

SIXTY-NINTH SESSION

***In re* POPINEAU**

Judgment 1028

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gérard Jean Paul Popineau against the European Patent Organisation (EPO) on 6 July 1989 and corrected on 9 August, the EPO's reply of 27 October, the complainant's rejoinder of 1 December 1989 and the Organisation's surrejoinder of 15 February 1990;

Considering Articles II, paragraph 5, and VII, paragraph 3, of the Statute of the Tribunal and Articles 47(1), 93(2)(b), (4) and (5), 94, 107, 108 and 109(1) and (2) 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 Frenchman, joined the EPO in 1983 as an assistant examiner of patents at grade A1 in the Search Department of General Directorate 1 at The Hague. He was promoted to A2 in 1984 and to A3 in 1986.

In his staff report for 1984-85 his supervisors found his output low but gave him a general rating of 3 ("good"). In the report for 1986-87 they rated him only 4 ("adequate") for "productivity" and "application" and 3 for "dealings with colleagues" and gave him a general rating in the lower range

of 3. On 19 August 1988 he put in detailed comments on the report strongly objecting to the ratings, to the way in which he had been assessed and to the reporting officers' criticisms. As to the rating for "dealings with colleagues" he said: "No explanation here either. Does getting a rating of 1 ["outstanding"] depend on the number of drinks colleagues are stood and the value of presents directors get? This rating is utterly arbitrary". The reporting officers added "final comments" on 23 September 1988 and the Principal Director of the Search Department his own observations on 27 September.

In a letter to him of 29 September 1988 the Principal Director of Administration observed that that remark accused his superior of corruption: if he failed to prove the charge he would incur a sanction.

In his reply of 7 October he raised procedural objections. After seeing him on the 13th the Principal Director of Administration wrote him a minute on the 14th announcing the start of disciplinary proceedings and asking him to comment. He did not. In a minute of 27 October the Vice-President of the Office in charge of General Directorate 1 informed him that by levelling unproven accusations against his supervisor he had failed to comply with his obligations as an EPO employee and a reprimand was imposed on him under Article 93(2)(b) of the Service Regulations. On 7 February 1989 he submitted an internal appeal under Articles 107 and 108.

He filed this complaint on 6 July 1989 challenging under Article VII(3) of the Tribunal's Statute what he took from the EPO's silence to be the rejection of his appeal.

In its report of 5 February 1990 the Appeals Committee unanimously recommended rejecting the appeal, and by a letter of 15 February the Principal Director of Personnel informed him that the President of the Office had rejected it.

B. The complainant alleges breach of Article 109(1) and (2) of the Service Regulations in that the President ought to have informed him within two months of the lodging of his internal appeal of a decision thereon.

As to the merits, he submits that there was breach of Article 93(4) of the EPO Service Regulations: "Disciplinary proceedings shall be initiated by the appointing authority where necessary on a report made by the immediate superior of the employee concerned". The letter of 29 September 1988 that in his view started the proceedings neither came from the President nor said that it was sent on his behalf.

There was breach too of Article 47(1) which says, as to staff reports, that the employee may "make any comments thereon which he considers relevant". The complainant's remark was made in exercise of his right under that article. The comments the reporting officers added later did not suggest that they had taken offence. In any event he was never shown the records, and so there was not due process. Even if the President did start the proceedings he acted out of turn and in breach of circular 162 of 28 December 1987, which says that he comes in only at the end of the reporting procedure.

It was in breach of a general principle of law to impute a wrongful intent to him. His remark was just a question and was taken out of context.

He seeks the quashing of the reprimand and an award of 10,000 guilders in moral damages.

C. The EPO replies that by a minute of 28 March 1989, less than two months after he lodged his appeal, the Principal Director of Personnel wrote to tell him that the President had referred it to the Appeals Committee. He was sent a copy of that minute and asked to sign and return it. Since he did not do so the EPO cannot show that it took a decision within the two months and that the proceedings duly went ahead, but he could have found that out by a mere inquiry.

As to the merits the EPO submits that the complainant failed to comply with his obligations as an official: he made accusations he could not prove yet would not withdraw. The sanction was not out of proportion to the offence: indeed an unfounded charge of something as serious as corruption might warrant a sanction worse than a reprimand. The Principal Director of Administration is competent to act on behalf of the appointing authority in staff matters. Besides, his letter of 29 September 1988 did not start the proceedings but gave a warning. It was his letter of 14 October 1989 that actually started them and it said that action was being taken "on the President's behalf". Article 47(1) does not entitle the staff to insult, let alone libel their superiors. That the complainant's supervisors did not appear to take offence is immaterial, though in point of fact the countersigning officer did state that some of the comments had gone too far. The remark objected to was insulting and the tone did not suggest a benign intention or a mistake; besides, he could and should have retracted the remark later. He had at his disposal all the records he needed to defend the charge against him. There was no interference in the reporting procedure: he got the reprimand, not because of the rating of his performance, but because of the insult.

D. The complainant rejoins that the EPO might just as easily have discovered by a mere inquiry whether he had got the letter of 28 March 1989 from the Principal Director of Personnel. In any event he Appeals Committee did not get round to hearing him until 29 November 1989. He criticises the Committee's proceedings and alleges that its members were under pressure from the Administration. The EPO is slow to acknowledge staff rights but quick to punish: why did the Vice-President not await the outcome of the reporting procedure before imposing the reprimand? Was it because of his membership of a staff association? He accuses the EPO of animosity on the grounds not of specific facts but of its own view of his general behaviour. Article 47 would be meaningless if the staff member was not free to comment as he pleased. The EPO is exaggerating the seriousness of a remark about a small point in his staff report.

E. In its surrejoinder the EPO rejects a statement of the complainant's to the Appeals Committee that he did not mean to be insulting: what he said came at the end of some thoroughly offensive remarks and, besides, he has time and again refused to retract it. His allegations about pressure on the Committee's members are unproven. That his remark was about a minor point makes it less pardonable, not more. CONSIDERATIONS:

1. The complainant, a grade A3 search examiner at the EPO, wants the Tribunal to set aside a reprimand he was given on 27 October 1988 by way of disciplinary sanction.

2. The sanction came about in the following way. Being displeased with his staff report for 1986-87, the complainant exercised his right to comment on his supervisors' appraisal of him, and he set out his comments in an appended minute of 19 August 1988. The minute uses strong language about the reporting officers.

Though the EPO let some of that pass it could not accept another comment under the heading "Relationship with others" and, more particularly, "Dealings with colleagues":

"Does getting a rating of 1 depend on the number of drinks colleagues are stood and the value of presents directors get?"

3. In their "final comments" dated 23 September 1988 the two reporting officers, though they thought it a pity that the complainant had "not put to better purpose the time he had spent writing his minute", let that remark too pass without comment. But in his observations of 27 September the Principal Director of the Search Department said that in his view "the tone and substance of some of Mr. Popineau's remarks fall short of the rudimentary courtesy and respect that ought ordinarily to prevail between official and supervisor". On 29 September the Principal Director of Administration wrote him a letter citing his remark quoted in 2 above, pointing out how serious was his charge of corruption against his immediate supervisors, asking him to submit proof within a week and warning that if he did not there would be disciplinary proceedings for the gross insult.

4. All that he said in his reply of 7 October 1988 was that since those supervisors had not taken the point in their final comments the reasonable inference was that his remark had not offended them. For the rest he merely stated formal objections to starting any disciplinary proceedings.

5. The Principal Director of Administration thereupon had a talk with the complainant which he describes as "frank". Writing this time on behalf of the President of the Office, he sent the complainant a letter on 14 October quoting the unacceptable remark, telling him that disciplinary proceedings were started and giving him another opportunity to answer, within a week.

6. The complainant did not respond, and in a minute of 27 October 1988 which he sent on the President's behalf the Vice-President of the Office in charge of General Directorate 1 stated, after summing up the facts material to the disciplinary proceedings, that he was giving the complainant a reprimand under Article 93 of the Service Regulations.

7. On 7 February 1989 the complainant lodged an internal appeal with the President and, having got no answer within the time limit, filed this complaint on 6 July 1989 seeking the quashing of the sanction and 10,000 guilders in moral damages.

8. The Appeals Committee reported on 5 February 1990 on the appeal and its report is appended to the EPO's surrejoinder. It unanimously recommended rejecting the appeal on the grounds, in particular, that in the course of the disciplinary proceedings the complainant had had several opportunities to withdraw his remark and must bear the consequences of refusing to do so.

9. The EPO does not challenge the receivability of the complaint.

10. The complainant pleads that the official who started the disciplinary proceedings was not competent to do so; that he was not given the case records; that staff are entitled under the Service Regulations to comment on staff reports; and that his remark was in the form of a question, and harmless anyway, and did not give his supervisors offence. In his rejoinder, which he filed after he had appeared before the Appeals Committee, he questions its members' independence and impartiality.

11. There are several material provisions of the Service Regulations about disciplinary proceedings. Article 93(4) says that "Disciplinary proceedings shall be initiated by the appointing authority"; Article 94 that the appointing authority shall have the right to issue a written warning or a reprimand directly; and Article 93(5) reads: "The proceedings in disciplinary matters shall be recorded in writing. No disciplinary measure may be decided unless the employee concerned has been informed of the charges made against him and has had the opportunity to state his case ...".

12. The Tribunal is satisfied on the evidence that those provisions were fully and correctly followed. The officials who started the disciplinary proceedings and imposed the sanction were competent to do so and were acting on the President's behalf. The material fact - the remark in the complainant's minute that was found unacceptable - was clearly stated, and there were no other "case records". Before getting the reprimand the complainant was given a hearing on several occasions and so able to state his case and withdraw the offending words.

13. Those words are in substance both offensive and libellous in that they insinuate that the complainant's supervisors are corrupt in awarding ratings in staff reports. The insinuation is the more serious in that it is in a context of grave insults that were incompatible with the calm that should prevail in any civil service. The complainant's bellicose attitude shows up again in submissions in his rejoinder, in which he goes so far as to cast aspersions on the independence and impartiality of the Appeals Committee's members.

14. The complainant seeks justification of his unrestrained language in Article 47(1) of the Service Regulations, of which the second sentence says that the official "shall be entitled to make any comments" he considers relevant on the staff report. But the freedom of speech that provision safeguards plainly affords no excuse for insult and libel. Neither is any justification to be found in his supervisors' showing no sharper response. The Principal Directors acted properly in taking the initiative to protect the officials under attack and punish behaviour that was at odds with the calm and efficient running of the Organisation's business.

15. The conclusion is that the procedure followed for imposing the sanction was wholly lawful and, as to the merits, the choice of sanction was wholly warranted. The complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, the Right Honourable Sir William Douglas, Deputy Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
William Douglas
P. Pescatore
A.B. Gardner