

NINETY-FIRST SESSION

In re Rumbo

Judgment No. 2061

The Administrative Tribunal,

Considering the complaint filed by Mr Angel Rumbo against the European Patent Organisation (EPO) on 10 March 2000 and corrected on 10 April, the EPO's reply of 30 June, the complainant's rejoinder of 6 October and the Organisation's surrejoinder of 15 December 2000;

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

Having examined the written submissions;

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

A. Facts relevant to this case are set out under A in Judgments 1488 (*in re Schorsack*) and 2024 (*in re Skelly* No. 2) delivered on 1 February 1996 and 31 January 2001 respectively. The work of patent examiners at the European Patent Office, the EPO's secretariat, is rated by a system of points and fractions of points which the Office uses to evaluate an examiner's output. Following staff dissatisfaction with earlier changes in the system, the President of the Office informed staff on 6 November 1997 that under the new points system, which was to come into effect on 1 January 1998, 0.9 points would be awarded for processing a "demand for international preliminary examination" under Chapter II of the Patent Cooperation Treaty ("PCT Chapter II") and 0.4 points (except in special cases) if the demand was subsequently converted into a European patent application ("Euro-PCT").

The complainant, a Spaniard born in 1959, is a patent examiner at grade A3 in the Office's Directorate-General 2 (DG2). By letters of 18 December 1997 he asked the President of the Office to rescind his decision regarding the new points system or else to treat his letters as internal appeals. By a letter of 23 January 1998 the President refused to withdraw his decision. In its opinion of 7 December 1999 the Appeals Committee unanimously recommended rejecting the appeals. By a letter of 13 December 1999, the impugned decision, the Director of Personnel Development informed the complainant of the President's decision to reject the appeals.

B. The complainant asserts that the new points system is not based on objective criteria. Moreover, there is inequality of treatment in that the completion of a file involves more work in some technical fields than in others. In his field for example, it takes as long to process a Euro-PCT application as to process a standard application for a European patent (hereinafter "Euro-direct"), if not longer. He submits that the Appeals Committee has no experience of examining patent applications and based its opinion on considerations which are unfounded. Besides, it was biased: it accepted the Administration's original assumption though it was not backed up by evidence, yet rejected the figures he submitted as evidence. Since the new system took effect the workload has grown but staff have not been given the necessary tools to cope. He assesses the increase in his own workload at 10 per cent.

He asks the Tribunal to quash the new points system and to award him a lump-sum equivalent to 10 per cent of his salary as from 1 January 1998 until the date on which the system is set aside. He also asks that the International Labour Organization (ILO) issue two recommendations to the European Patent Office, one to set up a system that takes account of the real workload involved in processing Euro-PCT files, and the other to change the system for assessing examiners' output. He applies for hearings.

C. In its reply the Organisation points out that the complainant's claims to recommendations by the ILO are irreceivable because they were not made in the internal appeal and are not within the Tribunal's competence.

Moreover, he has extended the claims made in his internal appeals: he is asking the Tribunal to quash the new system in its entirety whereas in his internal appeals he challenged only the allocation of points for Euro-PCT applications.

The EPO observes that when the General Advisory Committee, on which the staff is represented, was consulted, no one questioned the Office's assumption that Euro-PCT applications require less work than Euro-direct applications. The Appeals Committee confirmed that the assessment of examiners' work falls within the discretionary authority of the Office management. Moreover, its members are perfectly capable of understanding and assessing the complainant's arguments and figures. The mere fact that they based their opinion on information supplied by the Office is no evidence of bias. The EPO sees no breach of equal treatment in the fact that the new system affects examiners differently, depending on their technical fields. It asserts that examiners do have all the tools they need for their work. If any of them are at a disadvantage, this can always be reflected in their performance reports. The system is thus flexible and at the same time reliable. In the EPO's view, hearings would be superfluous because the complainant had ample opportunity to defend himself in the internal procedure.

D. In his rejoinder the complainant maintains his plea that the Organisation's original assumption was wrong, particularly as regards his own technical field. In support he submits figures to show that the amount of work required to process a Euro-PCT application is in no way determined by the work done in the PCT Chapter II phase, because changes introduced between the two phases make the file substantially different. While not doubting the competence of the members of the Appeals Committee, he maintains that they were biased. In his submission, if unequal treatment is to be avoided, the amount of work examiners in different technical fields have to complete in order to obtain the same number of points should vary only within reasonable limits. The overtime he has to do in order to complete his work is not paid, and contrary to the EPO's assertion, it is impossible for performance reports to take account of disadvantages because ratings are subject to strict numerical rules.

E. In its surrejoinder the defendant argues that the figures supplied by the complainant are not representative and that a general system for measuring productivity must be based on information pertaining to the whole of DG2. It maintains that, though there may be differences between the PCT Chapter II and Euro-PCT procedures, the "patentability criteria" used in the former play a decisive role in the latter. The Administration's conclusion that on average it took less time to process a Euro-PCT application than a Euro-direct application is therefore quite legitimate. Lastly, it denies that ratings obey strict mathematical rules: it is possible to take individual circumstances into consideration.

CONSIDERATIONS

1. The complainant serves the EPO as a patent examiner at Directorate-General 2. He filed internal appeals challenging a decision communicated by the President in a note of 6 November 1997, to take effect from 1 January 1998, to change the system of points allocated to the various tasks to be completed in processing European patent applications.

2. On 7 December 1999 the Appeals Committee recommended rejecting his appeals. It found that the Administration had acted within its discretion in deciding, after consulting the General Advisory Committee, that the number of points awarded would be 0.9 for processing PCT Chapter II applications, 0.4 for Euro-PCT applications and 1.0 for "special cases". It also found the Administration's calculations "to be an indication" that on the whole Euro-PCT applications require less work than Euro-direct applications; and that the complainant's calculations, which were different, failed to disprove the Administration's assessment. It accordingly concluded that he had no grounds for alleging breach of equal treatment or that the Organisation had not provided him with the necessary tools to cope with the larger workload generated by the new weighting system.

3. The President endorsed that opinion and rejected the complainant's appeals. The complainant was so informed by a decision of 13 December 1999, which he is now challenging before the Tribunal. He seeks the quashing of the new points system, payment of a lump-sum equal to 10 per cent of his salary since 1 January 1998, two recommendations from the ILO to put in place a system that takes account of the amount of work actually performed in processing Euro-PCT files and to change the system for assessing the output of EPO examiners. He has also applied for hearings "to clarify in person the information already submitted".

4. The evidence already filed by the parties suffices for a ruling and there is no need to allow the complainant's application for hearings.

5. As to his claims to recommendations by the ILO, the Tribunal observes that it is competent under Article II(5) of its Statute to hear "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of ... organization[s]" that recognise its jurisdiction, and that it does not have the authority to issue recommendations about an organisation's general policy.

6. This dispute is mainly about the lawfulness of the points system that has been in force at the EPO since 1 January 1998 for the purpose of assessing the productivity of patent examiners.

One of the tasks of the European Patent Office is to process international applications for patents under the Patent Cooperation Treaty and to conduct an international preliminary examination pursuant to Chapter II of the Treaty (PCT Chapter II). If, after the preliminary examination, the applicant decides to pursue the application, the latter can be converted to an application for a European patent (Euro-PCT) which will be examined by the EPO. Under the old assessment system, examiners were awarded one point for processing a standard application for a European patent (Euro-direct); one point for processing an international application involving an international preliminary examination (PCT Chapter II); and one point when the latter was converted into an application for a European patent (Euro-PCT), even if the same examiner had carried out the international preliminary examination. That system having been found unfair, the Organisation tried to change it, first by a note of 26 January 1993 which the Tribunal quashed on grounds of a formal flaw (see Judgment 1488, *in re Schorsack*), and then by a decision of 23 May 1996, which was revoked (see Judgment 2024 *in re Skelly* No. 2). The Organisation then issued the note of 6 November 1997, which is challenged in this complaint on the grounds that it is unlawful.

7. The gist of the complainant's arguments is:

(a) That to process a Euro-PCT application involves as much if not more work than processing a Euro-direct application.

(b) The new points system increased "the pressure of work" because examiners were not provided with adequate tools. Consequently, the only way to obtain the same number of points as formerly was to do overtime equivalent to 10 per cent of the weekly workload of forty hours.

In support of his arguments the complainant submits statistical information on his work from 1993 to 1998, on the basis of which he concludes that:

- "The amount of work devoted to the Euro-PCT processing increased by 8% due to a reduction in the number of direct patent grants of up to 14% in the Euro-Direct phase and to 6% in the Euro-PCT phase."

- "The amount of work involved in the Euro-PCT phase is:

1.) Totally independent of the amount of work done in the PCT Chapter II phase, and

2.) Equal to or higher than the amount involved in the Euro-Direct phase."

- "... approximately 16.5% more work is needed to process a Euro-PCT file than to process a standard Euro-Direct case."

- "The changes introduced in the Euro-PCT phase mean that processing a Euro-PCT case involves more work than processing a standard Euro-Direct case because a Euro-PCT file is quite different from the original file submitted at the PCT Chapter II phase."

The complainant concedes that in Euro-PCT cases much of the file has already undergone thorough study at the preliminary examination for the PCT Chapter II application. But, he says, the Administration seems unaware that an application contains dozens of specific technical characteristics; so there is nothing to prevent an applicant, at the Euro-PCT phase, from either altering the invention he claimed under the PCT Chapter II application, by introducing new technical characteristics in framing the claims, or from submitting an altogether new invention. There is no knowing from the examination done at the PCT Chapter II phase what invention will be claimed at the Euro-PCT phase. Consequently, he says, when the technical characteristics are not the ones submitted at the PCT

Chapter II stage, the Euro-PCT application takes as long to examine as any Euro-direct application. For example, the entire bibliography has to be analysed again. Lastly, he points out that the work is not at all the same in the Euro-PCT phase as in the previous phase.

8. The EPO reiterates that the members of the General Advisory Committee did not question the Administration's assumption that the old points system was too generous, and that the members of the Appeals Committee, who were perfectly competent EPO officials, concluded unanimously that the arguments and statistics submitted by the complainant were not representative. It adds that the new points system is not in breach of equal treatment and that there are no grounds for accusing the members of the Appeals Committee or the Administration of bias.

9. The Tribunal is aware that any fixed-rate system for weighting the tasks involved in processing complex files may give rise to valid objections. Nor does it doubt the validity of the complainant's statistics on his own work. But it finds no conclusive evidence allowing it to question assessments which were approved unanimously by the members of the Appeals Committee. In an area as technical as patents, the Tribunal will quash an organisation's decision only if it shows blatant misappraisal of facts. The defendant rightly points out that only information pertaining to the whole of DG2 can serve as a basis for a general system for measuring productivity, and its assessment shows no obvious misappraisal of fact. The Tribunal also observes that the provision for a full point to be awarded for "special cases" must be construed as meaning that the system is to be adapted to the amount of work actually required to process Euro-PCT applications. Of course, in order to demonstrate that the allegation of breach of equal treatment is devoid of merit, that provision will have to be applied in practice so that any additional workload borne by certain examiners - or inherent in certain technical fields - can be offset by recognition of such instances as special cases.

10. Since nothing in the evidence bears out his allegation of bias, the Tribunal can only dismiss the complainant's claims in their entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Seydou Ba

Hildegard Rondón de Sansó

Catherine Comtet