NINETIETH SESSION

***In re* Stenberg** **Judgment No. 2028**

The Administrative Tribunal,

Considering the complaint filed by Miss Susanne Stenberg against the European Patent Organisation (EPO) on 3 February 2000 and corrected on 24 February, the EPO's reply of 12 May, the complainant's rejoinder of 21 June, and the Organisation's surrejoinder of 30 August 2000;

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

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 Swedish national born in 1967, joined the staff of the European Patent Office, the EPO's secretariat, on 2 November 1998. She was appointed for a twelve-month probation period and assigned to Directorate-General 1 (DG1) in The Hague. From 2 November to 23 December she participated in a training programme for new search examiners at the Office's Academy. Participants in the programme were assigned tutors.

In a meeting with the complainant on 23 December 1998, the Director of Training at the Academy informed her that she was not suitable as a search examiner and gave her a copy of a probation report which stated that she was "obviously inadequate". He informed her that he was recommending that she be dismissed in accordance with Article 13(2) of the Service Regulations for Permanent Employees of the European Patent Office and that she had until 8 January 1999 to comment on the report. He also told her that she could resign in lieu of being dismissed.

On 8 January the complainant submitted her comments to the Director of the Personnel Department and asked to be retained for an additional four months to prove her capabilities. On the same day she met that Director who also told her that she would be allowed to resign rather than be dismissed. On 11 January he informed her of the financial implications of dismissal versus resignation.

On 13 January a "reconsideration" meeting was held between the Principal Director of Administration, the Director of Training, the complainant's Director in DG1, the Academy instructors and other officials of the Administration. Neither the complainant nor her tutor attended the meeting, and no staff representative was present. In a meeting the following day the Principal Director of Administration informed her that the outcome of the meeting was that the Office could not afford the amount of extra training she would need to perform her duties. She was given until 15 January to resign; she opted not to do so and on 15 January she was given a letter, signed by the Director of Personnel, dismissing her with immediate effect. On 12 February 1999 she appealed against that decision.

In its report of 7 July 1999 the Appeals Committee found that the complainant was given insufficient warning and recommended that the decision to dismiss her be rescinded. By a letter of 14 September the Director of Personnel informed the complainant that the Office would consider the possibility of a "financial arrangement covering the cause of [her] appeal". However, she let him know via a staff representative that she preferred to wait for the President's final decision. On 8 November 1999 the Director of Personnel informed her that the President had rejected her appeal. That is the impugned decision.

B. The complainant contends that the decision to dismiss her was tainted with five procedural and two substantive flaws.

First, according to Article 13(2) of the Service Regulations, a decision to dismiss a probationer before the end of the probationary period must be based on a report on the probationer's ability to carry out the work assigned. She argues that, under the general principles applicable to the international civil service, there exist certain rules

governing reporting which require a report to be drawn up by an immediate superior, to be on an official form, and to be given to a countersigning officer. None of these conditions was fulfilled in her case. Furthermore, the report should have been written by her Director in DG1 and not the Director of Training.

Secondly, she claims that her comments on the report were not taken into consideration; even before submitting them she was told that the decision to dismiss her had already been taken.

Thirdly, she submits that the decision was not taken by the proper authority. The dismissal letter of 15 January 1999 was signed by the Director of Personnel and makes reference to the Principal Director of Administration. However, Article 13 states that it is the President of the Office who has the authority to dismiss a probationer.

Fourthly, she claims that a decision to dismiss an employee must be preceded by a formal warning, as established by the Tribunal's case law and the jurisprudence of international civil service law. Yet even the Appeals Committee found that "she was not informed clearly enough or in good time". Consequently, she has been deprived of the opportunity to show an improvement in her performance.

Fifthly, she argues that the decision was not duly reasoned as required by Article 106(1) of the Service Regulations. The reason given in the dismissal letter was too general to allow her to rebut it properly.

