SEVENTY-EIGHTH SESSION

In re VAN DER PEET (No. 18)

Judgment 1391

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 17 March 1994, the EPO's reply of 31 May, the complainant's rejoinder of 15 July and the Organisation's surrejoinder of 16 September 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Article 14(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO requires its employees to carry out their duties and conduct themselves "solely with the interests of the European Patent Organisation ... in mind".

The complainant, a Dutch citizen, is employed by the EPO in its Directorate-General 4 in Munich as a patent examiner at grade A3. By a letter of 28 October 1991 the President of the Office told him of the start of disciplinary proceedings under Article 93 of the Service Regulations for breach of his duty of discretion and impairing the reputation of the Organisation, its officers and appeal bodies. The President said he contemplated relegating the complainant, referred him for details of the charges against him to an appended "draft report" and invited comment from him within ten days.

In a letter of 5 November the complainant denied intending to harm the Organisation or its staff and said he failed to understand which of his "official duties" he was in breach of.

By a letter of 25 November the President acknowledged receipt of those comments and said he had sent the Disciplinary Committee a copy of the draft report in keeping with Article 100 (Statements of facts) of the Service Regulations.

At hearings on 13 December the Committee decided that disciplinary proceedings were "admissible" but should be confined to acts committed since 1 January 1989 and exclude matters sub judice, and that the Administration should inform it and the complainant in writing by 13 January 1992 "exactly" what acts committed during the material period it was objecting to and what the "relevant context" was.

On 10 January 1992 the Administration replied by sending the Committee and the complainant copies of a further brief.

The Committee held final hearings on 24 January and on 11 February its chairman told the President and the complainant that it was recommending his relegation in step by 12 months on the grounds that he had made statements in breach of Article 14(1) of the Service Regulations.

By a letter of 4 March 1992 the President invited the complainant in keeping with Article 102(3) to see the Vice-President of Directorate-General 4 on 6 March before he acted on the Committee's recommendation.

According to the minutes of his meeting of 6 March with the complainant the Vice-President then explained to him that the President intended to endorse the recommendation and the complainant had nothing to add to his earlier objections.

In a letter of 9 March the Vice-President told him that the President had decided to relegate him to step 7 in grade A3, with nine months' seniority, for behaviour in breach of Article 14 of the Service Regulations. Because that letter contained a miscalculation the Vice-President sent him a correction in a letter of 7 April that said he was

relegated to step 7 in A3 with 21 months' seniority.

On 22 April 1992 the complainant lodged an appeal under Article 108 and on 6 May the Director of Personnel told him that the President was referring it to the Appeals Committee.

In its report of 1 December 1993 the Appeals Committee recommended rejecting his appeal and by a letter of 13 January 1994 the Director of Staff Policy informed him that the President had done so. That is the decision he is impugning.

B. The complainant submits that the disciplinary action against him is unlawful.

He pleads that it is "inadmissible". It was in breach of an "absolute privilege" for the EPO to deny his freedom of speech in judicial proceedings by reviewing remarks he had addressed to national or international judicial bodies. He had no case to answer anyway inasmuch as the Administration failed to say just what the charges were and what duties he might have infringed: neither in the "draft" report nor in its further brief to the Disciplinary Committee did it make that clear since it referred to matters pending before a national court of appeal and dating from before January 1989. For it to base disciplinary action on statements made in earlier appeals exposed him to double jeopardy. In any event it was wrong to take ten years to charge him with misconduct.

It was in breach of his right to a hearing. He was not allowed the full 15 days provided for in Article 101(1) to comment on the EPO's further brief: he got it on 13 January 1992 and the Disciplinary Committee's hearings were on 24 January. In any event the failure to identify "individual incidents" compelled him to confine to general issues such defence as he had time to offer.

The complainant charges the Committee with asking for a further brief - for which there is no provision in the rules - to overcome shortcomings in the Administration's draft report and evade the one-month time limit in Article 102(1). As further evidence of the Committee's bias he cites the chairman's failure to call for a general report under Article 101(1).

The wording of Article 14(1) is too vague to provide a standard by which to know whether the interests of the EPO alone were in an official's mind. So the Organisation could not rely on that provision to impair his basic rights under German law. He takes the word "conduct" in the rule to mean the performance of official duties: on that construction he has fully complied with 14(1), as his exemplary performance as an examiner shows.

