NINETY-FOURTH SESSION

Judgment No. 2196

The Administrative Tribunal,

Considering the complaints filed by Mr M. D., Mr G. K. and Mr D. K. against the European Patent Organisation (EPO) on 30 January 2001 and corrected on 26 February, the EPO's reply of 29 August 2001, the complainants' rejoinder of 12 June 2002, and the Organisation's surrejoinder of 29 August 2002;

Considering the application to intervene filed by Mr R. A. P. B. on 28 August 2001 and the Organisation's observations thereon of 6 September 2001;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants are permanent employees of the European Patent Office, the EPO's secretariat, and work in Directorate-General 1 (DG1) located in The Hague, the Netherlands. Each works in the field of "G01N" as a search examiner.

In February 1992 the Principal Director of the Principal Directorate Search informed staff in that Directorate that a productivity norm would be used to help determine the productivity rating of examiners. Staff members attaining or exceeding the norm could expect to receive a "Good" rating in their staff report. The norm was defined in terms of working days per dossier. In 1992 the productivity norm in the field of "G01N" was 2.4 days per dossier and it was reduced to 2.2 in 1993. The complainants did not challenge that decision at that time.

In 1997 the Principal Directorate Search was reorganised and in September the complainants, who until that time worked in directorate 1.2.36, were moved to directorate 1.2.40.

In a meeting on 25 February 1998 the complainants were informed orally by the Director of directorate 1.2.40 that a new productivity norm of 1.87 days per dossier would be applied to them as from 1 January 1998. On the same day they requested in writing that the Director respect the productivity norm of 2.2 days per dossier. The latter did not reply so on 4 March they sent a copy of their letter to the Principal Director Search. He also did not reply.

A document sent to each of the complainants on 27 May 1998 by the Director of directorate 1.2.40 made reference to a productivity norm of 1.87 days per dossier. In a letter of 3 June 1998 addressed to the President of the Office, the complainants asked that the productivity norm of 2.2 days per dossier "be respected by all parties". Having received no clear reply from the Administration, on 24 September each complainant wrote again to the President, asking him to re-establish their productivity norm at either the 1992 level (2.4 days per dossier) or the 1997 level (2.2 days per dossier), or to consider their letters as introducing an internal appeal. On 24 November 1998 the Director of Personnel Development replied that their requests had been registered as internal appeal RI/105/98 but that a conciliation procedure was to take place prior to the appeal being heard by the Appeals Committee. The parties were unable to reach an agreement during the conciliation process, so the complainants pressed their appeal on 16 June 1999.

On 13 July their Director informed them that their productivity norm for 1999 would be 1.87 days per dossier. The complainants contested this decision in identical letters to the President on 14 July. The Director of Personnel Development informed them on 21 July 1999 that their letters had been registered as internal appeal RI/75/99 and would be treated jointly with appeal RI/105/98.

By January 2001 their appeals had not been heard by the Appeals Committee, nor had the Administration submitted its position paper on the matter, so on 30 January 2001 the complainants filed their complaints with the Tribunal, impugning the implied rejection of their internal appeals.

In its opinion of 23 January 2002 the Appeals Committee considered both appeals unfounded and recommended rejecting them. The President endorsed that recommendation on 6 February 2002.

B. The complainants argue that they have been adversely affected by the decisions setting their productivity norm at 1.87 days per dossier because any eventual promotion is linked to their staff reports and the rating therein for productivity is assessed on this norm. Furthermore, the decisions were flawed. Not only did the Director fail to state the grounds on which he based the decrease, but there is also no record that the Local Advisory Committee was consulted to give its opinion on the matter; both constitute infringements of the Service Regulations for Permanent Employees of the European Patent Office. Nor were the complainants themselves consulted regarding the change in productivity norm.

They allege that there had been promises made by two different officials that their productivity norms would not be changed when they transferred into a new directorate and it was on this condition that they accepted the transfer. According to them, the Tribunal has consistently held that in the interest of the principle of good faith and fairness, an organisation has a duty to uphold promises given to staff.

The complainants contend that the new productivity norm is unreasonably low for their field of work. It is also not consistent with guidelines set out for the Principal Directorate. They have been subjected to unequal treatment.

They ask the Tribunal "to officially request" the EPO Administration to provide them with data necessary to evaluate the productivity norms. They claim the quashing of the decisions altering the productivity norms and re-establishment of the norm at the 1992 level (2.4 days per dossier), or in the alternative, re-establishment of the norm at the 1997 level (2.2 days per dossier). They also claim moral damages and costs.

C. The EPO states that it has filed a reply only to safeguard its rights; as the issue raised by the complainants is a matter of technical complexity, it is waiting for the Appeals Committee's opinion before making substantive comments.

It attaches the position paper it submitted to the Appeals Committee on 21 February 2001. In that document it contests the receivability of appeal RI/105/98, as being filed out of time. Regarding the merits of the appeals, it argues that the Tribunal's case law has upheld an organisation's right to set quotas, and that such decisions do not require consultation with either the General or Local Advisory Committees. It states that the decisions were not procedurally flawed and were sufficiently reasoned.

It pleads that the complaints are irreceivable and subsidiarily unfounded.

D. In their rejoinder the complainants dispute certain findings of the Appeals Committee. First, the Committee found that they had been given the reasons for the decision, but they point out that these were given one year after the productivity norm had been decreased. Secondly, they disagree with the Committee's statement that an assessment of a staff member's performance is based on a target set for the individual concerned and not on the productivity norm. They submit that it is the productivity norm that is used in the staff reports.

They press their pleas and claims.

E. In its surrejoinder the EPO presses its objections to receivability. It argues that the complainants' director was entitled to set a new productivity norm and that this did not require prior consultation with the Local Advisory Committee. Furthermore, the Director provided them with the reasons for his decision. It denies that the decision was flawed.

The Organisation states that the complainants have offered no evidence of the alleged promises made by two officials. The EPO denies that they were treated unequally. It explains the difference between an individual's target and a productivity norm.

CONSIDERATIONS

1. In their complaints filed in January 2001, the complainants contest the implied rejection of two internal appeals filed by them in September 1998 and July 1999. In their rejoinder dated 12 June 2002, they also contest the President's decision of 6 February 2002 rejecting their appeals. Those appeals had been filed against decisions related to a decrease in productivity norms from 2.4 days per dossier to 2.2 days per dossier in 1993, then to 1.87 days per dossier in 1998 and the following year. They argue that the norm imposed on them is unreasonably low and amounts to unequal treatment. They submit that the decisions decreasing the norm infringe Articles 38(4) and 106(1) of the Service Regulations and violate the duty of trust, good faith and fairness that the Organisation owes its staff. They seek the quashing of the decisions altering their productivity norm, reestablishment of the norm at the 1992 level (or, failing that, at the 1997 level), moral damages and 12,000 German marks in costs. There has been an application to intervene filed by one person who was party to the internal appeals but who did not join with the complainants in filing the present complaints.

2. The norm at issue is expressed in terms of units of time required to accomplish a given task. Accordingly, a decrease in the norm results in a decrease in the amount of time to accomplish the task or an increase in productivity. The complainants admit that they agreed (albeit, they say, reluctantly) to the decrease in norm effected in 1993 so it follows that insofar as they attempt to contest that decrease, their claim is doomed to failure. The only true issue in these complaints is their attacks on the decrease announced for the year 1998 and confirmed for 1999.

Receivability

3. The Organisation contests receivability on two separate grounds: one expressed, one implied. First, it says that the internal appeal with respect to the 1998 change was out of time so that the complaints to the Tribunal, insofar as they impugn the decision taken in 1998, are irreceivable. The EPO does not contest the receivability of the 1999 appeal. Second, the Organisation implicitly contests receivability of the complaints in respect of both internal appeals because the complaints were filed prior to the completion of the appeal process, and indeed prior to the Administration even having submitted its position paper on the internal appeals before the Appeals Committee.

4. The Appeals Committee found both appeals before it to be receivable. Since the receivability of the 1999 appeal is in any event conceded, and since both raise identical issues of fact and law, the question of the receivability of the first appeal is of academic interest only and the Tribunal will not spend any further time in considering it.

5. When the present complaints were filed, the Administration's position paper on the internal appeals had still not been filed (it was in fact delivered the following month, February 2001).

6. As indicated, the 1998 appeal was filed in September of that year. Shortly thereafter the parties, by mutual consent, entered into a conciliation procedure. The conciliation concluded in June 1999 without settlement of the issues. The 1999 appeal was filed in July of that year and in September the complainants submitted grounds for their first appeal. At that point they had done everything that could be required of them to bring on their appeals. When, in July 2000 the Administration's position paper had still not been produced, the complainants wrote indicating that if such paper was not produced by the end of August they would consider having recourse directly to the Tribunal. The Administration replied promising the necessary action in August and later revised this target date to September. It was indicated that the appeals might be heard in November or December. In fact, nothing happened and when the complaints were filed in January 2001, the proceedings had not advanced from where they had been in September 1999.

