

SEVENTY-EIGHTH SESSION

***In re* BREBAN**

Judgment 1386

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jean-Marc Bréban against the European Patent Organisation (EPO) on 24 June 1993, the EPO's reply of 23 March 1994, the complainant's rejoinder of 19 July and the Organisation's surrejoinder of 22 August 1994;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

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

The present dispute being about the complainant's dismissal at the end of the probationary period, the parties have lodged the following claims:

The complainant:

1. The quashing, together with all due effects in law, of his dismissal notified by the President of the EPO in a decision of 24 March 1993;
2. his reinstatement from the date of separation and the reinstatement of his career, or, failing that, damages including the costs of his removal;
3. moral damages;
4. costs in an amount to be set by the Tribunal.

The defendant Organisation:

Dismissal of the complainant's claims as devoid of merit.

Considering that the facts of the case and the pleadings may be summed up as follows: A. The complainant joined the staff of the EPO on 1 January 1992 as a clerk at grade B2 in Munich. Under Article 13(1) of the Service Regulations he was to serve six months' probation; until 30 June 1992, the outcome of it to determine whether he had his appointment confirmed. In keeping with what the EPO had said in the offer of employment he was transferred in February 1992 to Vienna. In an interim probation report made in May 1992 his supervisor made adverse comments on his performance and recommended not confirming his appointment. In June the President of the European Patent Office so decided. The complainant applied for extension of probation on the grounds that the conditions of probation had not been satisfactory. Late in June the President gave him notice of dismissal as from 1 July 1992. He appealed to the Appeals Committee, which recommended rejection. In March 1993 the President confirmed his decision.

B. The complainant submits that that decision, which he impugns, rests on mistakes of fact. His performance was satisfactory. What is more, the EPO overlooked essential facts: the training he got was too short and was incomplete. The Organisation drew mistaken conclusions from the evidence because it took insufficient account of such factors as his transfer to Vienna, which disrupted the discharge of his duties.

He claims reinstatement or material damages, moral damages and costs.

C. In its reply the EPO observes that a decision not to confirm a probationer's appointment is discretionary. It says that it made no mistake of fact and the complainant's performance was unsatisfactory. It overlooked no essential facts, and there was nothing wrong with the training he got to account for his shortcomings. No mistaken

conclusions were drawn from the evidence: the complainant knew full well that he might be transferred to Vienna and indeed expressly consented to it.

D. In his rejoinder the complainant points out that though the Appeals Committee recommended rejecting his claim it expressed grave doubts about the conditions of his probation.

E. In its surrejoinder the EPO observes that the Board went into the case thoroughly before recommending rejection.

CONSIDERATIONS:

1. The complainant, Mr. Jean-Marc Bréban, served probation with the European Patent Organisation (EPO). His last assignment was with the "Patent Information" department at Vienna. He seeks the quashing of the decision notified in a letter of 24 March 1993 from the Director of Staff Policy confirming the decision taken by the President of the Office on the conclusion of the internal appeal procedure not to confirm his appointment at the end of probation.

2. The complainant was the successful applicant for a vacant post of clerk at B1/2 advertised on 8 April 1991. The vacancy notice said that the post was in a unit in charge of publications, distribution and financial questions and the duties would be to manage by means of electronic data processing sales and subscriptions for several series of EPO publications, to process any complaints, to prepare statistics and handle related invoicing and to do typing jobs. The notice added that the incumbent would be expected to perform "other tasks related to those duties". The duty station was Munich but "the successful applicant would be expected to move to Vienna with the rest of the unit in 1992".

3. The complainant was given a probationary appointment, as announced in the vacancy notice, as a clerk at grade B2, by a decision of the President of the Office that took effect on 1 January 1992.

4. He was assigned, as planned, to the Patent Information Directorate. The head of his unit, Mr. C.E. Corney, appointed another member of the unit, Mr. Jean-Pierre Massenaux, to be his tutor during probation.

5. Early in February 1992 the unit moved to Vienna and Mr. Bréban moved there with his family. It is not in dispute that the removal disrupted work for at least a month. When things got back to normal Mr. Massenaux sent the complainant a note on 28 February 1992 explaining how he should go about particular aspects of his work.

6. The Administration contends that at about that time there was dissatisfaction with his performance: he was uncooperative, refused to take orders from his tutor, was late with work and rejected typing jobs or manual jobs connected with his duties; his work was poor and there were more and more complaints from customers. Mr. Corney and Mr. Massenaux discussed these matters with him several times.

7. On 21 May 1992, towards the end of his probation, Mr. Massenaux commented on his performance in a note to Mr. Corney. He recounted several particular incidents to illustrate the complainant's unsatisfactory performance and uncooperativeness. But the note was not sent to the complainant, who learned of it only after dismissal in the course of the internal appeal procedure.

8. On 27 May 1992 Mr. Corney wrote the probation report. It says that although Mr. Bréban had had training and "on-the-job experience" he lacked versatility and initiative and could not find the underlying causes of problems. Though the computer system was not very complicated, the use he made of it was disappointing. In relations with colleagues he was rigid and uncooperative. His performance was wanting in that he fell behind with the accounts and refused to do manual jobs when the unit moved to Vienna or to carry out normal administrative tasks such as typing letters to customers. In sum Mr. Corney recommended not confirming his appointment.

9. On 10 June 1992 the Principal Director of Patent Information informed the complainant that the President of the Office had decided in accordance with Article 13(2) of the Service Regulations not to confirm his appointment when his probation ended on 30 June 1992.

10. By a letter of 15 June 1992 the complainant asked the President to reconsider his decision and extend his probation by three months. His request was rejected by a letter of 22 June 1992 from the Director of Personnel. On 25 June 1992 he made comments on the probation report. The formal decision to dismiss him was written on 29 June 1992 on behalf of the President of the Office, but the President's signature is not on the text the complainant

was sent.

11. On 30 June 1992 the complainant lodged an appeal under Articles 106 to 108 of the Service Regulations against the probation report, seeking reinstatement, a three-month extension of probation and damages for various types of injury caused by his dismissal. The appeal was rejected on 13 July 1992 by a letter from the Director of Staff Policy, who said that the President had decided to submit his case to the Appeals Committee. On 23 June 1992 the Chairman of the Appeals Committee warned the complainant that his case would not be examined before the end of the year, when the Committee was to hold its first session at the new headquarters in Vienna.

12. After hearing the parties and four witnesses, including Mr. Corney and Mr. Massenaux, the Appeals Committee reported on 25 February 1993. It acknowledged that the circumstances of Mr. Bréban's probation had not been "ideal" but observed that he had failed to make the most of the opportunity to respond to his supervisors' warnings and in particular to pay serious heed to Mr. Massenaux's note of 28 February 1992. The Committee took the view that the absence of the President's signature on the formal decision to dismiss him - considering the context in which it had been taken - cast no doubts on the President's intention to terminate the appointment. Although it recognised that the decision was not beyond reproach, the Committee concluded that "the difficulties with which Mr. Bréban had to contend are not of such weight as to outweigh the criticisms made of him by his supervisors and the conclusion that he was not likely to make a satisfactory career in the Organisation". The Committee therefore recommended that the President reject the appeal and the claim to damages. The President endorsed the recommendation and the Director of Staff Policy so informed the complainant by a letter of 24 March 1993.

13. In substance Mr. Bréban makes three pleas in his complaint, which he filed on 24 June 1993. He alleges that the Organisation:

clearly misappraised the facts, particularly concerning his alleged difficulties in getting on with colleagues and the alleged warnings;

overlooked essential facts by not realising that the officials in charge of his probation failed to give him proper instructions and advice and to exercise adequate supervision to ensure that his probation was correctly followed (the complainant cites in this connection Judgment 243, in re Riley, under the second paragraph of 3);

drew blatantly wrong conclusions from the evidence in refusing to extend his probation period although it was unduly short owing to the transfer from Munich to Vienna.

He asks the Tribunal to order the quashing of the impugned decision, together with all due effects in law, and consequently to order his reinstatement as from the date of dismissal and the reinstatement of his career and to award him damages for material and moral injury, including the costs of removal, and costs.

