

SEVENTY-EIGHTH SESSION

***In re* DIETRICH**

Judgment 1394

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. André Dietrich against the European Patent Organisation (EPO) on 16 February 1994 and corrected on 3 May, the EPO's reply of 27 July, the complainant's rejoinder of 13 September and the Organisation's surrejoinder of 25 October 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. The complainant, a French citizen born in 1951, joined the staff of the EPO on 1 September 1981. He was assigned to its Sub-office in Berlin as an assistant examiner at grade A1 in the Search Directorate. On 1 July 1983 he was transferred to The Hague and promoted to grade A2. On 1 July 1986 the EPO transferred him back to Berlin.

Having come under several directors because he had changed technical fields, he got four staff reports for 1986-87. The first one, on his performance from 1 January to 30 June 1986, gave him a general rating of 3 ("good"); in the second, on his performance from 1 July to 31 October 1986, his general rating was 3+ ("upper limit of good"). He got another 3+ in the third report, on his work from 1 November 1986 to 31 August 1987. The fourth one, covering the last four months of 1987, included a general rating of 2 ("very good"); but in section VII, under "Comments of countersigning officer", his second-level supervisor, the Principal Director of Search, gave him an overall rating of "good" for the whole period, 1986-87.

On 24 May 1988 the complainant commented on his overall rating for 1986-87. He objected to the reporting officers' putting normal production at 105 files a year on the grounds that in his specialised field the norm was only 94. In a letter of 25 November 1988 he asked the Principal Director of Administration at the EPO's Office at The Hague to rate him "very good" on the basis of "overall performance". On 3 May 1989 he applied for the conciliation procedure under paragraph C4 of circular 162 of 28 December 1987 as to his general ratings in the third and fourth reports and the overall rating for the two years.

On 1 July 1989 he got promotion to A3.

On 15 June 1990 the President of the Office endorsed his third and fourth staff reports. On 5 September he appealed to the Appeals Committee against such endorsement, asking for review of his 3+ rating in the third report and for an overall rating of "very good" for the two-year period. In a report dated 8 October 1991 the Committee recommended that the President should review his general rating in the third report as well as the overall rating on the grounds that the number of searches attributed to him was mistaken.

By a letter of 28 May 1993 the President informed him that his general rating for the period covered by the third report should be 2 and that he was asking the Principal Director of Search to review the overall rating for 1986-87.

In a decision of 12 November 1993, the one the complainant impugns, the President told him that the overall rating for 1986-87 should be construed as meaning "good", inclining to "very good".

By a letter dated 21 February 1994 the complainant asked the President to review the decision of 12 November 1993 and make his rating for 1986-87 "very good".

In a letter of 10 May 1994 the President told him that he was withdrawing the decision of 12 November 1993 and sending the four staff reports back to the Promotions Committee. On 13 May the Principal Director of Search informed the officer in charge of staff reporting that he saw no reason to change the overall rating he had made for 1986-87. In a letter of 19 May that officer asked the complainant whether he sought application of the C4 procedure. After correspondence the complainant replied in a letter of 27 July that he saw no call for further conciliation.

B. The complainant submits that both the procedure which led to the President's decision of 12 November 1993 and the decision itself show fatal flaws.

He cites the Tribunal's ruling in Judgment 880 (in re Benze No. 5) that "The rules on reporting do not allow 'a 3, albeit inclining to 2'", and submits that the impugned decision offends against a rule of form.

His second plea is that the Administration erred in the overall rating for 1986-87. The officer who reported on his work from 1 September to 31 December 1987 told him in a prior interview that the rating would have been "very good" if his output had been 10 per cent above the norm. By his own reckoning his output was 19 per cent above. It was arbitrary of the EPO to correct the mistake but not change the overall rating.

His third argument is that it was unreasonable delay and misuse of authority for the EPO to take nearly six years to acknowledge the mistake. It is important to complete one reporting period before the start of the next one, the reason being that each report affects the following one and the setting of targets.

Fourthly, he contends that the rating for 1986-87 appears unfair when compared with the weighted average of the four overall ratings and that it was a misuse of discretion.

Lastly, he observes that the first officer to report on his work, in the period from 1 January to 30 June 1986, told him orally that if he continued to make the effort he would get an overall rating of "very good" for the full reporting period.

Describing the injury he has sustained, he blames the delay in his promotion to grade A3 from 1 July 1988 to 1 July 1989 on his rating of "good" for 1986-87.

He wants the Tribunal to (1) quash the decision of 12 November 1993; (2) declare that the EPO took too long to correct his staff report and draw up a new one properly; (3) order the EPO to give him as soon as possible a staff report for 1986-87 containing the rating "very good"; (4) award him one month's salary for every year of delay in damages for "moral and physical injury"; (5) award him the difference between his present earnings and what he would have earned had he been promoted to grade A3 on 1 July 1988; and (6) award him costs.

C. In its reply the EPO submits that the complaint is irreceivable. The complainant lodged an internal appeal against the impugned decision on 21 February 1994 and the President withdrew the decision on 10 May 1994. The fourth staff report is not final and the outcome of the reporting procedure hinges on the complainant's answer to the proposal of conciliation, which can go ahead only with his consent.

In subsidiary argument on the merits the Organisation submits that there is nothing improper about his overall rating, which has now been corrected to "good inclining to very good". It comes under the heading "Comments of countersigning officer" in the fourth staff report and must be distinguished from a "general rating", which the Tribunal indeed ruled should not be stated as "inclining" one way or another. The overall rating is merely an opinion which the Principal Director of Search stated in the exercise of his freedom of speech. As the countersigning officer for all four reports he was well-placed to make the overall evaluation. In any event his rating squared with the pattern of his general ratings.

The EPO acknowledges that the handling of the complainant's case took a long time. But the change in the general rating in the third report meant "sorting out an arithmetical tangle". The complainant's own lack of care may have caused the delay. Until he applies for conciliation there is stalemate.

D. In his rejoinder the complainant denies that the complaint is irreceivable. For one thing, his letter of 21 February 1994 was not an "internal appeal" against the President's decision of 12 November 1993 but just a final appeal to his good offices. Besides, not until 10 May 1994, or after a lapse of over two months, did he get a reply to his letter of 21 February; so the alleged appeal was rejected by implication under Article 109.2 of the Service Regulations.

On the holding of another conciliation procedure, he points out that circular 188 of 18 December 1989 says under paragraph C6 that any report that has already given rise to a final decision following a "C4 procedure" may not be contested again under that procedure.

On the merits he maintains that to describe him as "good inclining to very good" is a general rating and one that the Tribunal has ruled out of order.

He observes that the Principal Director did not draw the right conclusion from correction of the mistakes in the third staff report and alleges bias and dilatoriness. The allusion to "an arithmetical tangle" is just a pretext; for his part he tried his utmost to have the matter settled.

E. The EPO observes in its surrejoinder that the complainant denies lodging an internal appeal on 21 February 1994 against the decision of 12 November 1993 and so he failed to exhaust the internal means of redress.

Circular 188 of 18 December 1989, on which he relies, is immaterial and circular 162 of 28 December 1987, the one applicable to reports covering 1986-87, does allow for a second C4 procedure.

The Organisation insists that the overall rating under VII in his fourth staff report is different from the general rating under III, which is what the Tribunal ruled on in Judgment 880.

CONSIDERATIONS:

1. The complainant, a search examiner in the European Patent Office, objects to ratings he got for his performance in 1986 and 1987. During that period the Administration made four staff reports for him because he had had several assignments and worked under several directors. From 1 January to 30 June 1986 his general rating was 3, or "good". His ratings for the periods from 1 July to 31 October 1986 and from 1 November 1986 to 31 August 1987 were 3+, or the "upper limit of good". In his fourth report, for 1 September to 31 December 1987, he got a general rating of 2, or "very good", on which his countersigning officer commented "Agreed for the material period from 1.9.87 to 31.12.87. But I consider his overall rating for 1986-87 to be 'Good'". Not until 15 June 1990 did the President endorse the last two reports, thereby dismissing objections the complainant had made on 24 May 1988. He then lodged an internal appeal asking that the 3+ he had got for the period from 1 November 1986 to 31 August 1987 be raised to 2 and that his overall rating for the two-year period be changed from "good" to "very good". In its report of 8 October 1991 the Appeals Committee recommended allowing his claims and asking his supervisors to review their appraisal. The President of the Office invited his supervisors to take up the matter again and, after much soliciting from him, informed him on 28 May 1993 that he was to have a general rating of 2 for the period from 1 November 1986 to 31 August 1987 and the matter of his overall rating for the full two-year period would be reviewed accordingly. On 12 November 1993 the President finally decided that his "overall rating should be good (3) ... to be understood as inclining to very good (2)".

2. That is the decision the complainant is impugning, and he also claims an overall rating of 2, a ruling that it is wrong to take six years to correct a staff report, and an award of damages for the injury he suffered in that the "very good" rating he deserves would have entitled him to promotion to grade A3 at 1 July 1988, not 1 July 1989, the date when he actually got it.

3. Several days after lodging his complaint the complainant made another internal appeal again asking the President to give him the overall rating "very good" for the two-year period. The President replied on 10 May 1994 that the dispute required resumption of the reporting procedure and withdrawal of his decision of 12 November 1993. It is on those grounds that the EPO pleads that the complaint is not receivable.

4. The plea cannot be sustained. At the date of filing, 16 February 1994, the decision he is impugning did indisputably cause him injury and he was free to challenge it as he saw fit. Yet, though his claim to quashing did then serve some purpose it no longer does so since at his own instance the decision has been withdrawn. There is of course no question of quashing a decision that no longer exists and therefore has no effect in law. So the claim to the quashing of the decision must fail.

5. Since the reporting procedure has resumed and is to end soon the Tribunal will neither order the EPO to grant him a "very good" rating for 1986-87 nor in consequence make his promotion to A3 effective from 1 July 1988. But his claim to damages for injury due to wrongful delay in completing the report holds good and the Tribunal

may rule on it even before there is a final decision on the rating. The Tribunal is satisfied on the evidence that the delay that occurred was inadmissible. The EPO's failure to settle reasonably soon a dispute that raised no especially difficult issue of fact or law has discomfited the complainant in that after six years he does not yet have his final rating for 1986-87. The material injury he may suffer will depend on the final decision on his rating and on his claim to the backdating of promotion, and the Tribunal will not now rule on that issue. But he has sustained moral injury, and indeed it is expressly acknowledged in later staff reports. On that score he will get fair redress in an award of 5,000 German marks in damages.

6. Since his complaint succeeds in part and the reason why the Tribunal is declining to rule on the impugned decision is that that decision has been withdrawn, he is entitled to costs, and the award is set at 5,000 marks.

DECISION:

For the above reasons,

1. The Tribunal will not rule on the claims to the quashing of the President's decision of 12 November 1993 and to damages for the alleged unlawfulness of that decision.
2. The EPO shall pay the complainant 5,000 German marks in moral damages for the delay in rating his performance in 1986-87.
3. It shall pay him 5,000 marks in costs.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1995.

(Signed)

William Douglas
Michel Gentot
E. Razafindralambo
A.B. Gardner