As for the two substantive flaws, the complainant contends first, that it was not proven that she was "obviously" inadequate. She was dismissed after only seven and a half weeks at the Academy. This period was not sufficient to evaluate her work or her suitability as an examiner. The probation report was written by the Director of Training, who had no direct knowledge of her work and who based his assessment on input from her instructors at the Academy but not from her tutor; it was her tutor and not the instructors who worked directly with her. Furthermore, the Appeals Committee found that the report was "based on an assessment of her learning ability as a student in the Academy"; she contends that this is not the same as an assessment of her working ability. Secondly, she argues that the decision to dismiss her was flawed by abuse of power. She submits that the real reason for her dismissal was a lack of tutors.

She requests the Tribunal to: (1) quash the impugned decision, thereby quashing the initial dismissal decision; (2) order the EPO to pay her the remuneration and benefits she would have received if she had been allowed to complete the entire twelve-month probation period, plus interest from 15 January 1999; (3) order that she be paid compensation for material injury; (4) award her 10,000 Dutch guilders in moral damages; and (5) award costs.

C. In its reply the Organisation submits that the decision to dismiss the complainant during her probationary period was not flawed and that it was consistent with the Tribunal's case law. The Tribunal has held that a probationer may be dismissed before the end of the probationary period if the head of the organisation is satisfied that the probationer does not have the right qualifications, and decisions made under this condition are open to only limited judicial review. It has also held that a "formal warning" is not required in instances where it can be shown that it would serve no purpose. Furthermore, the complainant should have realised that there was some concern about her ability as an examiner from conversations she had had with her instructors and other colleagues.

The EPO contests that the decision was procedurally flawed. The Director of Training is indeed the competent authority for writing a probation report on someone still undergoing training at the Academy. It would have made no sense for her future Director to draft such a report since she had not yet had any contact with him. Furthermore, Article 13(2) of the Service Regulations does not specify that the report must be drawn up on a particular form. It denies that her comments were not taken into consideration and points out that the individuals involved with her probation met on 13 January 1999 to reconsider her case. The fact that the President did not sign her dismissal letter was not a procedural error. It submits that under the "delegation of powers" in force at the Office, a senior officer in the Personnel Department is competent to take such decisions even where the Service Regulations indicate that they should be taken by the President of the Office. Finally, the EPO asserts that the decision was duly reasoned: she received a copy of the report written by the Director of Training and was given an opportunity to comment on it.

It denies that there were any substantive errors in the decision. The complainant has failed to prove that she was not "obviously inadequate" and her plea of abuse of power, based on pure speculation, is unfounded.

The EPO submits that no material injury stemmed from the Organisation's actions because she managed to find

employment despite her dismissal from the EPO.

D. In her rejoinder the complainant submits that the Organisation has misinterpreted the Tribunal's case law in arguing that a formal warning is not required. The case law cited by the EPO relates to "faults of manner" and not job qualifications and she points out that the Appeals Committee found that this was not applicable to her. Furthermore, the extra attention she received during the training programme does not qualify as a warning.

She presses her plea that the Director of Training was not the competent supervisor to draft her probation report and she attaches to her submissions an e-mail that he sent to the EPO's legal department describing his role as Director. In that e-mail he said that his role was to check and sign all search reports; she notes that he did not say that he drafted and signed probation reports.

The complainant adds to her plea regarding the use of an official form for probation reports. Using the same form for all staff members and requiring a countersigning official safeguards staff members from arbitrariness.

She contends that she did suffer material injury. She had to bear the costs of travel and relocation to The Hague. Although she has already found new employment, her current salary is substantially lower than the salary she was paid at the EPO.

E. In its surrejoinder the EPO maintains that it has properly interpreted the Tribunal's case law regarding termination of probationary appointments and the duty to warn. It is the Organisation's view that the complainant's situation represented one of the exceptional cases where a warning would serve no purpose.

It presses its pleas that there were no procedural flaws in the drafting of her probation report. As the supervisor of the Academy staff and the training programme, the Director of Training was the appropriate person to draft that report. There is also no requirement that such a report must be written on a particular form. Although there are guidelines on reporting at the EPO, those apply only to staff members whose appointments are confirmed after completing the probationary period.

