

SEVENTIETH SESSION

In re KIRSCHBAUM

Judgment 1058

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Erhard Walter Kirschbaum against the European Patent Organisation (EPO) on 15 December 1989 and corrected on 12 January 1990 and the EPO's reply of 2 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 47(1) 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, a citizen of the Federal Republic of Germany, joined the staff of the EPO at The Hague in 1980 at grade A2. He was promoted to A3 in 1981. He was transferred to General Directorate 2 in Munich in 1982 as a substantive examiner.

The staff report on his performance in 1983, made in accordance with Article 47(1) of the Service Regulations, said under the heading "productivity" that the technical difficulty of his area of work was above the average for General Directorate 2.

On 2 July 1985 his supervisor made a report on his performance in 1984 which rated him only 4 ("adequate") for "productivity" and for "overall performance". In comments dated 2 September 1985 he objected to those and other ratings on the grounds that he was suffering from a debilitating illness. In his reply of 18 October the reporting officer refused to change the report and the countersigning officer endorsed it. On 5 November the complainant asked for the application of the conciliation procedure in accordance with section C.4 of the Notes on reporting.

An EPO medical officer declared in a certificate of 13 May 1986 that his illness had lowered his working capacity by 25 per cent in 1984 and 1985. The countersigning officer agreed to rate him 3 ("good") for overall performance but not for productivity. The complainant again stated his objections in writing on 1 September 1986. On 2 March 1987 the President of the Office increased the rating of his productivity to 3, struck out three critical remarks and endorsed the report as so altered. He signed it on 17 March. On 12 June 1987, however, he filed an internal appeal objecting to many points of the report.

In its report of 4 January 1988 the Appeals Committee recommended "establishing a new 1984 staff report".

By an undated letter which the complainant got on 18 July 1988 the President told him that the report was being sent back to the reporting officers with instructions that they review it in the light of the Committee's report, revise their reckoning of his productivity with due regard to the medical officer's findings and to the degree of technical difficulty of his work, and add the same remark about the degree of that difficulty that had been made in his staff report for 1983. The reporting officers rewrote the report and signed it on 21 October 1988. In detailed comments dated 14 December 1988 the complainant set out his objections to the second version: he said, among other things, that the reckoning of his productivity had not been properly adjusted; the remark in his 1983 report had not been reproduced, although in some areas the technical difficulty of his work in 1984 had been above average; and the report did not reflect the fact that the quality of his work was "well above average". The reporting officers rejected those objections in observations dated 13 and 14 March 1989. On 10 April the complainant signed the second version of the report and again asked for C.4 conciliation. On 15 September 1989 the President approved the report, the complainant's application for further conciliation being rejected as "inappropriate". That is the final decision he impugns.

B. The complainant observes that the final decision is at odds with what the President decided in his undated letter received on 18 July 1988 in that the remark in the 1983 staff report has not been repeated in the 1984 one. He asks

that the remark be added to the section of the 1984 report on productivity and that the EPO pay him 2,000 Deutschmarks in costs.

C. In its reply the Organisation contends that the complainant's real purpose all along has been to get the general rating of his performance improved by having his supervisors take account of the effects of his chronic illness on his potential output. A further dispute arose over his report for 1985, and it was agreed, by way of exception and in the course of conciliation over that report, to take account of his performance over the two years and in a single report on that period give a general rating acceptable to him and to the reporting officers alike.

A letter of 27 March 1990 informed the complainant that the Vice-President of General Directorate 2 had cancelled the reports for 1984 and for 1985 and ordered the writing of a single report instead.

The complaint therefore discloses no cause of action.

CONSIDERATIONS:

1. The decision of 15 September 1989 impugned by the complainant in this complaint, which he filed on 15 December 1989, confirmed his staff report for 1984 as amended after he had gone through the internal appeals procedure. His case is that that decision does not follow up a preliminary decision the President of the Office took in accordance with the Appeals Committee's recommendation.

2. What the complainant really wants is that allowance be made for a chronic illness which he suffers from and which reduced his work capacity in 1984 by 25 per cent and that the general rating of his performance in section III of his staff report be improved accordingly.

After the dispute about his report for 1984 there arose another over his report for 1985. He applied for the so-called conciliation procedure provided for in section C.4 of the Notes on reporting. The upshot was that the EPO came to the view that combining the two reports into a single text that would cover both years might resolve the differences between the two sides. The idea was that such an exceptional ad hoc solution should make it possible to grant a general rating for the full period that would be acceptable to complainant and reporting officers alike.

On 27 March 1990, after the complaint had been filed, the Vice-President of the Office decided, so as to reach a settlement, to withdraw the reports for 1984 and 1985 and to have a new report made covering both years.

3. The basis for the complaint being the staff report for 1984 and that report having been withdrawn, there is no need to rule on the claims filed by the complainant, who has obtained satisfaction.

4. The Tribunal will nevertheless make an award of costs because at the time of filing the complaint was warranted.

DECISION:

For the above reasons,

1. The Tribunal need not rule on the complaint.

2. The EPO shall pay the complainant 1,000 Deutschmarks in costs.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 29 January 1991.

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner

