

SIXTY-SIXTH SESSION

In re TOTI (No. 2)

(Judgment on the merits)

Judgment 973

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Luciano Toti against the European Patent Organisation (EPO) on 31 March 1988;

Considering Judgment 930 of 8 December 1988, whereby the Tribunal ordered that the proceedings should resume on the merits;

Considering the EPO's reply of 16 January 1989 on the merits, the complainant's rejoinder thereto of 18 March and the EPO's surrejoinder of 26 April 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 47 and 93 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. Judgment 930 recounted under A and 1 to 5 the facts of this case in which the complainant, an examiners' clerk, is objecting to his staff report for 1980-81.

B. The complainant's pleas on the merits were set out in that judgment under B. He is asking the Tribunal to order the Organisation to change from 4 ("adequate") to 3 ("good") his ratings for "productivity" (point I.A(1) of the staff report), "commitment to his work" (I.B(4)(iii)) and "reliability" (I.B(9)) and the general rating of his performance (III(ii)). He claims an award of 3,000 Deutschmarks in moral damages and DM 2,000 in costs.

C. In its further reply the EPO contends that the complaint is devoid of merit. It observes that the complainant is no longer challenging the person of the reporting officer, as he did in his internal appeal. As for the contents of the report, they show no flaw when reviewed by the principles the Tribunal applies to staff reports. Reporting officers must feel free to express their views if reports are to be of any value, and in this case there was no abuse of such freedom. The complainant was given his say and was granted conciliation, which led to changes. After hearing both sides and studying all the relevant papers the Appeals Committee found no obvious mistake or important omission or evidence of personal prejudice on the reporting officer's part. The gross inconsistency it found between the comments under I.B(2) and I.B(3) was removed before the President took the final decision on 8 January 1988.

As to "productivity" there are no set criteria for examiners' clerks and the reporting officer exercised his discretion in determining the rating due. The evidence all tends to show that the complainant did no more than the minimum he thought required of him. Other work he may have done cannot make up for his failure to carry out his routine duties or for his irregular output. One of his superiors warned him his output was too low. The 4 was therefore fair.

The comments under I.B(4)(iii) and I.B(9) bear out the same attitude to work and warrant the same ratings. The rating for productivity, which is as important as "quality", also supports the general rating of 4. The complainant had only himself to blame that his general rating did not open the way for early promotion.

D. In his rejoinder the complainant points out that the reporting officer, Mr. Chesi, failed to discuss his performance with him before writing the staff report and so prevented him from putting matters in their proper light. That was a breach of the rules on reporting and a procedural flaw.

The report is further flawed in that he was given no warning of the adverse appraisal: he denies outright that any of his supervisors gave him such warning.

He maintains that the report shows mistakes and omissions and the comments do not square with the ratings. In particular they say nothing of the work which he did in the period the report covers - and which he describes - or of the working conditions that prevailed at the time. His productivity stood comparison with that of a colleague who got a good report and it deserved a rating of at least 2 ("very good"). It is not his fault that there are no criteria for assessing it. His supervisors and even the Appeals Committee ignored evidence of the additional work he had done on a card index. It was therefore quite wrong of the Committee to say that no important fact had been neglected: the omission is blatant.

The report was a covert disciplinary sanction and caused postponement of his first and only promotion until 1988 and loss of steps. The material and moral injury were therefore serious. He asks the Tribunal to grant him the relief claimed in his complaint or else to set the report aside and in any event to award him moral damages and costs.

He seeks production of a study done by the EPO in 1980 on examiners' clerks.

E. In its surrejoinder the EPO observes that it is too late for the complainant to allege that Mr. Chesi failed to discuss the report with him before drafting it: he made the point neither in his internal appeal nor in his original brief. In any event, in the course of the conciliation procedure a director he had worked for said that he had been warned that his work was not up to standard, and so he was able to answer the point at the time.

The Organisation enlarges on its earlier pleas on the merits, observing in particular that the complainant could not make up for his shortcomings in carrying out his routine duties by concentrating on the card index, an incidental task he liked better. The Appeals Committee did not ignore evidence of his work on a card index: it simply concluded that it could not find "any important fact" that had been neglected. His comments on promotion are misconceived: if he works well and has enough seniority he may be promoted again after spending two years in the grade he was promoted to in 1988.

The EPO submits that there is no need for further written evidence.

CONSIDERATIONS:

1. The subject of this appeal is the complainant's staff report for the period from 1 January 1980 to 31 December 1981. Some alterations have already been made in the original text of the report. After conciliation proceedings the President of the Office deleted remarks under sections III(i) and V, and after an internal appeal he accepted a recommendation by the Appeals Committee and amended the text of comments under points I.B(2) and (3).

2. The relief which the complainant seeks is amendment of the ratings under points I.A(1), I.B(4)(iii), I.B(9) and III(ii) from 4 ("adequate") to 3 ("good"). He also seeks awards of moral damages and of costs.

3. Section I of the report, which is headed "Aspects of performance", is in two parts, A and B. Part A covers (1) "productivity" and (2) "quality". Under A(1) the complainant was given a rating of 4 for "output and intensity of work" and the comment was "Mr. Toti's performance consisted essentially of doing the minimum work required of him".

Part B of Section I has eleven sections, some of them with subdivisions: (1) "penetration", (2) "judgment", (3) "responsibility", (4) "application", (5) "accuracy", (6) "self-expression", (7) "relationship with others", (8) "timekeeping", (9) "reliability", (10) "specialist knowledge" and (11) "other aspects". Under point (iii) of B(4) - "commitment to his work (willingness to assist others and to meet exceptional demands)" - the complainant was given a rating of 4, and the comment was: "Little inclination to work directly with one particular person and to make special efforts".

Under B(9) - "endurance, response to pressure, willingness to persevere and overcome difficulties" - he was again given 4 and the comment was "See point B(4)(iii)".

Under Section III ("Overall performance") the reporting officer has to "complete the report by giving an integrated assessment of the person reported upon, having regard to the aspects of performance previously indicated and the overall marking". The comment under III(i) of the report was "Mr. Toti is an employee who once he gets the feeling that he is misunderstood sticks closely to doing those duties which he considers to be necessary". In III(ii) he was given a rating of 4.

Under other headings he was given a rating of 3: for I.A(2) ("quality"), I.B(2) ("judgment"), I.B(4)(i) ("ability to organise his own work well and efficiently"), I.B(5) ("accuracy") and I.B(6)(ii) ("self-expression" - "oral"). He was given 4 for I.B(1) ("penetration"), I.B(3) ("responsibility"), I.B(7)(ii) ("dealings with colleagues") and (iii) ("dealings with the public"), besides the ratings of 4 that are at issue. His timekeeping was rated satisfactory and his general conduct at work was thought to leave room for improvement.

The complainant contends that the comments under I.A(1) ("productivity"), I.B(4)(iii) ("commitment") and I.B(9) ("reliability") are grossly inconsistent with the ratings; that in assessing his productivity one essential fact - that he had done additional work - was overlooked; that the general rating in III(ii) is therefore based on obvious mistakes; and that the report is neither fair nor objective, has harmed his prospects of promotion and is tantamount to a disciplinary sanction.

4. The complainant is challenging the President's decision not to alter the ratings. The decision is a discretionary one and may be challenged only on limited grounds such as a formal or procedural flaw, a mistake of fact or of law, failure to take account of relevant facts, abuse of authority or drawing plainly mistaken conclusions from the evidence. The case law has laid down several principles in the matter of staff reports. First, the person approving the report will allow the reporting officer great freedom of expression. Secondly, the staff member's own comments may serve to remedy any error of judgment there may have been. Thirdly, it would be wrong to approve a report (a) if the reporting officer had made an obvious mistake of fact over some important point, (b) if he had neglected some essential fact, (c) if he had been grossly inconsistent or (d) if he could be shown to have been prejudiced.

5. The first of the complainant's arguments is gross inconsistency between the comments and the ratings.

Under I.A(1) the comment is that he did "the minimum work required of him", and he says that according to the Notes issued for the guidance of reporting officers a rating under 3 should be given only if the quantity of work performed falls below the minimum required.

The complainant shows a misunderstanding of the Notes. In paragraph 4 of the Notes it is explained that to judge from experience the majority of staff perform their duties efficiently and so may be rated "good". It is expected that about 65 per cent will achieve this rating, though some - say, up to 25 per cent - will do better. Others will be less than good, some - those still capable of doing a workmanlike job - will be only slightly less good, but others much less, including a small minority whose performance is downright unsatisfactory.

Paragraph 5 of the Notes states that a rating of 3 corresponds to "good" and means that the reporting officer is generally satisfied with that aspect of performance, "it being no less than might reasonably be expected of someone doing the job in question". When an aspect of work is found only "adequate" - i.e. less than "good" - a rating of 4 is appropriate.

If those criteria are applied to the complainant, who, as to "output and intensity of work", is described as doing only the minimum required, his performance cannot be described as "being no less than might reasonably be expected of someone doing the job in question": the minimum does not produce the average.

The same considerations apply to the comments under I.B(4)(iii) and I.B(9), of which the relevant part is "Little inclination ... to make special efforts", and which applies to his commitment to work and reliability. Someone who shows little inclination to effort cannot be described as average.

The plea of gross inconsistency between comments and ratings therefore fails.