CONSIDERATIONS

1. The complainant joined the European Patent Office as a search examiner at grade A2 as a probationer. She commenced her probation on 2 November 1998 at the Office's Academy. On 23 December 1998, at the end of her Academy training, the Director of Training signed a report on her performance during the course. He said that she had not shown the aptitude to become a successful examiner. He listed her deficiencies and said she had stayed "far below the average learning progression of her group". He concluded that her results were far below those expected of examiners on probation, and this would not allow her to proceed with the training programme; she lacked the ability to make efficient use of the Office's search tools and she was not able to put into practice sufficiently the training given at the Academy; she seemed not to understand the methods of performing an exhaustive search; her deficiencies were fundamental and there was "no hope of substantial improvement"; she was obviously not suited to performing the work of an examiner and he recommended her dismissal at the earliest possible date in accordance with Article 13(2) of the Service Regulations.

2. This report was given to the complainant and she was asked to respond by 8 January 1999. On that date she provided her comments.

3. On 13 January the Principal Director of Administration held a meeting with other officials of the Administration, the complainant's Director in DG1, the Director of Training and Academy instructors to discuss the complainant's situation. They had all been given a copy of her comments on the report. The conclusion reached at the meeting was that her work was clearly so unsatisfactory that there could be no justification for a longer probationary period and her comments on the report gave no reason to change that position. The Principal Director of Administration informed the complainant on 14 January 1999 of the negative outcome of the meeting. She was given the option of resigning or being dismissed. She opted not to resign and on 15 January received a letter of dismissal signed by the Director of Personnel.

4. She lodged an appeal on 12 February 1999. In its opinion of 7 July 1999 the Appeals Committee recommended that the decision be set aside on the procedural ground of insufficient warning. By a final decision dated

8 November 1999 the complainant was informed that the President of the Office decided to reject her appeal considering in particular that, in view of her performance at the Academy, there was no chance that the probationary period would be a success. The letter was signed by the Director of Personnel. This is the impugned decision.

5. In her complaint the complainant seeks the quashing of the impugned decision and the initial dismissal decision. She does not seek reinstatement but does seek compensation. The complainant argues that the decision was procedurally flawed on five grounds: (1) the report of 23 December 1998 was not drafted by her hierarchical superior; it was not on an official form and was not signed by a countersigning officer; (2) her comments on the report were not taken into consideration because the decision to dismiss her was already made; (3) the decision of 15 January 1999 to dismiss her was not taken by the proper authority, i.e. the President of the Office; (4) she received no written or oral warning; and (5) the decision was not reasoned.

6. She also listed two substantive flaws: (1) the Organisation did not prove that her ability was inadequate - seven and a half weeks was too short a period to reach that conclusion; (2) there was abuse of power in that the real reason was that there were not enough tutors.

7. Article 13 of the Service Regulations deals with the probationary period, which, at the material time, was twelve months for employees in the complainant's category. Article 13(2) provides for probationary reports not less than one month before the expiry of each six-month period. The report should assess the ability of the probationer to perform the duties assigned and his or her efficiency and conduct in the service. Article 13(2) also provides:

"A report on the probationer may be made at any time during the probationary period if his work is proving obviously inadequate. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing. On the basis of the report the President of the Office may decide to dismiss the probationer before the end of the probationary period."

8. Regarding the complainant's pleas on procedural grounds the Tribunal holds:

(1) On completion of her training in the Academy, the proper person to draw up the report was the one in charge of training and not her hierarchical superior in DG1 where she had not yet commenced work. The official form to be used for each six-month period and to be signed by a countersigning officer would not have been appropriate for a report on ability shown whilst at the Academy. There is no specific procedure for the drawing up and signing of such a report. This ground fails.

(2) A comprehensive meeting was held on 13 January 1999 and many people concerned in her training were present. All of them had been given a copy of her comments. It was after that meeting that the complainant was informed of the negative outcome and given an option to resign or be dismissed. It is therefore not substantiated that a decision was made without taking her comments into consideration.

(3) While the Service Regulations provide that the President of the Office may decide to dismiss a probationer before the end of probation, the letter of dismissal was written and signed by the Director of Personnel. On the face of it there is no indication that he was doing it on behalf of the President. He also signed the letter of 8 November 1999 containing the impugned decision. In this letter he informs the complainant of the President's decision to reject her appeal. The Tribunal does not dispute the principle of delegation of authority (see Judgment 1386 *in re* Bréban); however, when a complainant calls for proof that power has in fact been delegated to a specific person, it is a matter for the Organisation to produce such proof. The Organisation has failed to do so claiming that "it goes without saying that senior officers at the helm of the Personnel Department are entitled to decide in cases where the Service Regulations provide that the President should decide". This is not an adequate reply to the procedural ground. In the absence of any proof the argument succeeds.

(4) The Organisation did not claim that the complainant received a written or oral warning that there was a risk of dismissal at the end of the period at the Academy. It cites Judgment 1817 (*in re* J.) which says that a "warning will serve no purpose at all if the probationer is obviously unwilling or even unable to heed it". In such circumstances, a warning does not have to be given. The Appeals Committee requested separate reports from the officials concerned with her training at the Academy. The complainant's tutor said that, although she did not receive a written warning that she might be dismissed, the extra effort and attention required by the instructors and himself, and the fact that she lagged behind compared to her colleagues, could, in his opinion, have caused her some concern and discomfort

about her position as a probationer. He did not know, however, if she actually sensed any of this at that time. One of her instructors said that on 13 November 1998 he took her aside for a serious talk and told her that her performance was not what could have been expected and proposed that she did additional work by coming in earlier or leaving late. However, he did not notice her doing either. Another instructor said that after discussions with two of his colleagues, the three of them had offered the complainant an opportunity to do extra work with them if she so wished, but she did not feel it was necessary. In the Tribunal's view the complainant must have been aware of her poor performance in comparison with her fellow trainees. It was certainly pointed out to her. If she was not aware of the situation, it underlines her basic inability and lack of understanding of what was required of her. The observations on her inadequacies can be considered as equivalent to an oral warning. If she had received a written warning of possible dismissal there is no reason to believe that she could have improved her basic ability or comprehension in any way. The lack of a written warning should not be considered a formal defect in this case.

(5) The plea that the decision to dismiss her was not reasoned does not succeed. The decision must be viewed in the light of what was already known to the complainant. The letter of dismissal referred to the report by the Director of Training and the conclusion that she did not have the ability to work as an examiner. The report summarises her deficiencies which the Director says are "fundamental and there is no hope for substantial improvement". The report of the Director must be regarded as supplying detail in relation to the stated reason that she was dismissed because she did not possess the ability to perform adequately as an examiner.

9. As regards the first substantive ground, the allegation that the Organisation has not proved the complainant's ability to be inadequate and that seven and a half weeks was too short to judge, it is clear to the Tribunal that the collective opinion of those involved in training at the Academy was that from the beginning she lagged behind and that at the end her ability and competence were inadequate for the duties as an examiner. The aim of a probationary period is to see if the probationer can become a useful member of staff. The assessment of her abilities does not show any flaw which would justify setting aside the decision on that ground.

10. A second substantive ground alleging abuse of power is based on her contention that the real reason for her dismissal was that there were not enough tutors. This is highly speculative and there is no foundation for it.

11. The net result is that the complainant succeeds on only one ground, that is the failure of the Organisation to prove delegation of power by the President. This does not make it a case in which it would be appropriate to set aside the decision to dismiss. The complainant's performance was clearly unsatisfactory in the judgment of experienced trainers. Therefore, in accordance with Article VIII of the Tribunal's Statute, she is entitled to a sum for moral damages which the Tribunal sets at two months of the basic salary she was receiving at the time of her dismissal (not including any allowances). She is also entitled to costs in an amount of 2,000 euros.

DECISION

For the above reasons,

1. The Organisation shall pay the complainant a sum calculated in accordance with consideration 11.

2. It shall pay her 2,000 euros in costs.

3. The other claims are dismissed.

In witness of this judgment, adopted on 15 November 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

Mella Carroll

Flerida Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 28 September 2004.