

## FIFTY-SEVENTH ORDINARY SESSION

In re BENZE

Judgment No. 697

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Wolfgang Eberhard Benze on 2 July 1984 and corrected on 12 July, the EPO's reply of 24 September, the complainant's rejoinder of 18 November 1984 and the EPO's surrejoinder of 6 February 1985;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Articles 106(2) and 109(1) and (2) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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

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

A. The complainant is challenging the reckoning of his professional experience for the purpose of promotion. He received no answer to his internal appeal of 20 February 1984 and is challenging an implied decision to reject that appeal.

B. The complainant contends that he is entitled to full recognition of his professional experience as an examiner and as a mining engineer, which amount to 18 years and 8 months up to 31 December 1983.

C. In its reply the Organisation confines its arguments to the issue of receivability. It observes that the original appeal was lodged on 20 February 1984 and that on 26 June the Principal Director of Personnel informed the complainant that since the President had decided to reject it his case was being referred to the internal Appeals Committee. The complainant acknowledged receipt of that letter on 27 June and was therefore aware of it by the time he filed his complaint, on 2 July. As the Tribunal decided in Judgments 532 and 533, the provisional dismissal of an appeal and its referral to the Appeals Committee constitute a decision within the meaning of Article VII(3) of the Statute of the Tribunal. Since the internal means of redress have not been exhausted the complaint is irreceivable under Article VII(1). The complainant must await the President's decision on the Appeals Committee's report.

D. In his rejoinder the complainant observes that by 20 April 1984, 60 days after he filed his internal appeal, the President had not yet taken a decision or referred his case to the Appeals Committee as provided for in Article 109(1) of the Service Regulations. By then he did not wish to run the risk of having his complaint declared irreceivable on the grounds of his failure to respect the 90-day time limit for appeal to the Tribunal. No decision having been taken within a "reasonable" time, he took the view that he had no choice but to file a complaint.

E. In its surrejoinder the EPO enlarges on several points. Although Article 109(2) does allow appeal to the Tribunal where the President fails to refer an internal appeal to the Appeals Committee within two months<sup>(1)</sup>, it does not prevent the President from provisionally rejecting an appeal at some later date and referring it to the Committee. As to whether a decision was taken within a reasonable period, the requirement is that it should appear to any objective observer that no decision is likely to be taken within a reasonable lapse of time. In this case there were no objective grounds for supposing that the Committee would not report within a reasonable time. The time it takes should be deemed reasonable provided the proceedings are not arbitrarily protracted, and in view of the number of cases before the Appeals Committee they were not in the present case.

### CONSIDERATIONS:

1. Article VII of the Statute of the Tribunal provides that a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations. This case is concerned with the length of time taken by the President to arrive at a final decision. The relevant dates are as follows:

10 February 1984 The Chief of Personnel decided that "the number of years of professional experience" of the complainant for the purposes of the application of Article 49(7) of the Service Regulations was ten years.

20 February The complainant appealed to the President against this decision.

20 April The period of two months permitted to the President under Article 106(2) of the Service Regulations for a reasoned decision expired.

26 June The President informed the complainant that he had rejected his appeal and was referring it to the Appeals Committee.

10 September The Appeals Committee met to consider the appeal.

28 November The Committee made its report to the President recommending the rejection of the appeal.

8 January 1985 The President gave his decision rejecting the appeal.

2. Thus the whole process took 10 ½ months. But this includes a delay of over two months for which the Service Regulations provide a remedy. For Article 109(2) of the Service Regulations provides that if the President has taken no decision within two months, the appeal shall be deemed to have been rejected. The complainant did not avail himself of this remedy. If the President had observed the time limit, the process would have taken a little over eight months.

3. On 2 July 1984, that is, before this process was exhausted, the complainant filed his complaint with the Tribunal. The Organisation objects to the complaint as irreceivable under Article VII on the ground that the complainant had not exhausted the means of resisting it open to him under the Service Regulations. If this article is literally applied, the complaint is obviously irreceivable. But the Tribunal interprets it to mean that the means are exhausted if the complainant has pursued them with all diligence on his part but without being able within a reasonable time to obtain a result. If therefore at the date of the complaint a reasonable time had elapsed or if it would have been plain by that date to an objective observer that the process would not be completed within a reasonable time, the complaint is receivable.

4. When considering the applicability of Article VII to the facts of this case, it is not necessary (though it is of course relevant) for the complainant to show a lack of due diligence by any particular officer of the Organisation. It is in fact very likely that all the persons concerned will have done the best they could with the means at their disposal. It is, however, the duty of the President to provide the resources and the machinery to enable appeals to be heard and determined as expeditiously as is reasonably possible and to see that the resources and machinery are properly used.

5. The Tribunal is a judicial and not an administrative body. It is not for the Tribunal to say what resources the President should make available. The task of the Tribunal is to ascertain the normal period and not the ideal. It can only use its experience to determine what in fact the normal period is and not what ideally it ought to be. If the norms are not good enough, it is an administrative and not a judicial task to improve them.

6. If the wasted period of about two months is deducted, the time that elapsed between 20 February and 2 July 1984 was not abnormally long. Accordingly, the complainant filed his complaint before a reasonable time had in fact elapsed. To succeed he must therefore satisfy the Tribunal that, as it would have appeared to an objective observer on 8 July, there was no prospect of the process being concluded within a reasonable time. The Tribunal does not find that there was no such prospect in this case.

#### DECISION:

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 14 November 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

1. "If the President has taken no decision within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected."

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