Registry's translation, the French text alone being authoritative.

SEVENTY-SEVENTH SESSION

In re POPINEAU (Nos. 6, 7 and 8)

Judgment 1363

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Gérard Popineau against the European Patent Organisation (EPO) on 6 October 1993 and corrected on 18 October 1993, the EPO's reply of 10 January 1994, the complainant's rejoinder of 1 March and the Organisation's surrejoinder of 29 April 1994;

Considering the seventh and eighth complaints filed by Mr. Popineau against the EPO on 13 October 1993 and corrected on 24 October 1993, the EPO's replies of 12 January 1994, the complainant's rejoinders of 1 March and the Organisation's surrejoinders of 29 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 14, 16, 28, 45, and 93 to 113 of the Service Regulations of the European Patent Office, the secretariat of the EPO and circular 135 of 6 August 1984;

Having examined the written submissions and disallowed the complainant's application of 11 May 1994 for hearings;

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

A. The complainant, a Frenchman who was born in 1949, joined the EPO in 1983 and worked as an examiner in Directorate-General 1 (DG1) at The Hague.

By a letter of 5 November 1990 he applied under Article 45 of the Service Regulations for leave on personal grounds from 1 January 1991 for one year in which he would be gainfully employed with a firm of consultants on electronic data processing. The leave was granted in a letter of 21 December 1990. In a letter of 11 December 1990 of which he acknowledged receipt on 13 December the Head of the Personnel Department of the European Patent Office alerted him to Article 16(1) of the Service Regulations which is headed "Incompatible activities" and reads:

"... A permanent employee shall neither hold any office nor pursue any activity which is incompatible with the normal execution of his task, including any activity related directly to his function at the Office and performed independently of the latter for any purpose other than educational.

In particular, a permanent employee shall not participate directly or indirectly in the preparation or filing of an application for a patent for invention or any equivalent, or in any official proceedings relating to any such application or any resulting patent, whether on his own account or on behalf of others."

By a letter of 31 October 1991 the complainant applied for another year's leave and that was granted in a letter of 6 November.

In March 1992 there came to the Office's notice a pamphlet (SIREN No. 3248366162) advertising a firm called "Gérard Popineau Consultants" and offering among other things "research into the latest technology ... for patent applications". The pamphlet was a trading prospectus and described the work of a firm in France, with addresses in Paris and at Cogolin, in the department of Var, which consisted of university and professional people belonging to a variety of disciplines such as mathematics, data-processing, physics, electronics, bio-medical engineering and architecture.

In a letter of 27 March 1992 the Vice-President of the EPO in charge of DG1 took the complainant to task for having engaged in unauthorised outside professional activities since his appointment in 1983; ordered him to stop them at once because they were forbidden by Article 16(1); and told him that disciplinary proceedings had been started to dismiss him.

By a letter of 31 March 1992 to the President of the Office he denied engaging in professional activities incompatible with his EPO duties and receiving any income but salary between the date of his appointment to the EPO and the starting date of his unpaid leave. He pointed out that the pamphlet had gone out in September 1991 and asked that the disciplinary proceedings stop.

On 4 May 1992 the Disciplinary Committee received a report instigating disciplinary proceedings. On 5 and 6 May its chairman invited the complainant by telephone and by telegram to attend a meeting at The Hague on 11 May at which lots would be drawn for membership of the Committee in accordance with Article 98 of the Service Regulations. Money was paid into his account to cover travel costs. Since he did not reply the deputy chairman wrote to him on 25 May to say that lots would be drawn at a meeting on 12 June whether he came or not.

By letters of 21, 27 and 28 June the complainant filed three appeals. The first, which was numbered 19/92, was against the decision of 27 March 1993 forbidding him "any activity related to research into the latest technology ... for applications for patents". The second, 20/92, challenged the same decision insofar as it started disciplinary proceedings for dismissal. The third, 21/92, impugned "the decision of the Deputy Chairman of the Disciplinary Committee to start disciplinary proceedings to dismiss him with reduction of severance grant, notified by a letter of 25 May 1992".

In its report of 3 August the Disciplinary Committee held that:

the charge of acceptance of payment during the period of active service and without prior leave was not proven;

publication of the pamphlet "Gérard Popineau Consultants" was damaging to the EPO's interest and good name;

publication of it was serious misconduct;

the charge that he had engaged in forbidden activity before or during unpaid leave was not proven.

The majority believed that loss of step would be a proper penalty.

The Principal Director of Administration wrote on 26 August 1992 informing the complainant that the President did not agree with the majority and upheld his decision and asking him in accordance with Article 102(3) of the Regulations whether he wished to comment.

Since the complainant did not, the President confirmed by a letter of 2 September 1992 the decision to dismiss him under Article 93(2)(f), said it would take effect on 1 February 1993 and reduced his severance grant by one-third. Another letter of even date told him that he was forbidden any activity connected with patents until 1 February 1993. By a letter of 9 September he asked whether the ban applied to his colleagues and partners as well.

By a letter of 19 October the Organisation replied that it did, and he filed another two internal appeals on 30 November 1992 and 16 January 1993. The first, 42/92, sought the quashing of the decision of 2 September dismissing him. The second, 1/93, challenged the decision of 19 October "to treat it as a breach of Article 16(1) for an employee to carry on activity directly related to EPO duties".

Since his leave ended on 31 December 1992 and his dismissal took effect only on 1 February 1993, he reported for work on 4 January. By a minute of that date the Head of Personnel told him that he was relieved of duty but would be paid for January. The next day a minute forbade him to set foot on the Office's premises. By a letter of 20 January 1993 he challenged both decisions in a sixth appeal, 7/93.

In a report of 24 May 1993 the Appeals Committee, to which all his appeals had been referred, recommended allowing his claims in appeal 42/92, to the quashing of dismissal and to the refund of travel expenses, but none of the others.

By a letter of 7 July 1993, the impugned decision, the Director of Staff Policy notified to him the President's rejection of all his appeals.

B. In his sixth complaint the complainant observes that many examiners have carried out patent work while on leave on personal grounds. He cites the case of one who he says, though still on the staff, is the founder and main shareholder of a firm providing patent-related services. The Office encourages training in industry, which often

entails activity forbidden by Article 16(1). So the EPO has discriminated against him. Dismissing him is a misuse of authority, the more so as the Organisation infringed his right to a hearing.

He submits that the EPO offers no proof of its charges, particularly the one that he infringed 16(1). Its failure to abide by the rules of evidence is an error of law. And even if he had offended against 16(1) it ought to have taken the action provided for in 16(3).* By failing to do so it was in breach of the prescribed procedure.

(*Article 16(3) says that

"Any permanent employee may be required:

- to terminate within a specified period any activity which is prohibited by paragraph 1;

- to take the necessary steps for terminating within a specified period any employment exercised by his spouse where such employment is in any way connected with the Organisation and proves to be incompatible with that of the employee.

If the activity or employment in question does not cease within the specified period, the employee may be transferred to another post or his services may be terminated in accordance with Article 53.")

Citing the Appeals Committee's report, he argues that the penalty the Organisation imposed on him was out of proportion to the offence: the decision to confirm dismissal - against the Committee's unanimous recommendation - was flawed with blatant misappraisal of the evidence and misuse of authority and prompted solely by his staff union work.

In his seventh complaint he submits that 16(1) applies only to an official in active employment, not to one granted leave on personal grounds. So the dismissal is tainted with an error of law. Besides, all he was doing was document research, which French consultants do not regard as part of the process of applying for a patent and which was therefore not incompatible with his EPO duties. There was abuse of authority.

In his eighth complaint he refers to appeals 20/92 and 21/92. He challenges the decision of 27 March 1992 in which the EPO, notwithstanding evidence to the contrary, accused him of outside professional activity. The decision of 25 May 1992 is in breach of the rule against double jeopardy. The drawing of lots for membership of the Disciplinary Committee was not as prescribed.

In his sixth complaint he asks the Tribunal to:

quash the decision to dismiss him with reduced payment of severance grant;

order his immediate reinstatement and payment of salary and allowances as from February 1993;

cancel the disciplinary proceedings for breach of the rules of procedure;

award him 40,000 French francs for the moral injury in being barred from the EPO's premises;

award him damages equivalent to his potential earnings for the injury in being wrongfully forbidden professional activity between April and December 1992;

order the EPO to pay the sum of 1 French franc to the European Research Federation in moral damages;

order the waiver of the immunity of an EPO official, interference with the exercise of trade union rights being a penal offence in French law.

In his seventh complaint he further asks the Tribunal to:

quash the decision of 19 October 1992;

award damages in an amount equivalent to his associates' potential earnings from the wrongfully forbidden activity.

In his eighth complaint he further asks the Tribunal to:

order the waiver of the immunity of two other EPO employees;

declare the decision to start disciplinary proceedings to dismiss him to be in breach of trade union rights;

declare unlawful the letter of 27 March 1992 and the resulting procedure;

cancel the disciplinary proceedings.

In all three complaints he seeks costs.

C. In its reply to the sixth complaint the Organisation applies for joinder on the grounds that all three complaints challenge the same decision and raise the same issues of fact.

It submits that appeals 20/92 and 21/92 are not receivable since what they impugned were not decisions adversely affecting the complainant.

On the merits it submits that the decision to start disciplinary proceedings, a matter in which the President has broad discretion, was fully warranted and shows no flaws. A second drawing of lots for membership of the Disciplinary Committee, done in the presence of a member of the Staff Committee, proved necessary to avoid prolonging unduly the delay caused by the complainant's particular situation. Besides he made no challenge, as he had the right to do under Article 98(5). His right to a hearing was fully observed. He is wrong in arguing that what Article 16(3) says is compulsory, and both Committees held that disciplinary proceedings might be brought under Article 93.

Dismissal had nothing to do with the complainant's staff union work but was due to his breach of Article 16(1). Appeal 19/92 too was irreceivable because he could not disclaim knowledge of a rule the Head of Personnel had reminded him of in the letter of 11 December 1990. It applies to all staff whether in active service or not and is intended to safeguard the Organisation's interests. In line with part of the Disciplinary Committee's conclusions the Organisation conceded that the complainant had not practised any forbidden activity between 1983 and the start of his leave. But unlike the Committee it considers, on the strength of concurring evidence it sets out at length, that the complainant did engage in forbidden activity. By failing to disclose its real nature he was in bad faith. Worse still, it is not proven that he has desisted.

It is untrue that the EPO condones breach of the rules in 16(1). It strictly checks that they are observed, particularly when examiners are undergoing industrial training. As the owner of his business the complainant was not in the same case as the other official whom he mentions by way of example, who is "now just a shareholder" in a service company.

His misconduct was serious enough to warrant dismissal, and there is no question of reinstatement.

His claim to waiver of the immunity of EPO officers is irreceivable because he put it for the first time in one of his internal appeals and there was no decision; it is also groundless because the officers were acting in the discharge of duty.

He has no locus standi to claim damages for a trade union which is not privy to the dispute.

In answer to his seventh complaint the EPO submits that appeal 1/93 against the decision of 19 October 1992 was irreceivable because the decision had merely confirmed the prohibition in the letter of 11 December 1990. Besides, as the Appeals Committee said, the prohibition was warranted.

In its reply to the eighth complaint the Organisation recalls that according to the case law a decision to start disciplinary proceedings is not appealable.

D. In the rejoinder on his sixth complaint the complainant objects to joining the three complaints on the ground that they do not challenge the same decision. Although the Appeals Committee took all his appeals together it deliberated on them separately.

He enlarges on his pleas. Although the President said that on the Disciplinary Committee's recommendation he was

dropping some of the charges, he upheld the most heavy penalty.

The complainant contends that when he applied for leave the Organisation knew what kind of work he would be doing, and there was no requirement in the rules to reveal to it the source of his income.

Article 16 is not clear about the sort of activity it forbids. By construing it differently from the Organisation he committed a merely involuntary breach of it. So by imposing the most heavy penalty the EPO showed bias, particularly since it might have contemplated less severe action. He maintains that it was out to get him for his staff union activity.

In his rejoinder on his seventh complaint he mentions other officials' outside patent work and contends that the Organisation discriminated against him. In other cases, for example when examiners undergo training in industry, it construes Article 16 much more leniently.

Lastly, in his rejoinder on his eighth complaint he claims damages for the "libellous" charges in the decision of 27 March, asserts that the letter of 25 May 1992 from the deputy chairman of the Disciplinary Committee did start new disciplinary proceedings and repeats that the whole procedure was flawed.

E. In its surrejoinder on the sixth complaint the Organisation presses its pleas and its application for joinder.

In its submission the research done by the complainant did offend against Article 16, no matter what it was eventually used for. He incurred the risk of its being used for a patent application and liability for the consequences.

Article 16 applies also to an official who is on leave on personal grounds. The complainant had been given an express warning on 11 December 1990 and acted in bad faith, particularly since he should have asked for clarification if in doubt about what the article meant.

The EPO showed no bias against him. He may not be put on a par with examiners on industrial courses, who remain under direct EPO supervision and sign an agreement that they will maintain confidentiality.

Lastly, relying on a written statement of 28 April 1994 by an accredited Office agent, the EPO states that it has had evidence in its possession since 1991 that the complainant was carrying on forbidden activity.

In its surrejoinder on his seventh complaint the Organisation presses its earlier pleas and submits that the complainant's accusations against other staff are groundless and libellous.

In its surrejoinder on his eighth complaint it submits that the allegations in the letter of 27 March were founded and that by failing to attend the Disciplinary Committee hearings he himself hampered due process.

CONSIDERATIONS:

1. The complainant used to serve the EPO as an examiner at grade A2 in Directorate-General 1 at The Hague. He was dismissed for disciplinary reasons on 1 February 1993, and his main claims in his three complaints are to the quashing of the dismissal and to reinstatement.

The background to the dispute

2. The dismissal came about as follows. At the end of 1990 the complainant was granted one year's unpaid leave from 1 January 1991 and he later had it extended by one year. Before it started the Head of the Personnel Department sent him a letter dated 11 December 1990 pointing out Article 16 of the Service Regulations, which is headed "Incompatible activities" and forbids any activity incompatible with the normal execution of the employee's duties with the Organisation.

3. In March 1992 the EPO came by a pamphlet headed "Gérard Popineau Consultants". It advertises a "firm" established in 1982 in France that offers assistance in management and scientific and technical development, including industrial property and in particular patents for inventions. The pamphlet makes much of the firm's long practical experience in the fields it mentions. The last page offers personal data about Mr. Popineau.

4. The Vice-President of DG1 sent a copy of the pamphlet to the complainant on 27 March 1992 saying that it showed that since appointment to the Organisation he had been engaging in outside professional activity without seeking leave from the President of the Office as circular 135 of 6 August 1984 required. The Vice-President reminded him of his professional duties under Article 16 of the Staff Regulations, ordered him to desist at once and told him that disciplinary proceedings would be started to dismiss him because of the serious nature of what the pamphlet revealed.

5. On 4 May 1992 the Principal Director of Administration sent the chairman of the Disciplinary Committee a "report initiating disciplinary proceedings". It set out the charges against the complainant, the material rules and the intended sanction, which was dismissal with a one-third reduction in severance grant, as provided for in Article 93(2)(f). On 5 May he was invited to a meeting to be held on 11 May at The Hague at which lots were to be drawn in accordance with the rules to determine the membership of the Disciplinary Committee. Since he did not answer the deputy chairman of the Committee wrote on 25 May inviting him to a meeting on 12 June at which lots would be drawn whether he came or not. The report introducing the proceedings was appended.

6. Though duly invited, the complainant did not attend the disciplinary proceedings and entered no submissions in rebuttal. The Committee heard the Administration and asked whether it could prove that he had actually engaged in the activities advertised in the pamphlet. The Administration admitted that it had no evidence but the pamphlet.

7. The Committee reported on 3 August 1992. It was unanimous that in the pamphlet the complainant was offering services incompatible with his obligations under Article 16 and that by advertising them to the public he had committed a serious and punishable offence. But the majority held that the Administration had failed to show actual performance of the advertised services and for that reason recommended not dismissal but the loss of step increment provided for in Article 93(1)(d) of the Service Regulations. The minority's position is not disclosed.

8. On 26 August 1992 the President of the Office informed the complainant that he rejected the Committee's conclusion and intended to dismiss him with a reduction in severance grant, but invited him to submit comments in accordance with Article 102(3). The complainant did not respond, and on 2 September 1992 the President sent him a letter giving notice of dismissal at 1 February 1993 and reminding him that he must not in the meantime carry on any activity incompatible with his status as an EPO employee.

9. His leave expired at the end of 1992 and he reported for duty at The Hague early in January 1993. He was thereupon informed of two decisions: one, dated 4 January, relieved him of duty and granted him paid leave for January; the other, dated 5 January, banned him from EPO premises.

10. Abandoning the passive posture he had taken throughout the disciplinary proceedings, he then lodged several appeals, first against the decisions starting those proceedings, then against dismissal and lastly against the decisions of 4 and 5 January 1993.

11. On receiving the notice of dismissal he had asked the Administration in a letter of 9 September 1992 whether the ban on activity incompatible with his duties at the EPO until separation extended to his colleagues and partners in the firm. By a letter of 19 October 1992 the Principal Director of Administration answered that it did insofar as their activity was in his own interest.

12. His six appeals were referred to the Appeals Committee, which joined them. As appellant he took an active part in the proceedings. The Committee held his appeals either irreceivable or devoid of merit but for the main one against dismissal and the accessory penalty and his subsidiary claim to refund of the costs of travel to The Hague to attend the hearings. It held his main appeal receivable and sound.

13. The Committee issued its report on 24 May 1993. Its reasoning is much the same as the Disciplinary Committee's. It holds that by advertising services in the pamphlet the complainant was guilty of a serious breach of professional obligations but that the Office has failed to prove that he actually carried on the activity advertised. It seeks to determine in particular whether he acted in bad faith and finds that not proven. It therefore recommends that the President reverse the dismissal and meet the costs of his travel to attend its hearings. It says that it is of one mind about its reasoning and final recommendation.

14. By a letter of 7 July 1993 the Director of Staff Policy told the complainant that the President disagreed with the Appeals Committee and took the view that he had carried on activity incompatible with his status as an EPO

official and had acted in bad faith; so all his appeals were rejected and the disciplinary sanction in the letter of 2 September 1992 was confirmed.

15. The sixth complaint, lodged on 6 October 1993, impugns the decision of 7 July 1993. The seventh, of 13 October 1993, challenges the ban on any incompatible activity on the part of the complainant's colleagues or partners; and the eighth, of even date, appeals against the warning of 27 March 1992 from the Vice-President and the letter of 25 May 1992 from the deputy chairman of the Disciplinary Committee notifying the start of the disciplinary proceedings.

16. As the EPO asks, the seventh and eighth complaints are joined to the sixth because they touch on aspects of the main dispute.

The sixth complaint

17. In support of his main complaint Mr. Popineau puts forward the following pleas:

that there was breach of his procedural rights and right to a hearing;

that he was exempt from all professional obligations while on leave;

that the Organisation has no evidence to bear out its charges and misappraised the facts;

that the penalty was too harsh in view of the EPO's tolerance of similar practices by other officials.

The pleas are taken up below in that order.

18. The material rules are the following:

Article 14 of the Service Regulations is the first article in the chapter on the rights and obligations of permanent employees and is entitled "General Obligations". Paragraph (1) states:

"A permanent employee shall carry out his duties and conduct himself solely with the interests of the European Patent Organisation ... in mind".

Article 16 of the Regulations is entitled "Incompatible activities" and states in (1):

"... A permanent employee shall neither hold any office nor pursue any activity which is incompatible with the normal execution of his task, including any activity related directly to his function at the Office and performed independently of the latter for any purpose other than educational.

In particular, a permanent employee shall not participate directly or indirectly in the preparation or filing of an application for a patent for invention or any equivalent, or in any official proceedings relating to any such application or any resulting patent, whether on his own account or on behalf of others."

Circular 135 of 6 August 1984 requires staff to seek the President's leave to engage in any gainful outside activity and states that such activity must not impair the normal execution of duties.

Due process

19. The complainant pleads first that the Organisation's disregard of the prescribed procedure impaired his right to a fair trial as guaranteed in the Universal Declaration of Human Rights. He does not explain.

20. From scrutiny of the successive stages of the disciplinary proceedings the Tribunal is satisfied that the complainant was able to defend his rights throughout. He was told of the charges against him; he was invited to the meeting to set up the Disciplinary Committee and to its hearings; and its report and the final decision were notified to him. Instead of taking the opportunities he was offered he did his utmost to drag out and hamper the disciplinary proceedings: he did not answer its summons but, without running the risk of its questioning him, made use of the internal appeal procedure to challenge its proceedings indirectly.

21. As to the Appeals Committee proceedings, the Tribunal has one reservation on a matter that neither side has

raised: the relationship between the disciplinary procedure, governed by Articles 93 to 105 of the Service Regulations and the appeals procedure prescribed in Articles 106 to 113.

22. Even if disciplinary proceedings have begun there can be no "act adversely affecting" an employee within the meaning of Article 107 until the proceedings are over and there is a final decision by the competent authority. So the complainant's internal appeals were premature insofar as he lodged them before the President had taken his decision of 2 September 1992 on the Disciplinary Committee's report.

23. Whatever drawbacks there may be in the overlap between the disciplinary and appeal procedures, the complainant's procedural rights were in any event scrupulously observed. There was therefore no breach whatever of his right to a fair trial.

The professional obligations of an employee while on leave

24. The complainant contends that while on leave, from the beginning of 1991 to the end of 1992, he was free to carry on his firm's business and was not bound by any professional obligations as an employee of the EPO. He said so in as many words in his appeal of 21 June 1992, and again in the one of 27 June 1992, which contains the remark: "Article 16 does not apply to an employee with non-active administrative status". That is an attempt to elude criticism of his personal behaviour and of the undated pamphlet, the main exhibit in the disciplinary proceedings. He argues, though he fails to prove, that the pamphlet was published in 1991, i.e. at a time when he says he was relieved of professional obligations.

25. The plea fails. An official who is granted leave for any reason remains bound by all professional obligations but one - for that is what leave means - the performance of duties. The Head of the Personnel Department expressly reminded the complainant in the letter of 11 December 1990 that he would still have those obligations while on leave. But in any case he continued in law to be under all the obligations imposed by professional ethics, not just the one which the Head of Personnel's letter actually mentioned, and which was to refrain from helping to draw up patent applications.

26. So the complainant must be judged on his behaviour throughout the period of his employment in the Organisation, no diminution whatever of his obligations being admissible while he was on leave.

The proof and the nature of the misconduct

27. The main item of evidence that the Administration put to the Disciplinary Committee is the pamphlet described above. The complainant has never denied the authenticity or content of the pamphlet or argued that the services advertised were not provided. The Disciplinary Committee therefore had from him a tacit admission which, being absent from the hearings, he never rebutted at the time.

28. Only when the Disciplinary Committee had voiced doubt as to whether the advertised services were being provided did he change tack and seek in his submissions to the Appeals Committee to belittle the pamphlet. He made out that he had never carried on any activity incompatible with his professional obligations until he started his leave; that the pamphlet went out only at the end of the leave; and that it was just "trader's puff" anyway. Actually this last point is at odds with his repeated assertion in his briefs that his firm was not "in trade".

29. Some preliminary remarks are called for about the two bodies that in turn dealt with the case.

30. Though the Disciplinary Committee had an indisputable right and duty to satisfy itself that the Administration had a good case against the complainant, particularly in absentia, there are three points worth making.

The first is that the Committee failed to consider whether the pamphlet - besides, as it accepted, advertising services - was not in itself evidence of actual activity.

Secondly, the Committee arbitrarily shifted the burden of proof to the Administration. There was from the complainant's own hand a detailed description of his activity, and his firm was registered for business in France. So the burden was rather on him to show that it was nevertheless "dormant".

Thirdly, the Committee chose, again arbitrarily, to require from the Organisation evidence that it could not possibly produce since it had no means whatever of investigating an offence committed elsewhere by someone bent on

eluding its control.

31. As for the Appeals Committee, it promised in paragraph 56 of its report to look into "all" the grounds for dismissal "subject only to the condition that it should not duplicate the work of the Disciplinary Committee". Yet in paragraph 64 it simply endorsed all the points made by the Disciplinary Committee. It failed to examine several issues raised by the Organisation: whether there was incompatibility between the complainant's professional obligations and a potentially gainful activity that in breach of circular 135 he had neglected to declare; whether the pamphlet itself afforded evidence not only of an offer of services but of actual activity (an issue overlooked by the Disciplinary Committee too); the further evidence that came to light in the appeal proceedings, such as the complainant's admission to having "customers", colleagues and partners; the fact that "Gérard Popineau Consultants" was on the business register; and the reason he had given to explain why an allegedly dormant firm was still on that register.

32. The Committee made the issue of his "good faith" the nub of its report. But that is not part of the test of misconduct. An employee will be guilty of misconduct if his behaviour is shown to be objectively incompatible with his professional obligations. So here the Committee was taking a point quite immaterial to the case at issue.

33. In view of the shortcomings in analysis by the Disciplinary and Appeals Committees the Tribunal will itself go into the merits. All the evidence it needs being at its disposal, it will order no further submissions from the parties.

34. The complainant's own description of his firm shows it to be a commercial consultancy offering technical, economic, legal and computer research. It has impressive technology capable of processing the latest data and of a sort it could not have acquired without a reliable network of inside and outside connections. The submissions on the seventh complaint reveal that to run the business its owner, who was none other than the complainant, had to enlist the help of agents and colleagues. Such investment in technology and staff makes sense only for a long-term venture. That is borne out by the pamphlet's alluding passim to the firm's "day-to-day work", to research "completed", to the "complexity" of the work done and to the "experience" gained.

35. So the pamphlet is plainly far more than a mere advertisement of services. It dwells in detail on the purpose and activity of a busy firm of consultants which - says the complainant - has been growing since 1982. It is not credible for him to describe it as "dormant" and say he keeps it on as a "front" for the sole purpose of letting him enjoy the benefits of social security in France. The conclusion is that besides advertising services the pamphlet he distributed amounts to an avowal by him and to proof that he did engage in activity.

36. The full range of the firm's business as portrayed coincides with the EPO's own area of competence. The pamphlet contains many a reference to "industrial property", "copyright" and "patents"; it boasts years of practical experience in "a variety of environments", including the EPO; and it offers access to information at the EPO's disposal. Since the notes about the complainant's own attainments on the last page show no prior practical experience of his in that area the firm can have been offering such service only on the strength of his work at the EPO.

37. Two features of the business as advertised are worth noting here. The EPO brought them up in the disciplinary and appeals proceedings.

The pamphlet speaks of "wide experience in the different areas of basic information technology ... and applications".

Elsewhere it says that "the studies may cover important economic or legal questions: research into the latest technology ... for filing patent applications; technology monitoring through analysis ... of applications for patents".

Unlike the public information offered by the EPO the information thus offered must, because of the specific reference to "patent applications", mean information drawn from the EPO's own internal resources. That is borne out by the further offer in the pamphlet of access to the work of a French state body, the National Centre for Social Studies (CNRS), through the firm's "close connections" with research workers there.

38. For the foregoing reasons the Tribunal is satisfied that the complainant was in breach of his professional obligations throughout the period of his service at the EPO in that without leave he had set up and was running a consultancy firm under cover of his main professional activity. Such professional misconduct was compounded by the coincidence between the area of the firm's business and the EPO's own area of competence and by his offering

or actually providing services to his customers that were connected with his official duties at the EPO.

The appropriateness of the penalty

39. The complainant argues that in view of the recommendations by the Disciplinary and Appeals Committees the penalty he got was disproportionately severe. He sees dismissal as the EPO's revenge for his staff union work, and he pleads breach of equal treatment inasmuch as it condoned in others, or even encouraged, activities like those he had himself engaged in. He cites the case of an official who allegedly held stock in a service company that had regular contracts with the Office and the practice whereby staff take up internships in firms that deal with the EPO, and which allegedly entails all sorts of links incompatible with the Organisation's independence.

40. There is not a shred of evidence to support the charge of "union-bashing" he levels against the EPO. What prompted the disciplinary proceedings was his pursuit of private business for his own enrichment and in abuse of his position as an official.

41. There are two answers to his allegation that the EPO condoned similar activity in others. One is that the Tribunal will not rule on cases that are not before it. The other is that even if there was a "grey area" in which such activity was allowed - and the Appeals Committee does concede the point in thinly veiled language in paragraphs 63 and 64 of its report - that would not excuse what the complainant did. Indeed his inadmissible behaviour warranted especially sturdy exemplary action by the EPO.

42. In sum the EPO was fully justified in getting rid of an employee whose doings were a constant challenge to its authority and deeply disruptive of the public service and in using its power under Article 93(2)(f) of the Service Regulations to impose on him the further penalty of making the maximum allowable reduction in severance grant.

43. For the same reasons the Tribunal upholds the decisions the EPO took on 4 and 5 January 1993 to make it plain that he did not belong in the Office any more and to prevent him from stirring up trouble.

The seventh and eighth complaints

44. His seventh complaint impugns a decision - it is not quite clear which - forbidding any activity incompatible with his status as an EPO official until he left the Organisation's employ. Yet on 9 September 1992 he asked whether the ban applied to "all colleagues and partners" in his firm, and the Principal Director of Administration replied on 19 October 1992 that it applied to anyone working for the complainant's benefit.

45. This incident has already been taken into account insofar as it amounts to admission by the complainant that his "consultancy" existed, that it was doing business and that it was out to make money. There is no need to entertain the EPO's plea that the complaint is irreceivable; the plea is ill advised anyway since it seeks to prevent a ruling on a legal issue of some importance. Suffice it to say that the Principal Director's letter of 19 October 1992, on which the whole case turns, was entirely warranted. If an official had only to bring in third parties to put his own improper activity beyond control by the Organisation it would become only too easy to get round Article 16 of the Service Regulations.

46. The thrust of the eighth complaint is obscure. It purports to challenge the letter of 7 July 1993 from the Director of Staff Policy notifying rejection of the Appeals Committee's report insofar as it recommended against disciplinary action. What it is in fact challenging is the warning in the letter of 27 March 1992 from the Vice-President and the letter of 25 May 1992 signed by the deputy chairman of the Disciplinary Committee and notifying the start of the disciplinary proceedings.

47. The complainant is using the eighth complaint to launch personal attacks on those two officers, whom he accuses of "intellectual dishonesty" and "union-bashing". By way of "counterclaim" he seeks the waiver of their immunity so that they may be prosecuted in the French courts for interference with the exercise of trade union rights, fabrication of evidence and misrepresentation.

48. Again there is no need to rule on the EPO's objections to receivability. The complainant is much given to attacks of that kind, as is plain from Judgments 1028, 1135 and 1136 on earlier complaints of his and from his protests about a "witch hunt" and "totalitarian power" in his appeal of 30 November 1992. The Organisation is hereby assured that the allegations are unfounded and malicious in case the two officers, whom the complainant picks on as French citizens, seek the Organisation's assistance under Article 28 of the Service Regulations in

proceedings against him on charges of intimidation, calumny or libel.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Michel Gentot, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

(Signed)

José Maria Ruda
P. Pescatore
Michel Gentot
A.B. Gardner

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