

SEVENTY-SECOND SESSION

In re MAUGAIN (No. 6)

Judgment 1144

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr. Christian Maugain against the European Patent Organisation (EPO) on 1 February 1991, the EPO's reply of 22 April, the complainant's rejoinder of 27 June and the Organisation's surrejoinder of 17 September 1991;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Article 6 of the European Convention on Human Rights and Articles 20 and 47 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence;

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

A. The complainant, a Frenchman born in 1943, has since 1 June 1988 been a principal examiner at grade A4 in the EPO's General Directorate 2 at Munich. He joined the International Patent Institute in 1970 and became an official of the EPO in 1978 when the Agreement on the integration of the two organisations came into force.

His staff report dated 6 May 1988 and covering the period 1986-87 gave him a general rating of 3, or "good", and recommended promoting him from A3 to A4. On 27 May 1988 he commented in writing that the ratings in some parts of his report were at odds with the assessment of the quality of his work - "good, upper range" - and he was disappointed with the report. The reporting officer replied on 31 May that there was nothing inconsistent about it but allowed that his performance in two of the areas he questioned could be described as "good, upper range". The Vice-President of the Office endorsed the final report on 13 June and the complainant acknowledged receipt on 22 June 1988. On 1 August the President promoted him to A4 as from 1 June 1988.

On 11 May 1989 he got a general rating of 3 in an intermediate report for 1988. In comments dated 17 July he challenged the rating of 3 for the quality of his work as well as ratings under five other heads. The reporting officer confirmed his view in final comments dated 18 July 1989 and on 27 July the complainant applied for what are known as "C4" conciliation proceedings. By letter of 14 September to the Principal Director of Personnel he applied for a vacancy on a Technical Board of Appeal. The conciliation proceedings having failed, the President endorsed the report for 1988 on 13 November. On 12 December 1989 the Administration informed him that his application for the vacancy had not been successful. By letter of 20 January 1990 he appealed to the President against his staff reports for 1986-87 and 1988 and against the letter of 12 December 1989. The President referred the matter to the Appeals Committee on 8 March 1990. In its report of 15 October the Committee recommended unanimously that the President should reject the appeal. The Principal Director of Personnel informed him by letter of 8 November 1990, the decision he impugns, that the President had endorsed the Committee's recommendation.

B. The complainant submits that the EPO's staff reporting system should be declared null and void. It offends against the principle of equal treatment since it applies one procedure to staff below the age of 50 and another, simpler, procedure to staff over 50. It is in breach of Article 6 of the European Convention on Human Rights, which guarantees everyone the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The reporting system fails to meet proper standards of fairness and independence. It is at odds with the case law. How can it provide objective assessment of the Organisation's complex and varied activities?

The risk of malice is inherent in any reporting system which allows supervisors to assess subordinates. There is no need to show actual injury since the reporting officer is not a disinterested party. The complainant was a victim of bias. Besides, the rating he got of "good, upper range" is just the sort of vague in-between rating the Tribunal reproved in Judgment 880 (*in re* Benze No. 5).

He wants the Tribunal to declare the EPO's reporting system null and void, set aside his staff report for 1988 or at

least amend the general rating in it, quash the rejection of his candidacy for a Technical Board of Appeal and order an expert inquiry into the matters he raised in comments on the staff reports.

C. The EPO replies that the complainant's arguments are academic and have no ground in fact. He fails to prove that his 1988 staff report shows any flaw that would warrant setting it aside. Nor does he show how, disappointment aside, it might have affected him adversely. That a full report form need not be used for officials over the age of 50 does not harm the complainant, who is under 50. There is no basis for his allegations that the reporting system fails to meet proper standards of independence, impartiality and objectivity. At each stage of the procedure the official has an opportunity to be heard. If, as he submits, the reporting system is at odds with the case law, why has the Tribunal, which has entertained many complaints about EPO staff reports, never questioned its lawfulness?

D. In his rejoinder the complainant maintains his pleas and presses his claims. He accuses the Organisation of bad faith and of unwillingness to study the case records. To back up his criticisms of the rating system he recounts at length difficulties for which he blames other officials in General Directorate 2 and the agents of an EPO "customer".

E. The Organisation points out in its surrejoinder that the rejoinder contains nothing to make it change its position. It takes the view that the complainant's sole purpose is to have his staff report for 1988 set aside since he makes no attempt to show any flaw in the President's discretionary decision to reject his candidacy for a Technical Board of Appeal. His naming the "customer" he singles out for attack is in breach of his duty of discretion under Article 20 of the Service Regulations.

CONSIDERATIONS:

The complainant's application for oral proceedings

1. The facts and arguments being fully set out in the case records, the complainant's application for oral proceedings serves no purpose and is therefore refused.

The complainant's claims

2. The complainant asks the Tribunal to declare null and void the system of staff reporting at the EPO. He seeks the quashing, or at least the amendment, of his staff report for 1988. He also objects to a decision of 12 December 1989 rejecting his candidacy for a vacancy on a Technical Board of Appeal.

The material facts

3. The passages of Article 47 of the Service Regulations that are relevant to this case read as follows:

"(1) The ability, efficiency and conduct in the service of each permanent employee ... shall be the subject of a report at least once every two years under the conditions established by the President of the Office.

The report shall be communicated to the employee concerned who shall be entitled to make any comments thereon which he considers relevant."

An intermediate report on the complainant's performance in 1988 was drawn up by his supervisor and dated 11 May 1989. The ratings a supervisor may choose for particular aspects of an employee's work and for his general performance range from 1 to 5: they are "outstanding", "very good", "good", "adequate", and "unsatisfactory", in that order. The complainant's supervisor rated the "quality" of his performance 3, or "good". The complainant objected to that rating and wanted to have it replaced with "good, upper range", the rating he had been given for quality of performance in his 1986-87 report. He also challenged the rating of 3 for his "productivity", which he said had been reduced by his absences abroad or on leave in the second half of 1988.

In final remarks on the report the reporting officer pointed out that the Service Regulations did not provide for intermediate ratings of the kind that had appeared in the earlier report; that the complainant, who had been promoted to the post of principal examiner at grade A4 as from 1 June 1988 now had to be rated according to the standards applicable to someone in the higher grade; and that, even if due allowance was made for his absences for language training and for other reasons, his productivity warranted no higher a rating than 3.

The complainant's objections to the reporting system

4. The complainant asks the Tribunal to declare the entire reporting system at the EPO null and void and in support of that claim he contends that the system is flawed in two respects.

5. He observes, first, that circular 162 grants staff members over the age of 50 - a category to which the complainant does not belong - permission to complete a shortened form of the staff report if they so wish, and he argues that that somehow makes for inequality of treatment.

The complainant has not shown that he himself has been adversely affected because staff who belong to another category have that option.

6. His second plea is that the reporting system is in breach of the European Convention on Human Rights.

The Convention puts obligations on signatory States, and it is not apparent that it is applicable: the parties do not address the issue.

The complainant relies on Article 6, which says that everyone shall be entitled to a fair hearing by an independent and impartial tribunal.

At all events, even supposing that the Convention as such was applicable, the Tribunal's answer to the plea would be that the principles underlying Article 6 are fully recognised in the Service Regulations, which make provision for comments and indeed objections from the staff member, as well as for conciliation proceedings, internal appeal and ultimately appeal to the Tribunal itself.

The complainant's objections to his staff report for 1988

7. As was said in Judgment 806 (in re Hakin No. 8), a decision on a staff report, being a discretionary one, may be set aside only on limited grounds such as a procedural or formal flaw, a mistake of fact or of law, the overlooking of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence. That judgment goes on to explain that the review will be more limited because at the EPO there is a procedure for conciliation on staff reports and the Service Regulations allow the staff member to appeal to a joint committee made up of people who are closely familiar with the running of the Office.

8. The complainant alleges bias on the reporting officer's part and a desire in the EPO to cause him injury. He has adduced no credible evidence to support the allegations, and they are rejected.

Indeed the complainant fails in the many pages of argument and comment he has submitted to establish any of the flaws set out above that would warrant quashing his staff report for 1988.

On that score too his complaint therefore fails, as does his application for appointment of an expert to examine various papers, including his comments appended to the report.

The vacancy on the Technical Board of Appeal

9. The complainant applied to the Organisation by a letter dated 14 September 1989 for appointment to a Technical Board of Appeal and the Administration replied by a letter of 12 December 1989 that his application had been unsuccessful. According to the European Patent Convention appointment to such a body lies within the competence of the Administrative Council of the EPO. The President of the Office merely makes nominations to the Council, his refusal to nominate the complainant is a discretionary decision, and again the Tribunal has only the limited power of review set out in 7 above. The complainant having shown no fatal flaw in the decision, this claim too must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

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