SEVENTY-THIRD SESSION

In re SCOTTI

Judgment 1175

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Fabio Scotti against the European Patent Organisation (EPO) on 22 August 1991 and corrected on 10 September, the EPO's reply of 27 November 1991 and the letter of 17 February 1992 from the complainant's counsel informing the Registrar of the Tribunal that he did not wish to file a rejoinder;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 13 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, an Italian citizen who was born in 1960, took up duty with the EPO at its General Directorate 1, at The Hague, on 1 May 1989 as an assistant examiner of patents at grade A1 in the Search Department. He was to serve the one year's probation prescribed by Article 13 of the Service Regulations.

An interim probation report, which was dated 25 September 1989, described the quality of his work as "good" and the quantity as "average". The reporting officers said that he "should be able to increase his output" and suggested letting him change his technical field if he wanted to. He made no comment.

In January 1990 he discussed with the reporting officers the production quotas for probationers.

In a second probation report, dated 23 March 1990, they recommended confirming his appointment, though the countersigning officer warned him that it was "absolutely essential to keep up an even output in future". Again, he made no comment.

On 1 April 1990 he changed to a new technical field.

By a note of 17 April the Principal Director of Administration told him on behalf of the President of the Office that in the light of the probation report his probation was extended by six months under Article 13(2) of the Regulations; confirmation of his appointment would depend on his continuing to make progress as he had in the last few weeks; and after another three months, in July, there would be another report on his performance.

In another interim report of 12 July 1990 the reporting officers said that they thought him capable of a consistent output. But the final probation report, signed by the reporting officers on 20 and 26 September 1990, concluded that he was "not suited to the work of search examiner"; despite "a final spurt" his output was still too low, even allowing for his changing to a new field, and he showed a "certain lack of commitment". The recommendation was not to confirm his appointment.

A letter of 1 October 1990 gave him notice of a decision by the President of the Office to dismiss him at 1 November 1990. On 29 October he lodged an internal appeal. In its report of 29 April 1991 the Appeals Committee recommended rejecting it, and he is impugning the President's decision of 22 May 1991 to endorse that recommendation.

B. The complainant submits that only in exceptional circumstances may the President extend probation. Since the probation report of 23 March 1990 was in his favour the decision to extend the period of probation was in breach of Article 13(2).

Plainly the EPO sets great store by output and all the reports but the last show that he met its demands on that score. Besides, no one ever explained just what the criteria of output were: the only clue he got was at the outset when the reporting officers told him that the target for a probationer was half the figure for an experienced

examiner. But at their meeting with him in January 1990 they raised the production quota by 10 per cent and that was blatantly arbitrary and improper: may the EPO really refuse confirmation as it pleases just by raising the quota above whatever figure a probationer has reached?

Its reading of his reports, which show that his output was up to standard and consistent, is at odds with the facts.

He asks the Tribunal (a) to set aside the decisions of 1 October 1990 and 22 May 1991, (b) to order his reinstatement, (c) to grant him the equivalent of the pay of an established official as from 1 May 1990 and (d) to award him costs. Alternatively, he makes only claims (a) and (d), and replaces (c) with a claim to damages in the amount of 12 months' pay of an established official.

C. In its reply the EPO denies breach of Article 13(2) of the Service Regulations. It points out that the complainant failed to challenge in time the decision to extend his probation and that in any event the President has wide discretion in such matters. The first probation report, the one dated 25 September 1989, duly alerted the complainant to the need to "increase his output". At their meeting of January 1990 with him the reporting officers did not "raise" the production quota by 10 per cent; they merely reminded him that his output was not yet up to what was expected of probationers. Over the next two months - February and March 1990 - he showed that he was capable of much more and only on the strength of his apparent willingness to keep up even progress did they recommend confirmation. In the circumstances there were sufficient grounds for extending his probation.

There was nothing arbitrary about the decision to dismiss him. What proved conclusive were his output and his attitude in the extended period of probation as recorded in the final report of September 1990. Had he gone on working as hard as he had before the extension he would have easily come up to standard; but the evidence shows that by the time of final assessment his performance still fell short and his output was, as the report said, "below the expected average".

Though the reports do praise his ability and the quality of his work, that was all the more reason for his supervisors' insisting on output to match. The long and the short of it was that he did not exert himself as he ought.

As for the change of technical field, it was mooted even before the very first report - the one of 25 September 1989 - the complainant himself wanted it, and the reporting officers made due allowance for it in setting his production quota.

CONSIDERATIONS:

1. The complainant joined the staff of the EPO on 1 May 1989 as an assistant search examiner of patents at grade A1 and in accordance with Article 13 of the Service Regulations was put on probation for one year. On 1 October 1990 he was given written notice of dismissal at 1 November 1990. He lodged an internal appeal. By a majority the Appeals Committee recommended rejecting it and the decision that the President of the Office took on 22 May 1991 endorsing that recommendation is the one he is now impugning.

2. There is no dispute about the complainant's technical qualifications and skills, or proficiency in languages, or the soundness of his research work, his conscientiousness, time-keeping, or ability to get on with others: those are qualities that his supervisors acknowledged in the reports they wrote. The sole matter at issue is whether he was assiduous enough to produce an adequate and even output as measured by the number of patent applications he processed.

In the interim report dated 25 September 1989 his supervisors described his output as average and said that "after a period of adaptation and gain in confidence" he "should be able to increase" it. In their view he was "progressing satisfactorily". The second report, dated 23 March 1990, recorded that he had dealt with 65 applications and described that as "a very good output". But his output had been uneven: in May 1989, for example, he had dealt with not a single application, in June with 3 and in July with one, and in January 1990 again with 3, whereas in February 1990 the figure was 17 and in March 13. The general comment was that "after a talk with his director and the principal deputy director" he had made "strenuous efforts in February and March" and was "willing to continue" them, and the recommendation was for confirming his appointment. He entered no objection to those assessments.

3. The upshot was, however, that the President of the Office decided to extend the period of probation. He did so in the exercise of the discretion that Article 13(2) of the Service Regulations conferred on him. That provision reads

in part:

"... 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 and in respect of probationers in other categories the extension may not exceed three months.

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."

The President's decision was conveyed to the complainant by the Principal Director of Administration in a note of 17 April 1990. It was open to the complainant to file an appeal against the decision within the time limit of three months set in Article 108 of the Service Regulations. He did not do so. The extension of his probation is therefore beyond challenge: he may not object to it in the context of this complaint since he has failed to exhaust the internal means of redress as Article VII(1) of the Tribunal's Statute requires him to do.

4. An interim report dated 12 July 1990 was inconclusive. But the final probation report, which the reporting officer signed on 20 September and the countersigning officer on 26 September, recommended against confirming the complainant's appointment. The reporting officer wrote:

"... we now find that he is not putting in as much effort as in February and March of 1990. Since then his output has evened out but it is too low. Even allowing for the fact that he has been working in a new field since 1 April - a change he agreed to and had himself asked for - his output is below par. He has been warned of this orally. So we do not recommend an indefinite appointment."

The countersigning officer agreed that the complainant's "overall performance has not reached the level the Office can expect at this stage".

5. As the case law makes plain - for example, Judgments 736 (in re Michael) and 1161 (in re B.) - a decision not to confirm a probationer's appointment is a matter of discretion for the President. Although the Tribunal may review the lawfulness of dismissal of a probationer, 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.

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 the appointment. It must indeed be allowed the widest measure of discretion in determining whether someone it has recruited is suitable.

6. The Tribunal is satisfied that in this case the President of the Office made proper exercise of the discretion he enjoys under Article 13(2) to decline, on the grounds of performance, to confirm the complainant's appointment.

The Organisation is free to set quotas for the output of patent examiners. The complainant has failed to offer any evidence to suggest that the quotas the Organisation set for him were in any way unreasonable or that, even when he attained them, the evenness of his output was such as the Organisation was entitled to expect of him. In the circumstances it is not proven that the decision not to confirm his appointment shows any of the fatal flaws set out in 5 above.

DECISION:

For the above reasons,

The complaint is dismissed.In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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