6. Secondly, the complainant alleges that important facts were overlooked. He says that he did additional work which consisted in making calculations from statistics and maintaining and processing a special card index and which meant much more work for examiners' clerks in his directorate than in others. His detailed comments appear in VIII. He says that the President neglected those facts in making his final decision.

That is one of the pleas the complainant put to the Appeals Committee. The Committee heard both him and his counsel as well as Mr. Chesi, the reporting officer, Mr. Houyez and Mr. van der Laan of the Personnel Department, and Mr. Ullrich, the head of General Legal Affairs. The Committee says in paragraph 13 of its report of 27 March 1987 that it could not find neglect of any important fact. The President must have been aware from reading that report both of the allegation and of the Committee's conclusion, and there are no grounds for supposing that he overlooked the issue in coming to his decision.

7. A third plea is that the complainant was never warned that his productivity was too low. He says that the absence of such warning is a fact that, though never disputed, was disregarded both by the Appeals Committee and by the President. Yet paragraph 7 of the Notes states that it is expected that performance which is less than good will have been drawn to the staff member's attention in time to let him improve by the end of the report period.

The complainant is not correct in saying that the fact was never disputed. As the Organisation observes, Mr. Simon, one of the directors for whom he had worked, wrote a letter to Mr. Huguet of the Personnel Department on 2 March 1984 confirming that in the course of the period from 1 January to 11 July 1980 he had drawn the complainant's attention to interruptions in the flow of his work. It is true that the complainant denied that in a letter of 19 November 1984 to Mr. Huguet; but his lawyers' letter of 18 March 1986, which formed the basis of the case he put to the Appeals Committee, made no specific reference to failure to warn him. Although the Appeals Committee may hear evidence on contested issues of fact that are raised in proceedings before it the complainant did not take the opportunity of making the point and so the Committee's report did not mention it. Neither the Committee nor the President may be faulted for not commenting on an issue that had not even been raised.

Yet the absence of specific comment does not mean that the Appeals Committee were unaware either of the need for a warning where there was a danger of a below-average rating or of its relevance in this case. Mr. Simon's letter of 2 March 1984 was quoted, though in a different context, in the Organisation's submissions to the Committee and, together with the complainant's comments, must have formed part of the case file.

There is no presumption that just because a fact is not mentioned in the Committee's report or in the President's decision - even a fact that was not raised as an issue - it was ignored or neglected in considering the case and in taking the decision. The complainant has therefore failed to satisfy the Tribunal that the issue was overlooked.

8. Fourthly, the complainant argues that the adverse opinion of Mr. Debo, one of the directors, was based on an event that had occurred after the report period. On 28 February 1983 Mr. Debo sent Mr. Huguet an assessment of the complainant which he had supplied to Mr. Chesi eighteen months earlier. Mr. Debo states that the complainant worked in his directorate as an examiners' clerk from July 1980 until March 1982 and says: "He always did his normal work diligently and satisfactorily. He was disinclined to take on extra work, for instance as a stand-in. In his personal relations with other members of the staff he occasionally showed personal peculiarities which made dealings with him difficult. I would not describe Mr. Toti as an out-and-out supporter of the principle of sustained performance." The complainant attributes that comment to an incident involving himself and Mr. Debo in February 1982.

Again the matter is one the complainant failed to raise in the proceedings before the Appeals Committee and the Tribunal does not have the benefit of an inquiry by the Committee into the allegation. On the face of it Mr. Debo's assessment makes no distinction in the complainant's performance between the report period, which runs up to the end of 1981, and any later period. In paragraph 14 of its report the Committee rejected the general allegation that everyone concerned in compiling the staff report was prejudiced against the complainant: it found no evidence of any general conspiracy to report unfavourably on him or of prejudice. In the circumstances Mr. Debo's comments may be taken at face value and as untainted by prejudice.

9. Since none of the specific pleas made by the complainant is substantiated, he fails in his contention that the general rating of 4 in III(ii) is based on obvious mistakes. He has failed to prove that in its amended form the report is neither fair nor objective. The Tribunal is satisfied that the reporting officer's general assessment shows no fatal flaw and there are therefore no grounds for requiring any change in the general rating.

10. The complainant pleads that the general assessment harms his prospects of promotion and is tantamount to a disciplinary sanction. That is really no more than a comment and, insofar as it concerns promotion, it is, as the Organisation says, completely unfounded. If his performance is satisfactory and he has the required length of experience it will be possible for him to be promoted again once he has spent two years in the grade to which he was promoted in May 1988.

The report may not be equated to a disciplinary sanction. Article 93, which relates to disciplinary measures, fulfils a function quite different from that of Article 47, which is about staff reports.

11. Lastly, the disclosure of an EPO paper on examiners' clerks would serve no purpose whatever and the

complainant's application for such disclosure is disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner