Mr. Schoofs, made unfavourable reports on his performance in 1984 and 1985. He offered his resignation by a letter of 22 May 1986 and the Principal Director of Administration accepted it the same day. On 1 August the President formally confirmed the acceptance. He was to resign on 31 January 1987 and he left on that date.

2. In his first complaint, which forms the subject of Judgment 918, he appeals against the acceptance of his resignation. In this one he is challenging the report by Mr. Peeters on his performance from 1 January to 31 May 1984. His third complaint, which the Tribunal dismisses in Judgment 920, is about the appraisal of his performance in the next twelve months, from 1 June 1984 to 31 May 1985.

3. In the report on the first five months of 1984 Mr. Peeters rates him 3 ("good") for judgment, application, commitment, self-expression and dealings with colleagues; 4 ("adequate") for productivity, penetration, responsibility, accuracy and reliability; and 5 ("unsatisfactory") for quality. The general rating, too, was 5. In general comments Mr. Peeters says he cannot grasp essentials, his output has fallen and the quality of his work is no better.

The countersigning officer, Mr. Phillips, confirmed the low general rating, attributing it to the low rating for quality, which the better rates under other heads could not lift.

On 29 October 1984 the complainant recorded his general objections to the report, but Mr. Peeters confirmed the assessment and so did Mr. Phillips.

4. On 11 November 1984 the complainant applied for conciliation on both Mr. Peeters' report and on the one written by Mr. Pasturel on the period from 1 June 1984 to 31 May 1985.

Conciliation having failed, on 24 April 1986 the Vice- President of The Hague office had both reports submitted to

the President of the Office in Munich for confirmation, and the President endorsed the report by Mr. Peeters on 14 April 1987.

As was stated in A above, the majority of the Appeals Committee held that, since it was the low rating for quality that had prompted the general rating of 5, Mr. Peeters ought

to have given samples of bad work. They recommended asking Mr. Peeters to provide five samples and appointing someone independent to review the ratings. By a letter of 4 March 1988, the decision impugned, the Principal Director of Personnel informed the complainant that the President had decided to reject the appeal.

5. There is no need to rule on the issue of receivability since the complaint is devoid of merit.

The complainant fails to show that Mr. Peeters underestimated the difficulty of his work. Besides, Mr. Peeters did not. The Tribunal has no reason to question the Organisation's contention that minor correction in the description of his duties made no difference to the degree of difficulty of his duties. His work was full of mistakes and had to be redone, and he simply did not have the makings of a search examiner.

His objections to the reckoning of his output are unsound. Not only is a search examiner required to produce a steady output of work, but the output expected of him was reckoned according to the period covered by the report. There is therefore no reason why the report period should not be five months, even if the more usual period is a year.

Mr. Peeters had often warned him his work was below par and amply bore out the low ratings with comments under the various heads. What is more, as the complainant has never denied, he had every opportunity to answer.

Lastly, he does not even challenge the report on the grounds put forward by the majority of the Appeals Committee, namely the lack of evidence to support them. **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 Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
H. Gros Espiell  
A.B. Gardner