14. The receivability of the complaint is not challenged. In its pleas on the merits the Organisation draws on what it said on the internal appeal to the Appeals Committee and on the Committee's own arguments in its report. First, it stresses the complainant's poor working relations with colleagues and contends that despite his supervisor's promptings he showed that he was unable to adapt to his working environment and refused to perform some tasks that were stated in the vacancy notice. Secondly, it alleges that he disregarded the many warnings his supervisors gave him, and particularly his tutor's note of 28 February 1992. Despite its apparently friendly tone the minute was in fact a serious warning, as was plain from the bold print used in certain passages. Thirdly, the Organisation denies failing in its duty to train and supervise the complainant: it was up to him to make use of all the sources of information available at the workplace. Instead of complaining about the material difficulties caused by the transfer of the unit he should have made the most of it to show initiative and ability to adapt.

15. In answer to the complainant's pressing demands for extension of probation the Organisation points out that under Article 13(2), second paragraph, of the Service Regulations the President has discretion in the matter. He decided not to comply because he realised that the complainant's request was prompted by a desire not so much to serve the Organisation as to get a job for life.

The merits

16. Before ruling on the pleas set out above the Tribunal recalls the terms of Article 13 of the Staff Regulations, which is headed "Probationary Period" and reads:

"(1) Permanent employees for whom the President of the Office is the appointing authority shall serve a probationary period. The period shall be one year for permanent employees appointed to a post in Category A and six months for employees appointed to a post in Category B or C.

(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 of 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. ..."

17. It is not in dispute, and consistent precedent has it, that the administrative authority has the widest measure of discretion in confirming the appointment of a probationer (see Judgments 503, in re Maier, under 2; 687, in re Delangue, under 2; 1052, in re James, under 4; and 1161, in re B., under 4). The purpose of such discretion is to ensure that the Organisation may choose staff in full freedom and independence and in so doing it will assess the imponderable aspects of the probationer's personality, which must pose no threat to the harmony of staff relations. Here the Tribunal will not intervene in the Administration's choice except in the event of abuse of authority or a clear mistake of law or of fact.

18. The probationer, for his part, has every right to expect of the Administration that it will provide proper conditions for probation. Several facts which came to light in the internal appeal hearings and which have not been challenged raise serious doubts as to whether that was the case. The Tribunal will examine them against the requirements of due administrative process, beginning with the substantive issues.

19. The first point is that the complainant was never given a precise description of the duties required by the post he was put on; in any event there is nothing in the evidence that affords any such description. The Administration's explanation is that the job specifications were in the notice of vacancy. The Tribunal holds, however, that since the notice had to be in general enough terms to attract a wide variety of applicants it cannot be regarded as a specific enough job description to be of use to the official. The Organisation asserts that the complainant was able to consult the instruction manual attached to his computer terminal and to use the "help" key if he was in difficulty. But those are technical aids and no substitute for administrative instruction.

20. Omission is equally striking in the personal supervision he was given. His main tutor, Mr. Massenaux, admitted to the Appeals Committee that he did not feel fully qualified to give the complainant guidance. That is why he brought in a temporary employee, Mrs. Temrake, who seems to have known no more than he. As a last resort the Administration has tried to justify its conduct by criticising the complainant for not showing the initiative to get information from colleagues in the unit. But that argument is an admission of the administrative disorder that apparently prevailed in the unit, and the complainant may not be blamed for the consequences of that.

21. The Administration is also at fault for not giving the complainant sufficient warning that there had been criticism of him and the success of his probation was in jeopardy. The Organisation contends that he did get several oral warnings. Yet, contrary to the requirements of due administrative process, the file contains no evidence of such warnings, or their date or substance. The Tribunal is therefore unable to assess their scope.

22. In this context both the Administration and the Appeals Committee constantly refer to Mr. Massenaux's note of 28 February 1992 to the complainant. It is apparently the only written communication he ever got, and it is worth quoting:

"Jean-Marc, the instructions in the three languages are expected next week, ... i.e. absolute priority for immediate processing of deliveries.

The German customers will be supplied by Christoph in Munich.

Andréas has been told and will help you every day before the lunch-break, and more if necessary.

I've warned the post office that it will mean extra work for them. Obviously, Andréas and you will have to take the

orders to the first floor, not the Lady who takes the mail.

The Instructions will be delivered to room 415.

The customers need these documents urgently as the next examination will be in 4 weeks.

Pending the arrival of the Instructions could you invoice the "46" products as payments are already reaching accounts.

Thanks,

Jean-Pierre"

Although the note conveys the easy-going atmosphere of the unit, so cryptic a text may not be regarded as a valid administrative document, let alone a warning which might carry weight in assessing the outcome of probation.

23. The probation report contains an ambiguity, due to the way the report form is designed, in that the reporting officer has a choice of only two boxes: "Interim report" and "after extension of probationary period". There is no mention of a third contingency, which is the one that occurred in this case and is doubtless the most common: the final probation report. The reporting officer ticked the first box, which might explain the perfunctory nature of his comments. The head of the unit's final assessment on the form is also ambiguous since he ticked two boxes that are mutually exclusive:

"In the light of the foregoing, I recommend that the probationer's appointment should not be confirmed."

"In cases where the probationary period is continuing: that the probationer be told that he is not progressing satisfactorily."

So it seems from the wording of the form that the head of the unit did not fully grasp what the consequences of his doing so would be.

24. A last point is that the administrative procedures that were followed in this case impaired from start to finish the complainant's right of defence. The warnings, if warnings there were, were oral and so, as has just been said, are in no form that can be reviewed. Consequently, Mr. Bréban was unable to defend himself in writing against properly presented criticisms. The only written and specific criticism was Mr. Massenaux's note of 21 May 1992 to Mr. Corney, and it was not communicated to the complainant. Mr. Corney used it in drawing up the probation report and indeed he gave general purport to specific comments in it. But the complainant saw it only after the event, long after his appointment had been terminated. He was thus denied the opportunity of salvaging probation while there was possibly still time.

25. There being no need to determine whether there was any misappraisal of facts, the conclusion from the foregoing is that the impugned decisions, prepared as they were in a context of administrative inefficiency, are flawed in that they did not meet the requirements of due administrative process. They must therefore be set aside, whatever impression the evidence may give about the assessments of the complainant's actual ability and performance, which must indeed be regarded as unverified.

The administrative and financial consequences of the quashing

26. The relief the complainant seeks includes reinstatement in his post or, failing that, damages for material and moral injury, including the costs of removal. The Tribunal holds that reinstatement, which could only mean reinstatement for a further probationary period, would raise insurmountable practical difficulties because of the time that has elapsed since the date of dismissal, 1 July 1992. Mr. Bréban is, however, entitled to full compensation for the material and moral injury he sustained.

27. In material damages the EPO shall pay him an amount equivalent to the emoluments he would have earned from the date of dismissal until the end of the month in which the Tribunal delivers the present judgment. Since he has convincingly shown that he has not been employed since the EPO dismissed him the Organisation may not subtract from that amount any indemnities or other earnings he may have received during that period. It may, however, subtract any amounts he received by way of terminal allowance.

28. The Tribunal also accepts that the premature dismissal caused him moral injury in relation not only to his family and private life but also to his career prospects. Those prospects suffered from the EPO's having gravely compromised his chances of finding other employment by putting in the documents concerning his dismissal, and in breach of his rights of defence, criticism which could not under the circumstances be reviewed. The complainant shall accordingly receive, over and above the redress which by the present judgment in itself affords him, damages in the amount of 25,000 French francs.

29. His claim to removal expenses is devoid of merit in view of the provision in Article 81(1) a) of the Service Regulations that makes the refund of removal expenses contingent on the confirmation of appointment at the end of probation.

30. Lastly, since his main claims have succeeded he is entitled to costs, which the Tribunal sets at 25,000 French francs.

DECISION:

For the above reasons,

1. The decisions of 10 and 29 June 1992 and 24 March 1993 to dismiss the complainant at the end of probation are set aside.
2. The Organisation shall pay him damages equivalent to the amount he would have received in earnings from the date of dismissal until the end of the month in which this judgment is delivered, save that the EPO may subtract any sums it may have paid him in terminal allowance.
3. He is awarded 25,000 French francs in moral damages.
4. He is awarded 25,000 French francs in costs.
5. His other claims are disallowed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner