Registry's translation, the French text alone being authoritative.

EIGHTY-NINTH SESSION

***In re* van Walstijn** **Judgment No. 1984**

The Administrative Tribunal,

Considering the complaint filed by Mr Bartholomeus Gerardus Goseninus van Walstijn against the European Patent Organisation (EPO) on 15 March 1999 and corrected on 28 June, the EPO's reply of 13 September, the complainant's rejoinder of 23 November 1999, and the Organisation's surrejoinder of 14 February 2000;

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;

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

A. The complainant, a Dutch national born in 1965, joined the European Patent Office, the secretariat of the EPO, as an examiner on 1 August 1990. He was assigned to the EPO's Directorate-General 2 in Munich, Germany. At that time he had been living in Copenhagen, Denmark. Under Article 81(1) a) of the Service Regulations for Permanent Employees of the European Patent Office, he was entitled on taking up his appointment, to reimbursement of expenses incurred for the removal of household and personal effects to his new place of employment. Paragraph 4 of that same article provides that up to two consignments of goods will be reimbursed. The first consignment, exceptionally approved from his home town, Laren (the Netherlands), to Munich via Copenhagen took place in August 1990. At issue is the request for reimbursement of expenses for a second consignment.

On 30 April 1997 the complainant submitted form 4400 requesting approval for reimbursement of expenses for a removal scheduled for 22 May from Laren (the Netherlands) to Munich (Germany). In compliance with Article 81(3) of the Service Regulations, he submitted estimates from two removal companies and the competent department in the EPO approved one of the estimates. A removal was carried out on 22 May. Shortly thereafter the Personnel Department received an invoice from the removal company dated 30 May for a removal on 22 May that had allegedly taken place from Laren to Munich. The Personnel Department then telephoned the complainant, informing him that it had received the invoice from the removal company and asked him to sign the appropriate section of form 4400 so as to enable the Organisation to make a direct payment to the company. On 2 June the complainant signed the form under the statement: "I hereby authorise the office to accept and settle direct the invoice from the firm instructed by me to carry out the removal".

Since there was some doubt as to whether the removal (second consignment) from Laren to Munich had actually taken place given the fact that the complainant had requested special leave for a move within Munich, the Personnel Department felt it appropriate to verify the removal and it requested a copy of the bill of freight relating to the removal from the removal company on 11 June 1997. Although the company had originally confirmed a removal from Laren to Munich as described in the invoice, it retracted this statement on 16 June by orally informing the EPO that the removal carried out was in fact from Munich to Copenhagen. This was later confirmed in writing on 23 June. On 13 June the Head of the Remuneration Department contacted the removal company which had submitted the second estimate; according to that company, the complainant had requested that a removal within Munich be presented as from Laren to Munich.

On 16 June 1997 the complainant telephoned the Personnel Department and asked them not to settle the invoice. On that same date the Personnel Department wrote to the complainant requesting clarification. In a letter of 18 June he explained that: when his prospects to have a larger apartment in Munich fell through in the middle of May he

decided to send his wife's furniture back to Copenhagen; for that removal, he had expressly requested the removal company to send him the invoice; and when he signed form 4400 the second time he thought it still referred to his request to carry out a removal from Laren to Munich sometime in the future. Upon receipt of that letter, the Director of Personnel Management phoned the complainant to request a meeting; the complainant turned down the request in a letter of 2 July saying that he had already clarified all the issues.

On 17 September 1997 the Vice-President in charge of Directorate-General 4 informed the Chairman of the Disciplinary Committee that the President of the Office had decided to initiate disciplinary proceedings against the complainant. The Committee was asked "to investigate whether the complainant had intentionally attempted to gain around DM 10,000 in reimbursement for removal expenses (Munich to Copenhagen instead of Laren to Munich) to which, as he was well aware, he was not entitled". In a disciplinary hearing on 10 October the complainant was given the opportunity to present his case; his counsel confirmed what the complainant had already stated in his letter of 18 June 1997. At the complainant's request, further hearings took place during which two employees of the removal company confirmed that their company had accepted the complainant's request to indicate on the estimate a removal that was different than the one that had actually been carried out.

On 10 December 1997 the Disciplinary Committee submitted its report to the President of the Office. It concluded that the complainant had intentionally attempted to claim reimbursement of removal expenses to which he was not entitled and that he had not made any attempt to correct the consequences of his actions before suspicion arose. As a disciplinary measure it unanimously recommended a substantial downgrading.

In a letter of 23 December 1997 the Principal Director of Personnel informed the complainant that the President of the Office intended to dismiss him pursuant to Article 93(2) f) of the Service Regulations because his conduct amounted to a serious breach of Article 14 on the general obligations of permanent employees. Nevertheless, the dismissal would not include a reduction of the severance grant under Article 11 of the Pension Scheme Regulations. He was also informed that the President's decision had to be taken within one month of the notification of the opinion of the Disciplinary Committee - that is 9 January 1998 at the latest - and that under Article 102(3) of the Service Regulations he had the right to be heard.

The parties agreed that the complainant would be heard on 20 January 1998. During the hearing the possibility of the complainant resigning in lieu of disciplinary measures was discussed. By a fax to the complainant's counsel on 21 January the Director of Personnel Management informed him that the President of the EPO had decided to dismiss the complainant as from 1 February 1998 but that the possibility of resignation with effect from 1 March 1998 was still an option. On 22 January the Director of Personnel Management sent the complainant's counsel a new fax, informing him that the dismissal date would be as of 1 June 1998.

In a letter of 30 January 1998 to the complainant's counsel the Director of Personnel Management inquired whether the complainant intended to resign and set a deadline of 6 February. In a letter dated 10 February the Director of Personnel Management, having received no request from the complainant to resign, informed the complainant's counsel that the President of the Office had signed the certificate of dismissal, and he attached a copy of it. The original certificate was sent directly to the complainant on the same day and he was asked to acknowledge receipt of it. The complainant did not confirm receipt of the letter and certificate and the EPO sent him a reminder on 15 April. On 17 April the complainant acknowledged receipt of the letter of 15 April, but not of the certificate of dismissal.

On 20 April 1998 the complainant filed an internal appeal against the decision to dismiss him. He asked that the decision be quashed and requested an award of damages for the material and moral injury he had suffered. His employment ended with the EPO on 31 May. The Appeals Committee heard the complainant on 28 October and recommended on 16 November to reject the appeal as unfounded. On 18 December 1998 the complainant was informed that the President rejected his appeal. That is the impugned decision.

B. The complainant denies having committed attempted fraud and contests certain facts as represented by the EPO. He explains that there were two removals planned for mid-May 1997. One consisted of removing furniture belonging to his wife from Munich to Copenhagen. The second consisted of removing the complainant's furniture from Laren to Munich, for which he filled out form 4400 and received the approval of the Organisation. However, as a result of problems finding a suitable new apartment in Munich, only the removal from Munich to Copenhagen could be carried out as planned. That removal could not be reimbursed and he had agreed with the company that the invoice would be sent directly to him; only the invoice for the removal from Laren to Munich was to be sent to

the EPO. When he did not receive the invoice in a timely manner he inquired as to its whereabouts and learned that it had been sent to the EPO. He paid the invoice immediately and requested that the company cancel the invoice sent to the Organisation. He telephoned the EPO on his own initiative to inform them of the error.

The complainant argues that the decision to dismiss him was flawed by procedural and substantive errors. The decision did not state the grounds on which it was based, as required by Article 106(1) of the Service Regulations. Nor was the original decision communicated to him, either directly or through his counsel - which is a violation of Article 102(3). His counsel received only an informal notice of the original decision. The notice of dismissal was dated 22 January 1998 but the deadline for communicating the decision had been set as 21 January. The President of the Office signed only the certificate of dismissal but not the letter communicating the decision, thereby also violating Article 102(3). In addition, the certificate of dismissal was dated 22 January but was not sent to the complainant until 10 February.

He contends that he had "at no time intent to deceive the office" which would be a precondition for attempted fraud. This has all arisen out of a mistake made by the removal company. Furthermore, the EPO sustained no damages. He argues that in dismissing him from service pursuant to Article 93(2) f) of the Service Regulations, the principle of proportionality has been breached since there is not a more severe penalty that could be imposed in cases of actual fraud. The Disciplinary Committee unanimously rejected the option of dismissing him. He claims that the principle of equality has also been breached, as the President of the Office has not given specific reasons for his decision, thus preventing either an objective assessment of the President's actions or a comparison with similar disciplinary cases.

The complainant requests the Tribunal: (1) to quash the President's final decision of 18 December 1998 to dismiss him; (2) to reinstate him and award arrears of pay as from 1 June 1998, when he was dismissed from duty; (3) to award him 25,000 German marks in damages, even if he is reinstated; and (4) to award him 40,000 marks in costs.

C. In its reply the Organisation asserts that since the complainant did not request his reinstatement and payment of his salary as from 1 June 1998 in his internal appeal, those claims are irreceivable for failure to exhaust the internal means of redress. Furthermore, the EPO's decision to dismiss the complainant was not flawed by either procedural or substantive error. It is clear that according to the Tribunal's case law, disciplinary measures are within the discretionary power of the executive head of an organisation and can only be reviewed under limited circumstances, such as those involving abuse of discretion.

It refutes the complainant's argument that it did not comply with Article 102(3) of the Service Regulations. The fax sent by the Director of Personnel Management on 21 January 1998 to the complainant's counsel "was an official communication of the President's decision and not a mere 'informal information'". It is true that the certificate of dismissal was not sent until 10 February, but that is because the complainant had, until 6 February, the option to resign. The information he was given regarding the reasons for his dismissal was sufficient to satisfy Article 106(1).

The EPO denies that there has been a breach of equal treatment. Circumstances arising out of disciplinary cases make valid comparisons difficult. It also rebuts the complainant's argument that the Organisation did not suffer any damages. It does not characterise the issue as one of financial loss, or even potential financial loss, but rather one of loss of trust.

Although the complainant continues to deny that he has committed any wrongdoing, there has been ample proof provided by the removal company that the complainant had asked to have the invoice for the removal of furniture from Munich to Copenhagen to be specified as a removal from Laren to Munich. The element of fraudulent intent was unanimously established by both the Disciplinary and the Appeals Committees. Therefore, the imposition of a disciplinary measure was warranted.

It requests that the complainant be ordered to bear costs.

D. In his rejoinder the complainant presses his argument that his dismissal was legally erroneous on material and formal grounds. He contends that the EPO "wanted to 'establish an example' to the outside" and that it had difficulty understanding the objective facts. He asserts that it was clear to him from the outset which removal could be reimbursed and which one could not and that he had planned on receiving the invoices personally so that he would also control which one would be submitted for reimbursement. Consequently, it is wrong to hold him

responsible for the errors of the removal company and its employees. When he signed form 4400 he was not aware of its scope and at that time was being treated for "overwork syndrome"; he has attached a medical certificate as proof. Additionally, he paid the invoice before there was any injury to the EPO and this should have been a mitigating factor on any disciplinary proceedings.

He counters the Organisation's argument that the complaint is partially irreceivable. His internal appeal attacked the President's decision to dismiss him; therefore, quashing the President's decision would place him back in the employ of the EPO. In his appeal he had also asked for material damages, which would include loss of earnings.

E. In its surrejoinder the Organisation contends that the complainant continues to use lengthy explanations to obscure essential facts, such as his having submitted two falsified estimates with form 4400. It notes that the issue of "overwork syndrome" was never mentioned during the disciplinary procedure or the internal appeals process and that the certificate regarding the complainant's health in June 1997 is dated 11 November 1999, just days before the rejoinder was drafted. He has also failed to discredit the testimony of the removal company's employee. It points out that dismissal without a reduction in severance grant is not the most severe form of discipline.

CONSIDERATIONS

1. The complainant was recruited as a patent examiner at the European Patent Office, the EPO's secretariat, on 1 August 1990. The Organisation brought disciplinary proceedings against him for attempting to have the Organisation bear the costs of a removal for which he was not entitled to claim reimbursement (the salient facts are given under A above). As a consequence the President of the Office decided to dismiss him. The decision was notified to the complainant's counsel by two faxes of 21 and 22 January 1998 from the Director of Personnel Management. The date of his dismissal, originally set at 1 February 1998, was postponed to 1 June 1998. The complainant appealed against the decision, but a majority of the Appeals Committee recommended rejection. The President endorsed the recommendation by a decision of 18 December 1998, which the complainant is now impugning before the Tribunal.

Besides the quashing of the decision, he seeks reinstatement, payment of the salary due to him since his dismissal, an award of 25,000 German marks in damages and 40,000 marks in costs.

2. The complainant objects that the decision to dismiss him was not substantiated and shows formal flaws: it was taken more than one month after the Disciplinary Committee reported and was not notified to him in a timely manner by the President of the Office. On the merits he contends that, contrary to what the EPO asserts, he has not committed fraud. Even if he had attempted to do so, he desisted, so the Organisation sustained no injury. He alleges breach of the principles of proportionality and equality.

3. The EPO must of course comply with the principle that decisions adversely affecting employees of international organisations, particularly disciplinary measures, must be substantiated and allow the persons concerned to challenge them effectively. Indeed that principle is enshrined in Article 106 of the Service Regulations. In the complainant's submission, the EPO should have been particularly conscientious in accounting for the decision of 22 January 1998 as the President decided not to endorse the unanimous recommendation of the Disciplinary Committee, which, although it found that the complainant had attempted to obtain reimbursement for removal costs to which he was not entitled, concluded that, in the circumstances, a downgrading would be a fitting sanction. However, the evidence shows that throughout the procedure the complainant had numerous opportunities to learn of the charges against him and answer them. The President's decision, which expressly cites the opinion of the Disciplinary Committee and the complainant's comments of 20 January 1998, is clarified by the fax of 21 January 1998 sent by the Director of Personnel Management which mentions a hearing that took place in his office, the material rules and the possibility of the complainant's resigning. Having received a letter of 23 December 1997 informing him of the President's intention in the light of the Disciplinary Committee's opinion of 10 December 1997, the complainant was obviously bound to be aware of the reasons why the EPO concluded that he was guilty of serious misconduct warranting a severe sanction. His plea that the EPO failed to explain its decision therefore fails.