It is odd that the EPO objects to his remarks but not to its own officers' reference to the Appeals Committee's "maidenly" reactions and description of one of his complaints as "a fresh act of pure spite against his employer".

He wants the Tribunal to declare the disciplinary proceedings null and void and set aside the decision in the letter of 7 April 1992. He claims arrears in pay plus compound interest at 15 per cent a year; 200,000 German marks in moral damages; and costs plus compound interest at 15 per cent a year on lawyer's fees.

C. In its reply the EPO submits that the complaint is in part irreceivable and in any event wholly unfounded.

Since the complainant did not seek moral damages in his internal appeal that claim is irreceivable because of his failure to exhaust the internal means of redress.

On the merits the Organisation submits that the complainant is mistaken in relying on national legislation: no national court will assert its jurisdiction over disputes between him and the EPO. Article 14(1) of the Service Regulations lays down general standards of behaviour. Damage to the Organisation's reputation, whether in litigation or in the performance of official duties, warrants disciplinary action.

Though he feigns ignorance of the charges against him the complainant, as the author of the offending remarks, knew full well that twelve statements were at issue, three of which he had made in a letter of appeal to the Dutch State Council in 1989, the other nine in two briefs he submitted to the Tribunal in 1990. What made the Disciplinary Committee ask the Organisation for a further brief was a wish to simplify the proceedings and get all the relevant documents together. Besides, his lawyer had agreed to the procedure, which left him more than two months to prepare a reply.

His allegation of double jeopardy is unsound: no other disciplinary proceedings have been based on the offending

statements.

Nor was the time lag between them and the start of the proceedings excessive since the Organisation acted within a year of learning about them.

The independence of the Disciplinary Committee is plain: it restricted the proceedings to three documents and recommended a lighter penalty than the one the President had proposed.

D. In his rejoinder the complainant answers the EPO's arguments and presses his pleas of procedural and substantive flaws. He contends that the claim to full redress in his internal appeal covered moral damages: so the claim is receivable. If national law were not applicable why had a German court asserted jurisdiction over a dispute he had with the EPO?

The hearing with the Vice-President deprived him of a "real" opportunity to convince the President that he was innocent. He accuses the EPO of withholding material which proper inquiry required and taking disciplinary action to "muzzle" him.

E. In its surrejoinder the Organisation says that there is no new argument in the rejoinder to make it change its stand. Far from withholding evidence, the Disciplinary Committee gave the parties free access to all files. No national court has ever declared itself competent to hear a dispute between the EPO and a permanent employee.

CONSIDERATIONS:

1. The complainant has already filed 17 complaints, on the first of which the Tribunal ruled, in Judgment 568, in 1983. In this one he seeks the quashing of a disciplinary decision by the EPO that he be relegated in step by twelve months for breach of Article 14(1) of the Service Regulations, which reads:

"A permanent employee shall carry out his duties and conduct himself solely with the interests of the European Patent Organisation ... in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside the Organisation."

2. The Organisation set up a Disciplinary Committee under Article 98 of the Regulations to inquire into charges that the complainant had made several critical remarks and used unacceptable language about other staff members and about the Tribunal. Since those charges referred to statements made over a long period the Committee decided, in fairness to him to exclude statements made before 1 January 1989 or in judicial proceedings which were still pending.

3. The Committee identified four principles applicable to the obligation of an employee to "conduct himself solely with the interests of [the Organisation] in mind".

(1) The obligation governed conduct in relation not only to the Organisation and its staff but also to judicial bodies such as this Tribunal.

(2) It did not restrict the right of criticism by an employee in dispute with the Organisation because it was of the utmost importance for an employee, when stating his case before the Organisation, courts and other bodies to be able to exercise his fundamental right to speak openly and freely and not to be deterred by threat of disciplinary action.

(3) Great restraint should be exercised in taking disciplinary action in such cases.

(4) It would, however, be an abuse of his rights for an employee to make a dispute a pretext for offensive remarks "going beyond what can usually be called for in the circumstances and for which there is no clear justification supported by evidence."

4. Applying those four principles, the Disciplinary Committee held in its report of 11 February 1992 that the complainant had failed to comply with Article 14(1): three statements made by him in a letter of appeal dated 22 February 1989 to the Dutch State Council and nine in pleadings to the Tribunal in his fifteenth complaint - dismissed in Judgment 1065 - were "unacceptable" in that they "impugned the honesty, honour, and integrity of people carrying out their duties" and in making them he had "exceeded the level of what reasonably can be

accepted in the circumstances".

5. Of those twelve statements which the Committee declared "unacceptable" seven were critical of the Organisation: they accused a previous internal Appeals Committee of bias, the President of the Office of delay calculated to avoid "exposing his blundering management", and the Personnel Department of malice, bad faith, hatred, abuse of power, maladministration, impropriety and devious manoeuvring. In regard to the Tribunal there were four allegations of bias; two imputations of bias based on alleged conflict with a previous judgment; a charge of disregard of fundamental principles of law; and two further unexplained allegations of "manifest bias" and perversion of the law to please the Organisation. Finally, the complainant had said that the "impecunious" International Labour Conference was unable to sustain the Tribunal without funds from the EPO and other organisations.

6. The Disciplinary Committee recommended relegating the complainant in step by twelve months, and the President did so.

7. On appeal the Appeals Committee referred also to Article 16(1), which requires an employee to "abstain from any act and, in particular, any public expression of opinion which may reflect on the dignity of his office". The Committee held that in its report of 1 December 1993 he had failed to exercise care over the language of his pleadings; that it was damaging to the dignity of the international civil service in general and to the reputation of the Organisation in particular; and that the "expressions used were incompatible with the decorum appropriate to his status as an international civil servant". It recommended dismissing his appeal. By a letter of 13 January 1994 the complainant was informed that the President had decided to dismiss his appeal. That is the impugned decision.

8. Decisions taken by the Organisation are subject to review on grounds such as bias, bad faith, malice and abuse of authority. When seeking to defend his interests by impugning any such decision, an employee is entitled to allege and attempt to establish such grounds. A fair decision cannot be reached upon such matters by an internal appeals body or by this Tribunal if witnesses, parties and their representatives are unable to speak candidly and without the risk of incurring a penalty for what they may say, and especially if one party is unduly inhibited by the fear that failure to prove his case may make him liable to disciplinary action by the other party.

9. Accordingly the question at issue in this case is the extent of the freedom of speech that the litigant should enjoy and of the immunity that attaches to judicial proceedings.

10. The test applied by the Disciplinary Committee was whether the punishment of offensive remarks "for which there is no clear justification supported by evidence" would amount to abuse of the complainant's rights. But such a test laid an undue burden on the complainant in that if he was to avoid the risk of disciplinary action he must prove the truth of his allegations. No such burden should have been put on him. The mere failure to prove the truth of his allegations did not mean that he had either abused his freedom of speech or forfeited the immunity or privilege of judicial proceedings.

11. Nor does it suffice that an allegation be offensive and go "beyond what can usually be called for in the circumstances". A litigant whose submissions contain language that is unacceptable, or ill-chosen, or damaging, or unseemly, does not thereby lose the immunity that attaches to statements made in judicial proceedings, however much the breach of good taste may be deplored.

12. Disciplinary action will be justified only if the staff member's conduct amounts to abuse of process or to a perversion of the right of appeal. Such, for example, will be the case if his allegations "are clearly wholly unfounded" (see Judgment 99: in re Jurado No. 6); or if he appeals "to the Tribunal for the purpose of lending force to the wild and unnecessarily wounding allegations ... repeatedly made against the Organisation" and has thereby "entirely perverted from its proper purpose the right of appeal" to the Tribunal and has "affronted the dignity of his Organisation and of the Tribunal (see Judgment 96: in re Jurado No. 17); or if his actions "could neither have been directed to defending [his] freedom and rights, however widely interpreted, nor ... make the slightest contribution to the disposal of the proceedings" (see Judgment 111: in re Jurado Nos. 12 and 13).

13. In Judgment 1065 the Tribunal held that the complainant's language was "offensive" and "inadmissible" but not that it was an abuse of process. The Disciplinary Committee too found his language "unacceptable" but not an abuse of process. The Appeals Committee referred to Article 16(1) although no charge had been framed against him under that rule. The conclusion is that in the absence of a finding of abuse of process the disciplinary sanction

imposed on the complainant must be set aside, there being no need to take up any of his other pleas.

14. The complainant has asked for moral damages and for costs. Having regard to all the circumstances, the Tribunal makes no award of moral damages. It will however, grant him a sum in costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed.

2. The Organisation shall pay the complainant the arrears of salary due to him together with interest to be reckoned at the rate of 8 per cent a year.

3. It shall pay him 500 German marks in costs.

In witness of this judgment Sir William Douglas, 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 1 February 1995.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner

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