SEVENTY-SECOND SESSION

In re CASTRO GONZALEZ

Judgment 1153

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Ricardo Castro González against the European Patent Organisation (EPO) on 16 November 1990 and corrected on 13 March 1991, the EPO's reply of 5 June, the complainant's rejoinder of 25 August and the EPO's surrejoinder of 31 October 1991;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 13, 52(3), 53, 93, 107(1) and 108(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. Article 13(1) of the EPO Service Regulations requires that new permanent employees in category A shall serve one year's probation. Article 13(2) requires the writing of a probation report "not less than one month before the expiry of each period of six months within the probationary period", allows the probationer to comment thereon in writing, and provides that if his work has not proved adequate he shall be dismissed at the end of probation, though the President of the Office may extend the period before taking a final decision.

The complainant, a Spaniard who was born in 1953, took up duty at the EPO's office at The Hague, General Directorate 1, on 1 July 1988. He was an examiner of patents at grade A3 in a search directorate, his special fields being biochemistry and genetic engineering. In accordance with Article 13(1) he had to serve one year on probation, up to 30 June 1989.

In the light of a test in German he took on 4 July 1988 the EPO gave him two months' intensive instruction in that language. By a note of 26 August 1988 the Head of the Personnel Department informed him: "as is the case with other examiners who lacked German, your probation will be extended by the length of this course, i.e. two months".

In an interim report dated 24 January 1989 his supervisors expressed the view, with some reservations, that he was "progressing satisfactorily": though his output was not yet up to the mark and his knowledge of German was only "adequate", the quality of his work was very good. He signed the report on 26 January without substantive comment.

In the months that followed his supervisors took a severer view. There were correspondence and meetings between him and them about the criteria they were applying in checking his work. A note of 12 June 1989 from the Head of the Personnel Department informed him of the extension by the President of his probation by the two months, up to 31 August 1989.

On 12 July 1989 he wrote a long letter to the Principal Director of the Search Department going over "many technical aspects which have been a reason for various arguments ... in this last year". The Director's reply of 14 July took him to task for his refusal to accept advice and instructions. He objected, again at length, in a letter of 19 July.

In a note of 31 July to the President he alleged flaws in the procedure: the interim report of 24 January 1988 had been late and there had been no final one by 1 June 1989 as Article 13(2) required; he claimed confirmation of appoint-

ment at 1 July 1989 and reversal of the decision of 12 June to extend his probation; failing that, he lodged an appeal under Article 107(1) of the Service Regulations.

By a note of 7 August the Personnel Department called upon him under pain of dismissal to return by 9 August,

duly signed and with any comments he might want to add, the text of a final probation report which it said he had been given on 27 June in his supervisors' presence. He answered in a note of 8 August that he had been given no such report on 27 June and that indeed his first-level supervisor had then been absent. The Department's reply of 10 August ordered him to return by 17 August the report which his supervisors confirmed he had been given, whatever the date had been. On 16 August he told the Department he did not have it. On 22 August the Principal Director of the Search Department wrote a note alluding to his "refusal to act on instructions" and to the text of the final report, handed to him "on or around" 20 June, "which was negative and did not recommend permanent appointment".

In the presence of others the Vice-President in charge of General Directorate 1 saw him on 24 August. He denied that he had got a probation report on 20 June. The Vice-President thereupon gave him notice of dismissal at 31 August in a letter which said said that his denial was in bad faith and in breach of his obligation as an official and in itself warranted dismissal; moreover, his supervisors had found him incompetent, as indeed they had told him in the report handed to him on 20 June.

On 29 August the Personnel Department sent him by registered post a final probation report which his first-

level supervisor had signed on 10 July but it was sent back unclaimed on 26 September.

His appeal of 31 July was forwarded to the Appeals Committee. On 22 November his counsel lodged on his behalf a second appeal challenging his dismissal, and it too was passed on to the Committee.

The Committee joined the two appeals. In its report of 20 July 1990 it declared them receivable. It held that the decision to extend the complainant's probation had not complied with Article 13(2) of the Service Regulations and his first appeal was sound, but that that did not affect the outcome of the other one, which turned on the lawfulness of the dismissal. The EPO had made "several unfortunate mistakes", particularly in failing to keep a copy of the final report recommending dismissal, which in a brief he had put to the Committee on 15 May 1990 the complainant had owned up to having got on 19 June (not on 20 June) 1989. Instead of sending it back he had time and again denied it existed. In the Committee's unanimous view the mistakes were not especially serious or glaring; besides, even if they were, the complainant's dishonesty barred reliance on them. The Committee unanimously recommended rejecting his second appeal but by a majority recommended allowing him a sum in costs for having succeeded on the minor issue of extension of probation.

By a letter of 21 August 1990, the decision he is impugning, the Principal Director of Personnel informed him that the President had rejected his appeals, the first as time-barred and the second as devoid of merit, and had refused costs.

B. The complainant submits that only in accordance with Article 13(2) and so only "in exceptional cases" may the President extend probation beyond one year before taking a final decision on confirmation of an appointment. The Head of the Personnel Department's note of 26 August 1988 was a mere warning, not a decision by the competent authority. The decision of 12 June 1989 to extend his probation by two months was in breach of 13(2). It ought to have been taken after the writing of a final probation report. Taking a course in German, as many do, did not make his case exceptional. So he should have had his appointment confirmed at 1 July 1989.

The sole grounds for dismissal were the false charge of improper behaviour in denying receipt of a final probation report. The notice of dismissal which the Vice-President handed to him on 24 August 1989 had been typed beforehand; so the EPO had no intention of letting him exercise his right to a hearing and committed a breach of due process. Besides, his appointment having been tacitly confirmed at 1 July 1989, it was wrong to dismiss him under Article 13(2).

He seeks the quashing of the decision of 21 August 1990 and of the earlier decisions it upheld; confirmation of his appointment and reinstatement as from the date of dismissal or, failing that, the award of a reasonable amount in damages for material injury; the award of a reasonable amount in damages for moral injury; "other appropriate measures"; payment of salary for the period of notice prescribed in Article 52(3) of the Service Regulations; and costs.

C. In its reply the EPO submits that the complainant's objections to the extension of probation are irreceivable. The Head of the Personnel Department's note of 26 August 1988 "could have left him in no doubt" but that it was a

decision to extend his probation. Not having appealed within the three months allowed in Article 108(2) of the Regulations, he failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires. Even if an official believes that the decision has been taken without authority he must appeal in time. The note of 12 June 1989 merely confirmed the extension.

His objections to the extension are in any event devoid of merit. The decision of 26 August 1988 was in line with Article 13 of the Regulations. The Head of the Personnel Department acted under authority delegated to him by the President of the Office and in keeping with the practice followed when the probationer has to take a full-time language course. It was not contrary to 13(2) to extend the complainant's probation before making the reports. The extension was in the interests of both parties, its purpose being to determine whether he was fit for a successful career in the Organisation. It was also in his interest to let him know early on that he would get more time in which to pass muster. It was "exceptional" because most examiners fulfil the language requirements.

Since the extension was lawful the final probation report was not due until the end of the thirteenth month, July 1989. But according to 13(2) a report on the probationer "may be made at any time during the probationary period if his work is proving obviously inadequate". The complainant's shortcomings were "so closely bound up with his personality that there could be no hope of their disappearing"; so his supervisors were entitled to make the final report as early as June 1989. As he has at last admitted, he was handed the text at the time. The inconsistency of his statements on the matter shows his bad faith. The report dated 10 July 1989, which he refused to collect from the post office, was a mere reconstitution of the June one.

His dismissal, too, was lawful under 13(2). As the letter of 24 August 1989 shows, there were two reasons for it. His attitude cast doubt on his honesty and so on his fitness for employment in the Organisation, and from the outset he showed rigidity and unwillingness to undergo training. The Appeals Committee was unanimous about his shortcomings. Since he was still on probation 13(2) was the only material rule.

There was no breach of due process. He had only himself to blame for forfeiting the opportunity of commenting on his final report. Besides, there was much discussion with him about his shortcomings, as the evidence shows. It was reasonable of the Vice-President to have the written notice of dismissal ready so that if need be he could hand it over.

The complainant has been paid his full entitlements and his claims are either irreceivable or devoid of merit or both.

D. In his rejoinder the complainant enlarges on his earlier pleas, seeks to refute the case made out in the Organisation's reply and presses his claims. He develops his contention that the decision he is impugning was unlawful. In his submission the extension of probation, the refusal to make a timely final probation report and his dismissal were all in breach of the Regulations. According to Article 13(1) he should have had his interim report by 1 December 1988 and his final one by 1 June 1989. What he got were two interim reports, one on 25 January 1989 and the other on 19 June 1989, of which only the former bears the Vice-President's signature and is valid.

E. In its surrejoinder the Organisation submits that there is nothing in the complainant's lengthy rejoinder to weaken any of the arguments in its reply, and it develops those arguments, maintaining in particular that his objections to the extension of probation are irreceivable and, besides, groundless, and that he has failed to show any fatal flaw in the decision which the President took in the exercise of his wide discretion in the matter, not to confirm the appointment.

CONSIDERATIONS:

1. The complainant joined the EPO on 1 July 1988 as an examiner of patents at grade 3 of category A in Directorate 1.2.12 at The Hague. In accordance with Article 13(1) of the EPO Service Regulations he had to serve one year on probation, up to 30 June 1989, and as a probationer was subject to the provisions of Article 13(2) and (5), which read:

"(2) 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. In respect to probationers in Category A, the extension may not exceed one year ...

A report on the probationer may be made at any time during the probationary period if his work is proving obviously inadequate. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing. On the basis of the report the President of the Office may decide to dismiss the probationer before the end of the probationary period.

...

(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 extension of the complainant's probation

2. The complainant was given a test in German a few days after taking up duty, on 4 July 1988, and thereafter a two months' course in the language. By a note of 26 August 1988 the Head of the Personnel Department informed him that "as is the case with other examiners who lacked German, your probation will be extended by the length of this course, i.e. two months". By a note of 12 June 1989 he told the complainant: "The President has decided, under Article 13(2) of the EPO Service Regulations, to extend your probation by the corresponding period as from 1 July 1989". The upshot of the correspondence referred to in A above was that he wrote to the President on 31 July claiming confirmation of appointment at 1 July 1989 and reversal of the decision to extend his probation. His claim was rejected and forms the subject of the first head of appeal.

3. The complainant submits that the Head of the Personnel Department's note of 26 August 1988 did not yet amount to a challengeable decision by the competent authority, that the decision was conveyed to him in the note of 12 June 1989 and that his appeal of 31 July 1989 was therefore in time. For its part the Administration retorts that its note of 26 August 1988 could have left no doubt in his mind but that the decision had already been taken to extend his probation by the two months to 31 August 1989; that what the note of 12 June 1989 conveyed to him was not a new decision but mere confirmation of the one of 26 August 1988; that he ought therefore to have challenged it by filing his internal appeal within the time limit of three months set in Article 108(2) of the Regulations, i.e. by the end of November 1988; and that since he neglected to do so he failed to exhaust the internal means of redress and his claim is irreceivable under Article VII(1) of the Tribunal's Statute.

4. Whether the challengeable decision was the note of 26 August 1988 or the one of 12 June 1989 is an issue that the Tribunal need not rule on since for the reasons given below the complainant's objections to the extension are devoid of merit anyway.

Citing Article 13(2), he submits that only "in exceptional cases" may the President extend probation beyond one year before taking a final decision on confirmation, and his taking the German course did not make his case exceptional.

Yet there was nothing improper about extending the complainant's probation by a mere two months in accordance with Article 13(2). What made his case "exceptional" was that whereas most examiners meet the language requirements of their posts he did not. Moreover, the extension proved to be in his interests as well as the Organisation's since it allowed him more time in which to overcome the shortcomings his supervisors pointed out to him in the second semester of his period of probation.

The termination of the complainant's appointment

5. After a fairly satisfactory first probation report dated 24 January 1989 the complainant's supervisor, the head of his search directorate, began to take a poorer view of him. His final probation report refers to "a rather serious clash" in April 1989 after which the Principal Director, apprised of the problem by his supervisor, told him he must take fuller account of comments on his work.

In mid-June 1989, at a date about which there has been both doubt and controversy, the Principal Director, in the presence of the reporting officer, handed a second probation report over to him and invited written comment. No

copy of the report was kept and no receipt obtained from him.

In the circumstances recounted under A above the complainant protested at least three times in writing - in notes of 31 July, 8 August and 16 August - that he had never received the text of his probation report; yet the Head of Personnel, the director of his unit and the Principal Director of Search, made repeated assertions to the contrary although they were in some doubt about the exact date in June at which the text had been handed over to him.

He was summoned before the Vice-President of the Office on 24 August and appeared with the staff representative and his own counsel. The Principal Director, the director of his unit and his first-level supervisor were also present. The VicePresident asked whether he had received the text of the report on 20 June; yet again he said that he had not; and the Vice-President handed him the text of a letter notifying a decision to dismiss him as from 31 August on the grounds of serious breach of his obligations as a permanent employee and the unfavourable assessment stated in the report he had received on 20 June.

The same day - 24 August - the complainant wrote his own account of the meeting and sent it to the Office: among other things, he denied lying to the EPO.

Under cover of a registered letter dated 29 August the Personnel Department sent him a probation report drawn up from memory by the Director on 10 July and purporting to be the same in substance as the missing text. On 26 September the Dutch postal authorities returned the letter of 29 August unclaimed.

6. The complainant has three main objections to the decision not to confirm his appointment. The first is that since he ought to have had his appointment confirmed as from 1 July 1989 it was wrong to treat him as a probationer. The only provisions in the Regulations that might have afforded a valid basis in law for his termination were Article 52 on dismissal for professional incompetence, Article 53 on dismissal for other reasons and Article 93 on disciplinary measures. But none of them was applied.

7. The answer to that plea is in 4 above. Since the decision to extend his probation by the two months is upheld, the period of his probation was duly extended to 31 August 1989, the very date at which his appointment was terminated. Article 13(2) therefore afforded the basis in law for non-confirmation.

8. His second and third pleas may be taken together. The second one is that according to the Vice-President's letter of 24 August 1989 there was only one reason for his dismissal, namely his alleged "behaviour" and that the "behaviour" which that letter meant was his alleged denial that he had been given the text of a report by his supervisors on his performance. Since the EPO's accusation of bad faith is mistaken his dismissal has no basis in law.

The complainant's third plea is that the prior typing of the letter of dismissal shows that the EPO acted in breach of due process: it had no intention of properly investigating the charge of improper behaviour or of letting him present his point of view.

9. As the case law makes plain - for example, Judgments 687 (in re Delangue) and 736 (in re Michael) - a decision not to confirm a probationer's appointment is a matter of discretion for the President and the Tribunal will not substitute its own judgment for the Organisation's in matters that require such exercise of discretion. The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the Organisation. The competent authority will determine on the evidence before it, and possibly after extension of the probation as in the present case where doubt still lingers, whether to dismiss the official or to confirm his appointment.

Although the Tribunal may review the lawfulness of the dismissal, the nature of the decision is such that its power of review is limited. It will set aside the decision only if there was a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority. Moreover, in a case of dismissal of a probationer, the Administration will be allowed the widest measure of authority, and the decision must stand unless the mistake or illegality is especially serious or glaring.

The discretionary decision not to confirm the complainant's appointment shows no such mistake or illegality. In this case the complainant is alleging, in his second plea, a mistake of fact and, in his third, procedural flaws.

10. As the text of the letter of 24 August 1989 shows, the complainant was given not one, but two, reasons for non-

confirmation of his probationary appointment.

One reason was indeed, as he says, his "denying having ever received the performance report your supervisors prepared, when one was duly handed over to you on 20 June 1989 to allow you to add comments of your own and sign it as the rules require". The Vice-President charged him on that score with grave dereliction of duty and said: "Such behaviour alone warrants dismissal". But the Vice-President also wrote: "As for your qualifications as an examiner ... the information your supervisors have ... given me clearly shows that you have not attained the level at which your duties as an examiner may be carried out satisfactorily. You were duly informed of the negative appraisal of your work, notably by the report you received on 20 June 1989".

11. Since he was still on probation Article 13(2) was the only material rule, and since the extension was lawful the final probation report was not due until the end of the thirteenth month, July 1989. But according to 13(2) a report on the probationer "may be made at any time during the probationary period if his work is proving obviously inadequate". Believing the complainant's shortcomings to be "so closely bound up with his personality that there could be no hope of their disappearing", his supervisors were entitled to make the final report as early as June 1989.

12. At first he denied having been given any report in June; he did so in writing no fewer than three times. On 15 May 1990, almost a year later, he at last admitted in a brief to the internal Appeals Committee to having received it on 19 June 1989. His obstinate refusal to make that admission earlier and his repeated denials, which he based on mere quibbles over the exact date of receipt, rightly aroused doubt in the Organisation's mind about his honesty and therefore about his fitness to remain in its employ. But quite apart from that his professional shortcomings also warranted the decision not to confirm his appointment.

13. His allegations of breaches of due process are also groundless.

First, he had only himself to blame for not taking the opportunity of commenting on the text of his final report, which, as he has admitted, he got on 19 June 1989. And though he was sent by registered post a reconstituted version of that report dated 10 July 1989, it was eventually returned unclaimed to the EPO: he had simply refused to collect it from the post office.

Secondly, as to the other breaches of procedure he alleges, the Tribunal is satisfied that it was quite reasonable of the Vice-President in the circumstances to have the written notice of dismissal ready so that if need be he could hand it over. The Organisation had given him many opportunities to explain his position with regard to the text of the probation report; at the meeting of 24 August 1989 he merely repeated his denial yet again and, that being so, there was no reason to alter the already typed text of the letter.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mohamed Suffian
José Maria Ruda
A.B. Gardner

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