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

NINETY-SEVENTH SESSION

Judgment No. 2331

The Administrative Tribunal,

Considering the complaint filed by Mr R. W. against the European Patent Organisation (EPO) on 19 May 2003, the Organisation's reply of 12 September, the complainant's rejoinder of 12 October and the EPO's surrejoinder of 10 November 2003;

Considering Article II, paragraph 5, 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. The complainant, a Luxembourg national born in 1942, joined the International Patent Institute in 1967. This Institute was incorporated in, and the complainant therefore transferred to, the European Patent Office, the EPO's secretariat, on 1 January 1978. At the time of the material facts of the case, he was serving as a grade A4(2) examiner in Directorate General 2.

In his staff report for the period 1998-99, the complainant expressed criticism of the reporting system, which, in his view, penalises examiners who take sufficient time to scrutinise patent applications, and if necessary raise objections, since it only takes into account the number of applications processed. Following the procedure provided for in such contestations the complainant's rating was confirmed by the President of the Office on 21 July 2001. On 25 October 2001 the complainant filed an appeal against that decision. In its opinion of 10 February 2003, the Appeals Committee unanimously recommended rejecting the appeal as being without merit. The complainant was informed, by letter of 24 February, that the President had endorsed the recommendation. That is the impugned decision.

B. The complainant gives a detailed account of his work as an examiner and accuses the Organisation of basing itself, when attributing points for staff reports, on "a simple count" of applications processed, without taking account of the amount of work performed on each file, particularly in terms of documentary searches and objections raised to the patentability of inventions. He maintains that a consequence of this system is to prevent him from correctly applying the European Patent Convention, since on the one hand it discourages him from raising objections which would otherwise be justified, and on the other hand it allows applicants to bring pressure to bear on examiners by pressing for the delivery of a patent, in the knowledge that any objections the latter raise will be detrimental to their performance ratings. The complainant lists the reasons which could dissuade an examiner from objecting to the receivability of a patent application, including ignorance, negligence, output pressure or the hope of a promotion or other benefit. In his view, the objections provided for under the Convention are less and less vigorously raised, which is bad for everybody.

He contends that the existing reporting system breaches "general principles of law", such as "every person's right […] to be rated according to a system that yields correct results" and "the right not to be prevented […] from applying the articles and rules of an international agreement" (such as those of the Convention). In his view, the existing system rests on two false assumptions, namely that the number of objections to be raised is on average the same for all examiners and that their work is subject to a quality control. He argues that such control is impossible because of the complexity and the specificity of the areas covered by each examiner; directors cannot possess sufficient expertise to monitor their work from a technical point of view. He adds that the directors are responsible for ensuring a "reasonable" output and therefore give preference to this aspect to the detriment of quality.

The complainant requests that the Tribunal order the management of the Office not to apply the existing system to

his case. He also requests hearings.

C. In its reply the EPO notes that the complainant's challenge is directed not against the markings he obtained in his staff report for 1998-99, but rather against the actual method used to assess the productivity of examiners. It draws attention to the fact that his criticism coincided with a decline in his overall rating from "very good" to "good". It argues that, according to the Tribunal's case law, the appointing authority is entitled to organise its policies, and in particular to decide productivity norms for examiners, and that it may be sanctioned only if it has abused its discretion or set unreasonable norms.

The EPO notes that the rating system, which is designed to allow a comparison of examiners' productivity, has proved itself and has never met with objections from the Tribunal. It denies the allegation that the system produces incorrect results. It explains that the quality of the work done is reflected in the marking given under the heading "Quality" in the staff report and that a balance must be struck between quality and quantity. The Appeals Committee, which is made up of very experienced examiners, considered it legitimate that the Office through its reporting system should encourage the rapid processing of files. The Organisation argues that the directors have sufficient technical knowledge to check the quality of their subordinates' work. Lastly, it considers that hearings would serve no purpose.

D. In his rejoinder the complainant asserts that his rating changed with the arrival of a new director, which would confirm that the quality and quantity of work are assessed arbitrarily and subjectively. As for maintaining a balance between these two factors, he argues that the purpose of the Office is not to process files within a certain time limit, a point which is not mentioned in the Convention, but to issue correct patents which have been through the necessary checks. In his work, he has constantly to wonder whether more extensive searches are necessary and justified, yet the existing reporting system tends to penalise such searches. In his view, no quality control can be really effective. What is needed is for examiners to be motivated to do their work properly. That is not the effect achieved with the existing system. He denounces the perverse effect of the system, which in the end suits everybody's interests: the management is able to maintain a high output; examiners gather easy points and applicants obtain the patents they want. He explains the material and moral harm such a situation causes him and presses his request for hearings.

E. In its surrejoinder the defendant recalls that under the terms of the Convention, the Office clearly provides a public service. The Guidelines for Examination in the EPO aim to strike a balance between the quality of the service provided and the time required to do so. By placing the emphasis on the search for objections, the complainant shows that he does not have a sense of proportion or of the Office's interest. The mixed markings he has obtained and his frustration are therefore the result not of a defective reporting system but of his own notion of what his work involves.

CONSIDERATIONS

1. The complainant impugns the decision of the President of the Office to reject his appeal concerning his staff report for the period 1998-99.

2. He considers that the reporting system employed by the Organisation is unfair insofar as it attributes the same number of points for each patent application processed, which in no way reflects the amount of work actually performed during the reporting period. In his view, this system completely disregards an important aspect of an examiner's work and "leads to an intolerable situation whereby if, according to [his] duty, [he] raise[s] an objection under the European Patent Convention against the wishes of a patent applicant, [he] end[s] up being attributed fewer points than an examiner who did not need to or failed to raise any such objection". The points system allegedly prevents him, "in a demoralising way", from correctly applying the Convention, on the one hand by inciting him to abstain from raising the objections provided for in the Convention so as to process more applications and thus gain the number of points required by the management, and on the other hand by offering patent applicants a convenient way of putting pressure on examiners in order to obtain a patent to which they are not entitled.

He concludes that the perverse effects to which he draws attention are essentially derived from two false assumptions, namely that the number of objections to be raised is on average the same for all examiners and that the management checks the technical quality of files and takes account of that in its staff reports.

3. The EPO rightly points out that the complainant is not specifically challenging individual markings in his staff report for 1998-99, but only the method used to assess the productivity of examiners, and that the complainant's criticism of this method of calculation has coincided with a decline in his overall rating from "very good" to "good".

It then comments that the method of calculation used to assess examiners' productivity, which basically consists in attributing one point for each application processed, is designed to ensure that assessments can be compared. In its view, the breakdown of points allocated to the different stages of the procedure and the distinction drawn between areas of technology provide as true a picture as possible of the various tasks that examiners have to perform in the course of processing a patent application. It concludes that the method of calculation applied, as the Appeals Committee unanimously confirmed, does not produce blatantly incorrect data. It argues, moreover, that if an examiner is meticulous and precise in his work, this is reflected in his "Quality" marking. It emphasises that it is essential to achieve a balance between quality and quantity of output: while the Organisation's reputation depends on the quality of the examiners' work, it is equally true that the Office provides a public service and must therefore be able to provide this service within the time scale required by the Convention.

The defendant adds that, contrary to the complainant's allegations, the directors have sufficient technical knowledge to check the quality of the work performed by examiners within their directorates.

It recalls that the Office has more than 20 years' experience in the assessment of examiners' performance, and particularly their productivity, using a points system similar to that criticised by the complainant, and that so far the Tribunal has never voiced any objection to the system. On the contrary, in a recent ruling (see Judgment 2061), the Tribunal endorsed the points system applied for the period 1998-99 without objecting to the actual principle of attributing points.

4. In Judgment 2061 the Tribunal ruled that, with regard to the validity of the points system applied at the EPO since 1998 to assess the productivity of patent examiners, the Tribunal will quash the Organisation's decision in such a technical area only if it shows blatant misappraisal of facts. And, in its Judgment 1175, it agreed that the Organisation is free to set quotas for the output of patent examiners.

5. In the case in hand, the complainant, as indicated above, is contesting a method for assessing the productivity of examiners which is based on a system of attributing the same number of points for each application processed.

There is no evidence, however, that this method was applied with discriminatory effects to the detriment of the complainant, or that the method breaches any principle of law.

6. The Tribunal, which, under the terms of Article II, paragraph 5, of its Statute, is competent 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 organisations that have recognised its jurisdiction, cannot therefore order the Organisation, as the complainant requests, not to apply the system it has adopted to assess his productivity.

7. The complaint must therefore be dismissed without any need for hearings, as requested by the complainant, since the Tribunal considers it is sufficiently informed by the parties' pleadings and their annexes.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2004, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.