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

SEVENTY-SECOND SESSION

In re POPINEAU (Nos. 3 and 4)

Judgment 1136

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Gérard Jean Paul Popineau against the European Patent Organisation (EPO) on 14 May 1991 and the EPO's reply of 1 August 1991;

Considering the fourth complaint filed by Mr. Popineau against the EPO on 14 May 1991 and the EPO's reply also dated 1 August 1991;

Considering the complainant's letter of 9 September 1991 informing the Registrar of the Tribunal that he did not wish to rejoin in either of his complaints;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 96 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, 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 is employed by the EPO as a patent examiner in the Search Department of General Directorate 1 at The Hague.

His staff report for 1986-87 contained a general performance rating of 3, or "good", and the comment "The general rating comes low in the range of 3 (and is a warning)". The countersigning officer drew the comment to his notice and alerted him to the risk of a lower rating.

In August 1988 he put in detailed comments strongly objecting to his ratings, to the way in which he had been assessed and to the reporting officers' strictures. Some of his remarks being found offensive to his supervisors, he had a reprimand imposed on him. That is the decision he challenged in his first complaint, and the Tribunal upheld it in Judgment 1028.

The reporting officers stood by their assessment, and he applied for conciliation under what is known as the C4 procedure to have the comment on his general rating withdrawn. By a letter of 18 January 1989 the Vice-President in charge of General Directorate 1 warned him that his general rating would go down to 4, or "adequate", unless evidence in his favour emerged during conciliation. After conciliation, on 12 October 1989, the Vice-President did lower his general rating to 4.

On 23 January 1990 the complainant filed an internal appeal against that decision. On 26 January he lodged a second one against the same decision insofar as it confirmed the reporting officers' refusal to withdraw the comment on his rating.

The President of the Office informed him on 12 March 1990 of the referral of his two appeals to the Appeals Committee and endorsed his staff report on 15 May.

In its report of 23 November 1990 the Appeals Committee unanimously recommended rejecting both his appeals. By decision of 21 December 1990, the one he contests in both complaints, the President rejected them.

B. In his third complaint the complainant observes that he had asked to have the comment in his staff report - "The general rating comes low in the range of 3 (and is a warning)" - changed to "The general rating should be 3, no

account being taken of specialised knowledge and skills which proved impossible to assess". In refusing to make that change the Organisation showed bias and failed to assess him properly.

He submits that the Vice-President's interference compromised the conciliation proceedings. He seeks the quashing of the decision not to alter his staff report for 1986-87.

In his fourth complaint he presses his objection to the Vice-President's action in the course of the conciliation and submits that the Vice-President's letter of 18 January 1989, which the reporting officers and the conciliator were aware of, amounted to "inadmissible interference in the C4 procedure".

He accuses the EPO of breach of Article 96 of the Service Regulations, which allows employees to ask for the deletion of any reference to a disciplinary measure in their personal files. The reduction in his rating is a hidden sanction which will remain for evermore in his file. Having already been reprimanded for his comments, he alleges breach of the principle of double jeopardy. He wants the Tribunal to set aside the decision to lower his general rating for 1986-87 to "adequate".

C. In its reply to the third complaint the EPO refers to its reply to the main claim in his fourth one, which is to the quashing of the President's decision of 21 December 1990 to confirm the rating of 4. That claim, it submits, is devoid of merit. So therefore is his subsidiary claim in his third complaint to have his general rating put back to 3 and the reporting officers' comment struck out.

In its reply to the fourth complaint the Organisation contends that approval of a staff report is at the President's discretion and consistent precedent restricts the Tribunal's power of review over such decisions.

The Vice-President's letter of 18 January 1989 is not "inadmissible interference in the C4 procedure". The President has authority, which he may delegate to the Vice-President, to check that a general rating matches the ratings and comments on particular aspects of an official's performance. In the case of mismatch he is free to raise or lower the general rating as he sees fit. The letter of 18 January merely invited the complainant to show the reporting officers - if he could - that their assessment was wrong. The Vice-President did not, as the complainant suggests, order the reporting officers to stand by their appraisal; the reason why they did not change it is that the complainant offered them no cogent argument for doing so.

The Organisation denies breach of Article 96 of the Service Regulations. In its view the complainant is wrong to see his general rating of 4 as a hidden disciplinary sanction permanently recorded in his personal file. The Service Regulations draw a distinction between a disciplinary measure, which may in time be withdrawn, and a staff report, which is intended as a record of the official's performance and does remain on file. For the complainant's insulting remarks about his supervisors he was given a reprimand and Judgment 1028 upheld it. But the lowering of his rating had nothing to do with that incident and was based entirely on the content of his staff report and on the failure of conciliation proceedings to secure a better assessment.

CONSIDERATIONS:

1. The complainant, a grade A3 search examiner at the EPO's General Directorate 1 in the Netherlands, is asking the Tribunal to order a change in the general rating of his performance in his staff report for 1986-87. He has filed two complaints. One challenges the general rating of 3, or "good", and the reporting officers' comment: "The general rating comes low in the range of 3 (and is a warning)". The other complaint impugns the final decision by the President of the Office to replace the 3 with 4, or "adequate".

2. As the EPO asks, the Tribunal joins the two complaints. It is the more inclined to do so because it doubts whether the former shows any cause of action, the President's final rating of 4 having superseded the one it challenges.

3. The same performance report was incidental to the complaint the Tribunal dismissed in Judgment 1028: in that case the complainant objected to a disciplinary sanction imposed on him for having appended unacceptable comments to the text.

4. After the reporting officers had made their assessment but before any final decision was taken to confirm it he applied for conciliation under what is known as the "C4 procedure". In the course of such conciliation the Vice-

President in charge of the EPO's office in the Netherlands warned him by a letter of 18 January 1989 that his general rating would be reduced to 4 unless the proceedings showed grounds for keeping it at the figure the reporting officers had proposed. The Appeals Committee reported on his case on 23 November 1990. On the strength of careful review of what the parties had said it unanimously recommended rejecting his appeals, and so the President's final decision was to lower the general rating to 4.

5. The complainant contends that his supervisors disregarded his comments on their report; that their assessment was not objective; that the lowering of the rating was really a disciplinary sanction imposed on grounds that had already prompted the one mentioned in 3 above; and that the Vice-

President's minute of 18 January 1989 was improper interference in the conciliation proceedings and encouragement to the Appeals Committee to endorse his point of view.

6. According to well-established precedent - see for example Judgment 880 (in re Benze No. 5) and the cases cited therein under 4 - a reporting officer has wide discretion both in passing comment on various aspects of a subordinate's services and in making the comprehensive assessment reflected in the general rating. The presumption is that such assessment is made in good faith in the interests of both organisation and staff member, and it will stand unless there is an obvious mistake of fact or failure to show the sort of objectivity that ought to govern reporting.

7. Reviewing the challenged report by such criteria, the Tribunal observes that the reporting officers made carefully worded and irreproachably conscientious comments on particular aspects of the complainant's work. Broadly speaking, their comments suggest that his performance was average or even poor; yet their general assessment still acknowledges and praises his qualities. The reservations they do express show reluctance to give him a clear 3. That being so, the President did not go beyond the bounds of his discretion in coming down firmly in favour of a general rating of only 4, or "adequate", thereby displacing the proposed rating and so the accompanying comment as well.

8. Having been taken in the lawful exercise of the President's discretion, the decision was not a hidden sanction at all, let alone one imposed for the same reasons as the sanction the Tribunal upheld in Judgment 1028: that sanction was imposed because the comments which he had been allowed under the rules to append to the report had been offensive and libellous.

9. Lastly, the Tribunal rejects the complainant's contention that the Vice-President interfered in the conciliation proceedings by announcing beforehand his intention of lowering the general rating from 3 to 4. In announcing that intention in his letter of 18 January 1989 the Vice-President said that he would not lower the rating if conciliation gave evidence of improvement. That meant that he would agree to a better assessment if conciliation or the Appeals Committee favoured one. So his letter was not an attempt to tamper with conciliation: it was meant to encourage it.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

(Signed)

Mohamed Suffian
Mella Carroll
P. Pescatore
A.B. Gardner