SEVENTY-SEVENTH SESSION

In re VOLLERING (No. 3)

Judgment 1340

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 5 November 1993, the EPO's reply of 24 January 1994, the complainant's rejoinder of 28 February and the Organisation's surrejoinder of 12 April 1994;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 106 to 109 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a Dutch citizen, is employed by the EPO as a patent examiner at grade A3 in Directorate-General 1 (DG1) at The Hague.

On 3 June 1992 he lodged an internal appeal under Articles 106 to 108 of the Service Regulations against the imposition of a computer programme known as "computer-assisted editing of search and annex reports", or CAESAR. The President of the Office referred his appeal to the Appeals Committee on 29 June 1992.

The Administration's reply of 18 May 1993 contained the text of a note which the Principal Director of Search had sent to the Personnel Department on 12 June 1992 and which included the remarks that the complainant "seems to require a lot of time to do anything" and his "main contribution to the EPO would appear to lie in the field of time deductions".

On 14 June 1993 the complainant filed a second appeal asking the President to offer an apology for the harm he said the note had caused him; to circulate among certain staff members an official denial of the allegations in it; and to replace the Principal Director with someone other than a subordinate as the countersigning officer for reports appraising the complainant's performance in periods since 1991.

In a letter of 15 June the complainant asked the chairman of the Committee not to take up his appeal of 3 June 1992 until he could answer the allegations by the Principal Director. The chairman accordingly adjourned his appeal to November 1993.

By a letter of 30 June the Director of Staff Policy told him on the President's behalf that since the note of 12 June 1992 was part of the Administration's reply to his appeal of 3 June 1992 he was free to comment on the note in his rebuttal of that reply.

On 28 July 1993 the Principal Director wrote to him referring to his note of 12 June 1992, admitting that his criticism of deduction of time for writing an article was unfounded and apologising unreservedly for having made the statement, which was "not based on fact".

The complainant impugns the inferred rejection under Article 109(2) of his claims of 14 June 1993.

B. The complainant submits that the EPO has failed to address his claims. The letter of 30 June 1993 from the Director of Staff Policy ignores them, and the note of 28 July from the Principal Director is not a substitute for the official denial he wants from the President of the Office.

The Administration's failure to replace his countersigning officer has left him open to such biased remarks as the one the Principal Director appended to his 1992 appraisal report on 1 June 1993, that he showed "reckless disregard for the efficiency and well-being of the Office".

He seeks an award of 25,000 guilders in moral damages, including 5,000 for the Administration's failing to apologise for injury caused by the note of 12 June 1992, 10,000 for its failing to circulate a formal correction of the unfounded allegations and innuendos in the note, and 5,000 for its ignoring his claims of 14 June 1993. He also wants the Tribunal to order the EPO to meet his claims and pay him 10,000 guilders in costs.

C. In its reply the EPO submits that the complaint is irreceivable. Since the note the complainant objected to was part of the Administration's brief in his first appeal he should have commented on both at the same time. Instead he mistakenly singled the note out and then went to the Tribunal without first exhausting the internal means of redress. Besides, the Principal Director having apologised on 28 July 1993 for a statement "not based on fact", he had no cause of action. It is premature for him to ask for the appointment of another countersigning officer for his reports for 1992 and later years: he must wait for the outcome of the conciliation proceedings he has requested on his 1992 report before lodging such an appeal.

In subsidiary argument the EPO contends that the only apology worth having comes from the official at fault, not from the Administration. Since the Principal Director apologised and circulated his apology, the complainant is wrong to accuse the President of ignoring his claims. Not only do his claims to moral damages go beyond those in his letter of 14 June 1993, but he does not back them up with argument.

D. In his rejoinder the complainant rebuts the EPO's pleas on receivability. Neither the subject of his first appeal nor the redress he was seeking has anything to do with this dispute. The "apology" from the Principal Director was not a decision of the President's; besides, it concerns only part of the note he was objecting to. He gave the President four-and-a-half months to take a decision on the claims in his letter of 14 June 1993 before he went to the Tribunal.

The Principal Director's bias being plain from his note of 12 June 1992, the complainant sought impartial protection of his basic rights from the President. The "apology" from the Principal Director aggravated the injury by ignoring some misrepresentations in the original note and making a new one. There being serious doubts about the Principal Director's impartiality, the President had a duty to replace him as countersigning officer to ensure the "neutrality" of reporting.

He broadens his claims to include 5,000 guilders in moral damages for each of the staff reports the Principal Director countersigns, starting with the one for 1992.

E. In its surrejoinder the EPO says there are no arguments in the complainant's rejoinder that might lead it to change its position. Nor does anything in his performance reports bear out his allegations of bias. His new claim to damages is irreceivable since it rests on hypothetical injury which the evidence does not bear out.

CONSIDERATIONS:

1. On 3 June 1992 the complainant lodged an internal appeal - No. 18/92 - with his employer, the European Patent Organisation, objecting to the compulsory use of a computer programme known as CAESAR. On 29 June his appeal was transmitted to the Appeals Committee.

2. While considering his appeal the Personnel Department had asked for a note from his supervisor, the Principal Director of Search, who wrote one on 12 June 1992. The text, which was headed "Note for the Personnel Department", was not brought to the complainant's notice until nearly a year later in the course of the internal appeal proceedings. The last paragraph read:

"That Mr. Vollering personally requires a lot of time for using the CAESAR system would not surprise me since he seems to require a lot of time to do anything. At my request he once prepared a (well written) article for the house magazine (EUREKA) ... According to the time deducted, this took Mr. Vollering 3 weeks to do. Furthermore, I note that, in 1991, Mr. Vollering deducted 58.7 days for tasks in staff representation. Considering that Mr. Vollering is not an elected person, it is interesting to compare this figure with the 46 days deducted by an elected person who was also Chairman of the Staff Union. To sum up, Mr. Vollering's main contribution to the EPO would appear to lie in the field of time deductions."

3. In a letter of 14 June 1993 the complainant set out at length his objections to the note of 12 June 1992 and asked the President of the Office:

"on behalf of the EPO administration to apologise for the harm to me caused by [the note]."

"to write on behalf of the EPO a statement rectifying the false declarations, insinuations and prejudicial allegations made [in the note]; and to send this statement" to him and to a list of EPO officials he named;

"to replace [the Principal Director of Search] as the Countersigning Officer by a person not under his supervision, for all [his] Staff Reports following the period 1990-1991."

In conclusion he said that, if the President declined, his letter was to be taken as lodging a further internal appeal under Articles 106 to 108 of the Service Regulations.

4. A letter which the Director of Staff Policy wrote him in reply on 30 June 1993 said that the note of 12 June 1992 was "not a report within the meaning of Article 47 of the Service Regulations" but a document written and submitted in the course of internal appeal proceedings under Article 108(1) of the Service Regulations; it was open to him to comment in answering the EPO's reply to appeal 18/92.

5. The Principal Director of Search sent the complainant a note dated 28 July 1993 which said:

"In my note of June 12, 1993 [recte 1992] to the Personnel Department I expressed strong criticism of the time I said you had deducted for the preparation of an article in EUREKA. This was based on my recollection of the deduction which you communicated to me verbally at the time in question.

A subsequent check has shown that this criticism was unfounded and that no such deduction had been made.

I apologise unreservedly for having made this statement which was not based on fact."

6. The Appeals Committee took up appeal 18/92 in November 1993. The complainant's further brief did not mention the Principal Director's note of 12 June 1992 but at a meeting of the Committee he put to it in writing a request dated 10 November that it "ignore" the note and he appended thereto a copy of the present complaint to the Tribunal. The Committee in its report recorded his request and did not in fact cite the note of 12 June 1992.

Receivability

7. The Organisation argues that there was "every justification" for the complainant's "consolidating the internal appeal protesting" against that note with appeal 18/92, that he was therefore wrong in "excluding this document" from the latter appeal, and that since he has failed to exhaust the internal means of redress on that score his complaint is irreceivable insofar as it objects to the note.

8. When he first protested against the note in his letter of 14 June 1993 to the President he asked that if the President refused his request for redress the letter should be treated as lodging an internal appeal under Articles 106 to 108. Having refused his request, the President was obliged to deal with the matter as an internal appeal. Article 109 provides:

"(1) If the President of the Office or, where appropriate, the Administrative Council considers that a favourable reply cannot be given to the internal appeal, an Appeals Committee as provided for in Article 110 shall be convened without delay to deliver an opinion on the matter; the authority concerned shall take a decision having regard to this opinion. Extracts from the decision may be published.

(2) If the President of the Office has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected. ...

(3) When all the internal means of appeal have been exhausted, a permanent employee ... may appeal to the Administrative Tribunal of the International Labour Organisation under the conditions provided in the Statute of that Tribunal."

So the complainant is correct in saying he is entitled to lodge a separate internal appeal against any allegations or insinuations in the note that he may take to be false and damaging. It gave rise to a new cause of action that was independent of the compulsory use of the CAESAR programme. The President did not convene the Appeals Committee to hear his appeal on that score and therefore, under Article 109(2), rejection was implied two months

after the lodging of the appeal. That is the decision impugned. Under Article VII(2) of the Tribunal's Statute the complainant had ninety days from the date of the implied rejection in which to lodge a complaint, he observed the time limit, and his complaint is therefore receivable.

The merits

9. The Organisation submits that it is devoid of merit because he received from the Principal Director of Search the note of 28 July 1993 withdrawing the allegations he had objected to and offering an apology.

10. The plea is mistaken. The Principal Director withdrew only one allegation, about the time the complainant had taken to write an article, and apologised for the factual inaccuracy therein. He made no withdrawal of the other allegations or any apology for them. In that he apologised for only the one allegation he might be deemed to be reaffirming his other allegations. The note of 12 June 1992 is highly sarcastic in tone and the remarks it contains are seriously damaging for any supervisor to make about a subordinate if they are untrue. The Organisation did not ask the Principal Director to substantiate his allegations, and it is still maintaining that the note contains - apart from the acknowledged inaccuracy - only remarks of a general nature and that the complainant has offered no evidence showing them to be untrue. In point of fact he appends to his complaint a letter addressed on behalf of the Central Staff Committee to the President on 2 July 1993 which states that the amount of time off which the Principal Director said he spent on staff activities is excessive.

11. At all events the onus of proof lies on the Organisation to bear out its allegations and insinuations and not, as the Organisation submits, on the complainant to show them to be untrue. In the absence of any proof of their accuracy the assumption must be that they are untrue.

12. The EPO has not responded at all to the complainant's situation. What he sought was an acknowledgement from it that what had been alleged against him was untrue, the form to be two-fold: an apology from the President for the harm caused and a statement correcting the untrue allegations. He got neither.

13. The Organisation pleads that an apology is of value only if it comes from the author of the note. That is too narrow a view. The complainant had a legitimate grievance and was entitled to have his good name vindicated by the Organisation. The least he was entitled to was an acknowledgement that the allegations were untrue, and indeed an apology would have been a gracious addition.

14. The complainant was entitled to redress for the harm caused to him by the untrue allegations. Subordinates are vulnerable to criticism by superiors and if criticism is untrue must be protected from unjust attack. In this case there was a duty on the Organisation to make an investigation. Since it failed to take any such action the complainant is awarded moral damages for its failure to protect and vindicate his good name. The amount is set at 10,000 guilders. He is also awarded costs.

15. The complainant has asked that the Principal Director of Search should not act as countersigning officer for his staff reports after 1990-91. The EPO submits that his claim is premature because his first report after 1990-91 was the one for 1992 and at the time of the Organisation's reply to the complaint it was the subject of the conciliation procedure which is provided for under the guidelines on staff reports and which the complainant had applied for on 18 September 1993. The Organisation submits further that if after the procedure has been completed he is dissatisfied with the outcome he may lodge an internal appeal.

16. The Tribunal agrees. The complainant is entitled to ask the President to take a decision on that matter and may then lodge an internal appeal if dissatisfied with it.

DECISION:

For the above reasons,

1. The Organisation shall pay the complainant the sum of 10,000 guilders in damages for moral injury.

2. It shall pay him 500 guilders in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tirbunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner

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