SEVENTY-SEVENTH SESSION

In re OFFERMAN

Judgment 1352

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paul-Peter Offerman against the European Patent Organisation (EPO) on 3 April 1993, the EPO's reply of 21 June, the complainant's rejoinder of 17 September and the Organisation's surrejoinder of 15 November 1993;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 13, 106, 107 and 108 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 Dutchman, joined the staff of the EPO at its office at The Hague on 1 February 1991 as an electro- technician at grade B2. Under Article 13(1) of the Service Regulations his first six months of service were probationary, a report being due by the end of the fifth month.

On 16 July he signed without comment a probation report drawn up on 8 July. His reporting officer recommended confirming his appointment but said there was room for improvement "on punctuality and service" and quality of work. His countersigning officer recommended extending probation until 15 October 1991 and telling him that he was "not progressing satisfactorily".

By a letter of 23 July 1991 the head of the Personnel Department informed him that the President of the Office had decided to extend the probation period by two-and-a-half months as from 1 August 1991 and that confirmation of his appointment would depend on "improvements being noticed in your work".

The two reporting officers who signed his final report on 23 September recommended against confirmation on the grounds that he had not shown improvement and was lacking in "perceptivity, initiative and independence". The countersigning officer having endorsed their recommendation, the complainant protested in comments dated 1 October; he described "a superior" of his as "not able or willing" to solve problems in the department and announced his intention to appeal.

By a letter of 9 October 1991 he asked the President to confirm his appointment or treat his letter as an internal appeal under Articles 106 to 108 of the Service Regulations.

The head of the Personnel Department informed him in a letter of 15 October that the President had decided to dismiss him as from 16 October 1991 under Article 13(2).

In a letter of 11 November 1991 the Principal Director of Personnel conveyed to him the President's decision to refer his case to the Appeals Committee. In its report of 8 October 1992 the Committee recommended rejecting his appeal. By a letter of 7 January 1993, the impugned decision, the Director of Staff Policy notified to him the President's decision to endorse that recommendation.

B. The complainant submits that the President's decision was unlawful. He puts forward three pleas.

He argues first that there were fatal procedural flaws. Under Article 13(2) of the Service Regulations his first probation report was due not less than one month before expiry of probation, but he got the report just two weeks before. The Administration further infringed 13(2) by denying him time "for reflection" to write comments on the report.

His second plea is misuse of authority by the countersigning officer. Although the reporting officer favoured confirming his appointment, the countersigning officer recommended extending the probation period simply on the

grounds that the six months prescribed in the Service Regulations were too short, not because of any exceptional circumstances or serious doubts warranting such treatment.

He contends, lastly, that by extending the probation period the President drew a mistaken conclusion from the evidence. He was wrong to rely on certain adverse comments by the reporting officer, whose general recommendation was in the complainant's favour, and to follow the recommendation of the countersigning officer. The copious criticism in the second report - of work covering less than two months - was designed merely to afford a basis for the decision not to confirm his appointment.

He seeks the quashing of the decision of 7 January 1993, confirmation of his appointment as from 1 August 1991 with payment of salary and entitlements up to the date of reinstatement, and awards of 50,000 guilders in moral damages and 3,000 guilders in costs.

C. In its reply the EPO submits that his complaint is devoid of merit insofar as it is directed against the decision of 15 October to dismiss him on 16 October 1991. Insofar as it challenges the President's decision of 23 July not to confirm his appointment as from 1 August 1991 it is irreceivable and, besides, without merit.

The EPO points out that since the complainant did not lodge a timely appeal against the decision of 23 July 1991 he has failed to exhaust the means of internal redress in keeping with Article VII(1) of the Tribunal's Statute. He neither commented on the recommendation in the first report to extend probation nor referred to it in his letter of 9 October 1991 appealing against dismissal. Indeed he first referred to the decision of 23 July 1991 in a note to the Appeals Committee dated "08.92" in reply to the statement from the Administration on his appeal.

In any event the decision to extend his probation was sound. Since any appointment would have been permanent the Administration had to make sure he could carry out his duties to his supervisors' satisfaction. The delay in issuing his first report was not detrimental to him and so is not a fatal flaw. He had ample time to comment on the report between 16 July 1991, when he received it, and the decision of 23 July.

Inasmuch as he did not make any effort to dispel the doubts expressed in the first report his second could but confirm that he was unfit for permanent appointment in cate- gory B. Had he taken seriously the Administration's earlier warnings would he have sacrificed two-and-a-half weeks on annual leave during the extended probation period?

Since the President of the Office did not act unlawfully, the complainant's claims are unfounded.

D. In his rejoinder the complainant observes that he expressly appealed in the letter of 9 October 1991 against the decision of 23 July, the only one adversely affecting him at the time. After setting out his objections to that decision he explained why he had delayed appealing against it until 9 October, a date well within the prescribed time limit.

He objects to his supervisors' failure to discuss his shortcomings before issuing the first report and accuses an official unfamiliar with his work of altering the favourable evaluation the reporting officer put in the second report. He alleges other flaws in the reporting procedure and describes his taking of annual leave as "normal and appropriate".

E. In its surrejoinder the EPO says there are no points in the rejoinder that alter its position. Though it could have objected that his internal appeal against dismissal was premature since he did not receive the decision to dismiss him until 15 October 1991, it pleads irreceivability only on the grounds of his belated challenge to the extension of probation. It rebuts his pleas on the merits and submits that his comments about a supervisor - who was acting on authority delegated by the countersigning officer - are libellous.

CONSIDERATIONS:

1. On joining the staff of the EPO at The Hague on 1 February 1991 as an electro-technician at grade B2 the complainant was put on probation. The period of probation was six months in accordance with Article 13(1) of the Service Regulations.

2. His supervisor and reporting officer was Mr. Vrugt, the head of Technical Services, and the "countersigning" officer was Mr. Minnoye, the Director of General Administration. Mr. Vrugt signed the complainant's first

probation report on 8 July 1991 and Mr. Minnoye on 13 July. About his ability to perform his duties the report said under point II.2:

"Seems to perform his duties in an adequate way. In case of handing over work to colleagues this has to be done more carefully. Could improve on punctuality and service. Seems to take certain things too lightly."

The comments in II.3 on the "quality and quantity of the work performed" were:

"Quality is average, but certainly has to be improved. Quantity seems average."

and in point II.4 on "conduct at work":

"Mr. Offerman appears to be a pleasant colleague. Seems to learn quickly. A little more attention should be given to punctuality and application in relation to the work."

Though Mr. Vrugt recommended confirming his appointment Mr. Minnoye said in comments under point III:

"The execution and completion of technical tasks by Mr. Offerman can be quoted as good but within the short probationary period it is difficult to evaluate Mr. Offerman's capabilities to learn, adapt himself and respect all working procedures within the technical service, therefore I propose to extend the probationary period until 15/10/91."

On 16 July the complainant signed the report, saying that he had "no comments to make".

3. By a note dated 23 July the head of the Personnel Department informed the complainant of the decision by the President of the Office to "prolong your probation period by 2 1/2 months as of 1 August 1991" in accordance with Article 13(2) of the Regulations and explained that the confirmation of his appointment would "depend on improvements being noticed in [his] work, taking into consideration the remarks made by [his] superior at point II, paragraphs 2, 3 and 4" of the probation report.

4. Mr. Vrugt having since been transferred to another post, two other supervisors, Mrs. van der Steenhoven and Mr. van Houwelingen, were in turn in charge of Technical Services. They signed a final probation report on the complainant on 23 September 1991. Their detailed comments were unfavourable and they recommended against confirming his appointment. The complainant added undated "General comments" protesting against their evaluation, but Mr. Minnoye too, as countersigning officer, recommended on 25 September against confirmation saying:

"Despite the fact that a chance was given during the prolongation of the probationary period, Mr. Offerman was not able to use this opportunity to improve his performance significantly."

5. The complainant thereupon appealed to the Appeals Committee; in its report of 8 October 1992 the Committee recommended rejection; the President accepted the recommendation; and the Director of Staff Policy so informed him by a letter of 7 January 1993, the decision he impugns.

6. The complainant contends:

first, that his appointment should have been confirmed at the end of six months and that the decision of 23 July 1991 to extend the period of probation was wrongful; and

secondly, that the extension was too short and came during the summer holidays, when his supervisors kept changing, and that the decision to terminate his appointment was wrongful.

The relief he seeks is:

(a) the quashing of the final decision of 7 January 1993;

(b) the confirmation of his appointment as a permanent employee as from 1 August 1991;

(c) payment in full of his remuneration from 1 August 1991 to the date of reinstatement;

(d) 50,000 guilders in moral damages; and

(e) 3,000 guilders in costs.

7. The Organisation submits that his objections to the decision of 23 July 1991 to extend his probation are irreceivable because they did not form part of his internal appeal, which in its view challenged the decision to dismiss him at the end of the extended period.

8. In his letter of 9 October 1991 to the President he protested against the evaluation of his career in the first probation report; he explained that the reason why he had not at the time appealed against the extension of probation was his awareness of "managerial problems in the technical service"; he sought confirmation of his appointment; and he said that if the President did not allow his claims his letter was to be treated as lodging an internal appeal. It was so treated. In his submissions to the Appeals Committee he made the same case as he does before the Tribunal. In particular he asked the Appeals Committee to recommend allowing his appeal against the decision of 23 July 1991 not to confirm his appointment. In its report the Committee noted that the EPO had raised "no objection to the receivability" of the appeal and it went into the merits.

9. What was at issue before the Committee was the EPO's decision not to confirm the complainant's appointment, and he chose to object to the failure to confirm at the end of his first six months' probation and to the failure to appoint him at the end of the extended period. Since he filed his appeal within three months of the decision of 23 July 1991 and since he raised both those issues before the Committee, he is not barred before the Tribunal from basing his argument on the first probation report.

10. As he points out, he did not receive the text of that report one month before the end of the prescribed six months and he had no discussion with Mr. Vrugt as reporting officer before the report was drawn up. But the matter at issue is whether there was any fatal flaw in the essence of the decision, i.e. whether he suffered any injury. As the Tribunal held in Judgment 890 (in re Créchet) under 3:

"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."

11. In this case the complainant chose not to make comments on the report and in any case, instead of being dismissed, was given another two-and-a-half months in which he might have shown his mettle. The Tribunal concludes that in the circumstances he suffered no actual injury either from the lack of prior discussion or from getting the text of the report on 16 July instead of 30 June. The conclusion is that the Organisation's failure to meet the deadline in Article 13(2) did not make unlawful the decision not to confirm his appointment.

12. The Tribunal has stated many times the limited grounds on which it may review the lawfulness of termination where there is no fatal formal or procedural flaw. They are that there was a mistake of law or fact, that some essential fact was overlooked, that clearly mistaken conclusions were drawn from the evidence, or that there was abuse of authority. What is more, in the case of dismissal of a probationer the employer is to be allowed the widest discretion and the decision will be quashed only if the mistake or the illegality is especially serious or glaring: see, for example, Judgment 687 (in re Delangue) under 2.

13. The complainant alleges that the President drew mistaken conclusions from his first probation report in deciding to extend the period of probation in that he overlooked the favourable remarks in the appraisal; that the adverse comments by Mr. Vrugt were not all that serious since he recommended confirmation; that the countersigning officer, Mr. Minnoye, mentioned the difficulty of assessing him in a mere six months; and that he should not suffer for the shortness of probation.

14. It would have been justifiable to confirm the complainant's appointment at the end of the first six months only if his work had proved satisfactory in all respects. The report did not suggest that it was. Mr. Minnoye's remarks are not to be taken to mean, as the complainant implies, that in all cases a period of six months is too short for probation, but that it was too short in his case. Had his performance already proved satisfactory in all respects the

six months would have been adequate. But because he still had doubts the countersigning officer refused to endorse the reporting officer's recommendation to confirm his appointment. That the two supervisors disagreed affords no reason for setting aside the decision by the President, who, with two diverging opinions before him, chose to follow the recommendation for extension. There are no grounds for saying that the President overlooked the good features of the report and paid heed only to the bad: the President had to evaluate the report as a whole, setting good against bad. His decision to extend the probation was an unobjectionable and indeed entirely reasonable response intended to enable the complainant to improve.

15. The complainant contends that Mr. Minnoye's recommendation for extension of his probation was an abuse of authority because it was not based on any adverse comment. In fact what Mr. Minnoye said cannot be interpreted as unqualified approval: he clearly thought that the complainant had not proved himself and required more time. His recommendation was no abuse of authority.

16. As to the second probation report signed on 23 September 1991, the complainant objects to its going into an "enormous amount of detail about the different aspects" of work he had done over a period of "less than two months and during a peak holiday period in which the supervisor of the complainant was constantly being changed".

17. One of the supervisors who signed that report was Mrs. van der Steenhoven. She had been his tutor in his first six months on probation and later his supervisor for fourteen working days. The other reporting officer was Mr. van Houwelingen, and he was the complainant's supervisor for ten working days before the report was made. So each of them had sufficient opportunity to see whether he had made efforts to improve his performance as assessed in his first probation report. The details of their observations serve to show that they were watching him closely in the period in which he came under their supervision. The time that each of them had - particularly Mrs. van der Steenhoven, since she already knew the complainant and his work - was quite adequate to enable them to form an opinion that the President of the Office might safely rely on. Nor is there any evidence before the Tribunal to suggest that any of their criticisms was made in bad faith and with the purpose - as the complainant contends - of "justifying the decision". The President therefore made no error in acting on their recommendation.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public in Geneva on 13 July 1994.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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