7. The Tribunal has frequently in the past had to consider the question of when a complainant may be said to have exhausted the internal remedies when the internal appeal proceedings have been unduly delayed and have not resulted in a final administrative decision. In Judgment 1829, under 6, the Tribunal cited and examined its earlier decisions and summarised them as follows:

"[...] The Tribunal's case law has it that where the pursuit of the internal remedies is unreasonably delayed the requirement of Article VII(1) will have been met if, though doing everything that can be expected to get the matter concluded, the complainant can show that the internal appeal proceedings are unlikely to end within a reasonable time [...]."

8. Likewise, in Judgment 2039, under 4, the Tribunal said:

"Precedent says that the requirement to exhaust the internal remedies cannot have the effect of paralysing the exercise of the complainants' rights. Complainants may therefore go straight to the Tribunal where the competent bodies are not able to decide on an issue within a reasonable time, depending on the circumstances [...]."

9. In the circumstances of this case, the Tribunal has no hesitation in declaring the complaints to have been receivable when they were filed. It notes in passing, that even after the filing of the complaints, it took the Organisation more than a year to bring the internal appeal procedure to a conclusion. By any standards, that is an unacceptable delay. The Organisation's plea that it is overwhelmed by a heavy volume and a backlog of internal appeals may be a reason, but it is not an excuse. Incompetence or a lack of resources can never justify depriving employees of their right to a speedy and just resolution of their grievances.

10. The case is remarkably similar to that of Judgment 1968 where the Tribunal said under 5:

"[...] As at 29 July 1999 the complainant had done all that could be reasonably expected of him. He had filed his appeal in time. Approximately a year later he wrote to enquire about its progress and had been informed that the Administration had done nothing but would move forward as soon as possible. He filed his complaint just over four months later having heard nothing further from the Administration. At that time almost twenty months had elapsed since the original challenged decision had been published. The Administration's plea that it had a heavy backlog of internal appeals to deal with may be a reason for the inordinate delay, but it is not an excuse. As at 29 July 1999, it was simply not reasonable to expect the complainant to wait any longer to see even the beginning of the end of the internal appeal procedure. If the Organisation was overloaded with internal appeals, it was for it to remedy the situation rather than expect the complainant to bear the consequences."

11. The consequence of the receivability of the complaints is that the Appeals Committee's recommendation and the President's decision approving the same can only survive if the complaints themselves are dismissed; failing which they will become simple nullities. To put the matter another way, both the receivability and the merits of the complaints must be assessed at the time they were filed in January 2001 and events subsequent thereto, while possibly of interest, can have no impact on the outcome.

The merits

12. While the complainants raise a number of pleas, most of these are in respect of the correctness of the decisions to decrease the productivity norm applicable to them. These are technical matters within the particular expertise of the Organisation and while the Tribunal will not hesitate to intervene on questions of correctness in appropriate cases, its primary role is to ensure the legality of administrative decisions. Since the complainants raise a threshold issue regarding the manner in which the decisions lowering the productivity norm were arrived at, the Tribunal will take up that matter first.

13. Article 38(3) and (4) of the Service Regulations read as follows:

"(3) The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

- any question of a general nature submitted to it by the President of the Office;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36.

(4) Each Local Advisory Committee shall be responsible for giving opinions on:

- any proposal to make rules and, in general, except in cases of obvious urgency, any proposal which concerns solely the whole or part of the staff at the place of employment concerned;

- any question of a local nature submitted to it by the President of the Office or his representative;

- any question submitted to it for an opinion by the General Advisory Committee;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

14. It is common ground that neither the General Advisory Committee nor the Local Advisory Committee were consulted in the present case. It also appears to be agreed that the change in productivity norm at issue were to apply only to those search examiners working in the complainants' technical field in directorate 1.2.40.

15. The Organisation takes the position that there was no need to consult either Committee. It cites and relies on what the Tribunal said in Judgment 1175:

"5. [...]

The purpose of probation is to find out whether a probationer has the mettle to make a satisfactory career in the Organisation. The competent authority will determine on the evidence before it, and possibly after extension of the probation as in the present case where doubt still lingers, whether to dismiss the official or to confirm the appointment. It must indeed be allowed the widest measure of discretion in determining whether someone it has recruited is suitable.

6. [...]

The Organisation is free to set quotas for the output of patent examiners. The complainant has failed to offer any evidence to suggest that the quotas the Organisation set for him were in any way unreasonable or that, even when he attained them, the evenness of his output was such as the Organisation was entitled to expect of him. [...]"

16. The Organisation seeks to read far more into this judgment than it really says. In the first place, as the extract makes plain, the decision was about probation, a field where the Tribunal has always allowed far more latitude to the employer than when it is dealing with permanent employees. Second, and more important, the discretion recognised by the judgment was in the setting of "quotas" or, perhaps more accurately, targets.

17. Productivity norms are not quotas. They are standards of general application against which the quotas or targets of individual employees may be established. This is most clearly stated by the Organisation itself in its surrejoinder where it says:

"For each examiner a *productivity target* is fixed individually because individual factors such as seniority, experience or a reduction in working hours need to be taken into account. A crucial element for the calculation of the target is the *norm* which is set specifically for a technical field. This norm '*est exprimée en nombre de dossiers pondérés à faire par un examinateur formé fictif de capacité moyenne durant 180 jours de recherche*'[(1)] (note by the then Principal Director Search, [...]). From its wording alone, this is clearly a definition of a general standard which needs to be adapted to the individual situation of an examiner. Hence, the production norm is relevant only insofar as it defines the performance level at which the assessment '*good*' can be expected for productivity, ie one of the aspects appraised in the staff reports. From the above it follows on the one hand that the 'norm' is a general standard necessary to ensure a common and harmonised ground for performance appraisal within the unit to which it applies, and on the other that equality of treatment requires that individual targets be set on the basis of the norm. Consequently, the target ensures equality of treatment, a goal the norm alone cannot achieve."

18. This is conclusive. On the Organisation's own showing the norms at issue are of a "general standard" applicable only "within the unit to which it applies". On the one hand, this clearly distinguishes them from the individual goals or targets to which Judgment 1175 applies. On the other hand, it brings them squarely within the language of Article 38(4) of the Service Regulations quoted above as being "any proposal which concerns solely the whole or part of the staff at the place of employment concerned".

19. In Judgment 1488, the Tribunal dealt with a very similar situation regarding this same Organisation which had failed to consult the appropriate advisory committee with regard to a proposed change in the point system by which patent examiners were rated. Although the rule there being examined was Article 38(3) rather than Article 38(4), the texts are almost identical and there is no valid basis to distinguish between them. The Tribunal in that case said:

"9. The construction that the Organisation puts on Article 38(3) is too narrow. Article 38(3) does of course, as the EPO says, apply to cases where the Service Regulations and Pension Scheme Regulations are to be amended or 'implementing rules' are to be made, and the legal status of staff is thereby to be affected. But it goes further: it applies to cases where 'any proposal' is made 'which concerns the whole or part of the staff'. So it casts a wide net that goes beyond mere changes in legal provisions.

10. Article 38(3) does not interfere with the President's exercise of his decision-making authority, but seeks to ensure that the proposal shall go through a formal process in which the staff have a right to be consulted through the General Advisory Committee. Indeed it makes for good relations between staff and administration not just to empower but to require that body, set up under the Service Regulations to represent both sides, to give 'a reasoned opinion'. It does not matter that management may have consulted the staff on the subject in other ways. What was lacking in this case was what Article 38(3) required: the formal consultation of the General Advisory Committee and the submission of its reasoned opinion before the decision was made."

20. The Tribunal could hardly have spoken more clearly. What was said there about the General Advisory Committee is equally applicable to the Local Advisory Committee where purely local matters are concerned.

21. Since the complaints succeed on the threshold issue, it is not necessary to take up the complainants' other pleas.

22. The complaints will be allowed and the impugned decisions will be set aside. Each complainant is entitled to moral damages of 1,000 euros and they shall jointly receive costs in the amount of 1,000 euros. The intervener shall benefit from the nullity of the impugned decisions but is not entitled to any damages or costs.

DECISION

For the above reasons,

1. The impugned decisions are set aside.

2. The EPO shall pay to each complainant the sum of 1,000 euros in moral damages.

3. It shall pay to the complainants jointly the sum of 1,000 euros for costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 1 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

1. Registry's translation: 'is expressed as the number of weighted dossiers to be treated over a period of 180 days of search by a fictitious trained examiner of average ability'