4. So too does his plea that the appointing authority was late in notifying its final decision. Article 102(3) of the Service Regulations says that the appointing authority must take its decision within one month of the notification of the opinion of the Disciplinary Committee. It is true that the letter of 23 December 1997 set 9 January 1998 as the deadline for a decision to be taken, possibly after a hearing. But at the complainant's request the time limit was

extended by fifteen days, and it had not expired when his counsel was informed, on 21 and 22 January 1998, of the President's decision. The complainant cannot have sustained injury from the fact that the original of the decision was notified to him only later, and even less from the fact that the Organisation allowed him the opportunity to resign, which would have closed the disciplinary proceedings. The notification in the form of a fax was not in itself unlawful and it did not have to be signed by the President personally.

5. The complainant's pleas on the merits are more substantial, but they fail to demonstrate that the impugned decision was unlawful. It is clear from the very abundant evidence, and particularly the well-substantiated opinions of both the Disciplinary Committee and the Appeals Committee, that the complainant did try to get the Organisation to bear the cost of the removal of some furniture from Munich to Copenhagen - the reimbursement to which he was not entitled - by signing documents stating that the removal was from Laren to Munich - for which he could claim reimbursement, but which did not take place. The fact that uncertainty about where he would live in Munich prevented him right up to the last minute from taking a decision about transferring some of his furniture to Copenhagen does not mitigate the fact that he signed erroneous documents to obtain a reimbursement to which he was not entitled. His misconduct has been established. He paid the offending removal bill by a cheque dated 12 June 1997, received on 16 June, after the Personnel Department had asked the removal company on 11 June to provide a document confirming that the removal was from Laren to Munich, and on 16 June he told the Personnel Department by telephone not to pay the bill. But, although under German criminal law these facts might remove or mitigate the penal nature that could attach to the offence of attempted fraud, when disciplinary sanctions are applied it is immaterial whether or not an act is criminal. Furthermore, the fact that the Organisation in the end suffered no financial injury because it did not have to pay out money it did not owe, does not mean that the complainant's misconduct should not have been sanctioned.

6. Since, quite clearly, his misconduct is established and warrants disciplinary action, the only issue remaining is the delicate one of the President's assessment of how severe the sanction should be. It should be noted in this connection that, although it came down heavily on the complainant in its statement of reasons the Disciplinary Committee decided unanimously on a fairly benign punishment, deeming that his good record for conduct and performance should be taken into consideration, and that his unwillingness to retract his interpretation of the incident as a series of misunderstandings and unfortunate mistakes was probably due to the fact that he had manoeuvred himself into a situation from which there was no way out without loss of face. Neither the President nor the Appeals Committee were convinced by these arguments concerning the complainant's good record and the reasons for his conduct. The majority of the members of the Appeals Committee held that his behaviour constituted a very serious breach of the obligations incumbent on EPO employees and was likely to undermine the mutual trust which must prevail in relations between the Organisation and its staff, and that the sanction applied was not disproportionate to the complainant's misconduct.

7. The Tribunal recalls that, according to a long line of precedent, shared by other international administrative tribunals, the decision-making authority has discretion in determining the severity of a sanction to be applied to a staff member whose misconduct has been established. But that discretion must be exercised in observance of the rule of law, particularly the principle of proportionality. If a sanction is obviously disproportionate to the charges, the Tribunal will set it aside (see for example Judgment 1447 *in re* Berg, delivered on 6 July 1995). In the present case, the complainant's dismissal is not obviously disproportionate to the attempted fraud with which he is charged and which is a serious breach of the duty of honesty incumbent on international civil servants. Consequently, the complainant's plea of disproportionality between the charges and the sanction fails. The President of the Office did not overstep the limits of his discretionary authority by taking the impugned decision. Contrary to the complainant's assertion, he was not bound to hear him personally. He broke no general principle of law, and particularly not the principle of equality. Lastly, the complainant's state of health, cited for the first time in the rejoinder and described in a medical certificate dated 11 November 1999, has no bearing on the merits of the impugned decision.

8. The conclusion is that the complaint must be dismissed, there being no need to go into the receivability of the complainant's claim to reinstatement.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.