

## **FORTY-FIFTH ORDINARY SESSION**

### ***In re* LUYTEN**

#### **Judgment No. 438**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Patent Organisation (EPO) by Mr. Henri Walter Luyten on 3 March 1980, the EPO's reply of 12 June, the complainant's rejoinder of 12 August and the EPO's surrejoinder of 16 September 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 23 of the Staff Regulations of the International Patent Institute, Article 108 of the EPO Service Regulations, the Institute's rules on the appraisal of performance and the Agreement on the Integration of the International Patent Institute into the European Patent Office;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant was appointed to the staff of the International Patent Institute in The Hague in 1969. In 1975 his immediate supervisor, who was the chief of his unit, and the chief of his division were unable to agree on the assessment of his work performance and, in accordance with the Institute rules, sought the opinion of an arbitrator. The arbitrator took the view that the right general assessment was "good", the complainant appealed to the Reports Committee, and the Committee upheld the arbitrator's view. On 1 February 1977 the Director-General informed the complainant that he endorsed the Committee's recommendation. The complainant felt that he deserved to be assessed as "very good" and he appealed to the Appeals Committee. That Committee took the view that clearly mistaken conclusions had been drawn from the facts and it recommended withdrawing the complainant's annual report and sending it back to the Reports Committee. The Director-General rejected that recommendation, decided that the appraisal procedure should start all over again and so informed the complainant on 14 July 1977. The new annual report, notified to the complainant on 9 November, confirmed the "good" assessment and on 14 December the Director-General approved it. On 1 January 1978 the Institute was integrated into the European Patent Office, the Director-General of the Institute became Vice-President of the EPO and the complainant became a member of the EPO staff. On 10 January 1978 he appealed to the former Director-General against the decision of 14 December 1977. The Director-General, as Vice-President of the EPO, forwarded the appeal to the President, who referred it to the EPO Appeals Committee. The Appeals Committee reported on 2 October 1978 and, on its recommendation, the President on 20 October set aside the Director-General's decisions of 14 December and 14 July 1977 and ordered that the original performance report should be sent back to the Reports Committee. Nothing was done, however, and on 13 December 1979 the President took a further decision confirming the "good" general assessment for 1975 on the grounds that the Reports Committee was defunct and the report could not be sent back to it. It is the final decision of 13 December 1979 which is impugned.

B. The complainant contends that the correct view was the one taken in June 1977 by the Appeals Committee of the Institute, namely that, since most aspects of the complainant's performance were assessed as "very good" it was clearly mistaken to give him only a "good" general assessment. The appraisal procedure having begun all over again, the chief of his unit drew up a new and quite different report: for four aspects of the complainant's performance the assessment was changed from "very good" to "good". He observes that such assessments are subjective and were difficult enough to make at the material time and quite impossible 18 months later. He believes that since the EPO is the universal successor of the Institute there is no legal impediment to acting on the recommendation made by the EPO Appeals Committee on 6 September 1978 and to the President's decision of 20 October 1978. He contends that it is customary to allow the administration the same period of time to withdraw a decision conferring a right on the staff member as is allowed to the latter to appeal against the decision. Under Article 108 of the EPO Service Regulations the President ought to have withdrawn his decision within the three

months following 20 October 1978, and not 14 months afterwards.

C. In his claim for relief the complainant asks the Tribunal:

(a) to set aside the performance report;

(b) to quash the decision of the President of the EPO dated 13 December 1979 and order that he be given a "very good" general assessment for 1975;

(c) subsidiarily, to refer the original report to the Reports Committee, account to be taken of the recommendation of the Appeals Committee of the Institute; and

(d) to award him 2,000 guilders as costs and damages.

D. In its reply the EPO observes that the first two points of the President's decision of 20 October 1978 - quashing the Director-General's decision of 14 December 1977 and quashing his decision of 14 July 1977 - are still in force and that all that he decided on 13 December 1979 was not to refer the report to the Reports Committee but uphold the "good" general assessment. The first claim for relief - for setting aside the second performance report - is therefore without substance. As regards the second claim - for the quashing of the decision of 13 December 1979 - the third point of the decision of 20 October 1978 - referral of the report to the Reports Committee - was cancelled by the impugned decision on the grounds that no effect could be given to it, the Institute being defunct. The rules of the Institute on the appraisal of performance are also defunct and the President of the EPO had no authority to reconstitute the Reports Committee provided for in those rules. For the same reason the complainant's third claim must fail. Moreover, his application for an order that the President of the EPO give him a "very good" general assessment for 1975 is at odds with the case law, whereby the Tribunal will not set aside decisions on the appraisal of performance unless they are tainted with some flaw. The impugned decision is fully valid. The President had the authority to take it, and he consulted the Vice-President of the EPO - the former Director-General of the Institute - before he took it. Lastly, it was in no way arbitrary. The EPO therefore asks the Tribunal to dismiss all the claims for relief.

E. In his rejoinder the complainant withdraws his first claim. He observes that the EPO has confirmed the first two points of the decision of 20 October 1978. That decision gave effect to the recommendation made on 2 October 1978 by the EPO Appeals Committee, which found that the "good" general assessment did not reflect the various detailed assessments and that the decision to give such a general assessment had therefore been taken in disregard of the facts. The President was bound by that opinion and was wrong to confirm the "good" general assessment by his decision of 13 December 1979. That the complainant should get the "very good" general assessment he is claiming is required by the memorandum which the Director-General of the Institute addressed on 1 April 1976 to all chiefs drawing up performance reports and in which he asked them to beware of "discrepancies between the general and detailed assessments". A clearly mistaken conclusion was therefore drawn from the facts, and the impugned decision is therefore tainted with a flaw which entitles the Tribunal to set it aside. The complainant therefore presses all his claims but the first.

F. In its surrejoinder the EPO observes that, considering the time that has elapsed since 1975, it would in any event be impossible to review the assessment now. For the legal reasons set out in the reply the report cannot be sent back to the Reports Committee. In practice the only claim which can succeed is the one for the quashing of the decision of 13 October 1979 and the award of a "very good" general assessment. But that would be tantamount to substituting the Tribunal's assessment for the President's and that is something which the Tribunal neither can nor will do. Moreover, the impugned decision neither has caused nor will cause the complainant any prejudice. Performance reports are used only on deciding on promotions. According to the rules, the next time the complainant is considered for promotion only the assessments of his performance for 1976, 1977 and 1979 will be taken into account. The assessment for 1975 will not count.

CONSIDERATIONS:

Receivability

1. In his complaint, which is dated 3 March 1980, the complainant asks the Tribunal to quash the decision which the President of the EPO took on 13 December 1979. That is the "impugned decision" within the meaning of Article VII, paragraph 2, of the Statute of the Tribunal. Since the complainant has exhausted all the internal means

of redress and filed his complaint within ninety days of the date of notification of the decision, the complaint is receivable.

The merits

2. An assessment of the President of the EPO of an official's performance is a matter of discretion. The Tribunal will therefore set aside the impugned decision only if it was taken without authority, or if there was breach of a rule of form or of procedure, or if the decision was based on an error of fact or of law, or if essential facts were overlooked, or if there was misuse of authority, or if clearly mistaken conclusions were drawn from the facts.

3. It is beyond question that under the Staff Regulations the President of the EPO was the competent authority. It was he who was authorised to determine the final assessment of the complainant's performance and notify it to him.

4. The impugned decision of 13 December 1979 was the culmination of the lengthy and complicated procedure described in the summary of facts which is set out above. The claims for relief are so worded that there is no need for the Tribunal to review that procedure at all its stages. The Tribunal will merely observe that in his rejoinder the complainant has withdrawn his first claim, namely that the second performance report be set aside.

5. The impugned decision is in two parts:

(a) after consultation of the former Director-General of the International Patent Institute it once again gives the complainant a "good" general assessment for 1975; and

(b) it declares that the Reports Committee is defunct and that therefore the question of the assessment for 1975 cannot now be referred to it.

6. Before the decision was notified to the complainant, the Appeals Committee of the EPO, to which the complainant had appealed, had considered the matter. On 6 September 1978 it had recommended that the decisions taken by the Director-General of the Institute on 14 December and 14 July 1977 should be quashed and that the original performance report should be referred to the Reports Committee.

7. On 20 October 1978 the President of the EPO communicated the Appeals Committee's report to the complainant, stating that he endorsed the report and followed the Committee's recommendation.

8. It appears that by his final decision of 13 December 1979, which is the decision impugned, the President of the EPO has changed his mind and accordingly reviewed his decision of 20 October 1978 based on the Appeals Committee's report.

9. The President was competent to do so since he was not bound by the recommendations of the Appeals Committee. He was also right in stating that it was impossible to refer the matter to the Reports Committee as the Appeals Committee had recommended, since the Reports Committee was defunct.

10. There is no evidence to suggest any fault within the meaning of paragraph 2 above in awarding a "good" general assessment for 1975.

Nor may the Tribunal substitute its own assessment for the decision taken by the President in the exercise of his discretion and grant a "very good" general assessment.

11. The subsidiary claim, (c), is also unfounded since as has been said the Reports Committee is defunct.

12. The claim for moral damages also fails, for the delays which are complained about did not affect the complainant to an extent that would justify it.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 11 December 1980.

(Signed)

André Grisel  
Devlin  
H. Armbruster

Bernard Spy

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