

NINETY-FIRST SESSION

In re Créchet (No. 6)

Judgment No. 2064

The Administrative Tribunal,

Considering the sixth complaint filed by Mr Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 24 August 2000, the EPO's reply of 21 December 2000, the complainant's rejoinder of 19 February 2001 and the Organisation's surrejoinder of 9 April 2001;

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

A. The complainant's career and facts material to this case are set out under A in Judgments 890, 1667, 1879 and 1910 in which the Tribunal ruled on his five earlier complaints.

The complainant is an examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, at The Hague. He was seconded as a liaison officer to the Portuguese National Industrial Property Institute in Lisbon from 1 May 1992 to 31 December 1995. As from 1 January 1996 he resumed his duties at DG1 at the same grade, A3.

He was dissatisfied with his performance reports for the periods from 1992-1993 and from 1994-1995 and contested each of them in August 1995 and October 1996 respectively. Following a conciliation procedure, the President of the Office nonetheless endorsed the reports on 27 April 1998. By letters of 28 May the complainant asked him to reconsider that position or else to treat the letters as notices of appeal. In a letter of 9 June 1998 the Director of Personnel Development informed him that the President had decided against reviewing his position and had referred the matter of his reports to the Appeals Committee.

In August 1998 the complainant also challenged his report for the period 1996-1997. Although a conciliation procedure ensued, the President endorsed the report on 15 March 1999. In a letter of 13 July to him the complainant stated that the report did not reflect the work he had done in the last few years. He therefore asked him to reconsider the report or else treat his letter as a notice of appeal. The Director of Personnel Development replied in a letter of 21 July 1999 that the President would not reconsider his position and had referred the matter to the Appeals Committee.

On 5 June 2000 the Committee reported on the three appeals and recommended rejecting them as devoid of merit. By a letter of 21 June 2000, the impugned decision, the Director of Personnel Development informed the complainant of the President's decision to reject the three appeals.

B. The complainant submits that, in spite of giving him a limited assurance that the success of his mission would count in his favour, the EPO had failed to take it into consideration in the three contested staff reports. The first two reports overlooked his "important responsibilities" as a liaison officer and were not endorsed within the time limit set in the general guidelines on reporting attached to communiqué No. 206. What is more, there was breach of process because the "principal reporting officer" signed his report for the period 1994-1995 after the complainant had made his comments.

Explaining that his overall rating was only "good" for 1996-1997 having been "very good" for 1990-1991, he infers

that the report for the period 1996-1997 overlooked the positive results obtained during his mission in Portugal and the "significant effort" he made - particularly to increase his output - on returning to DG1. The report does not indicate either how the "guarantees as to the development of [his] career are or will be given effect". When he returned from his secondment the EPO refused to consider whether the experience he acquired as a liaison officer could be put to good use. That, he says, amounts to "*de facto* downgrading".

He asks the Tribunal to set aside the decision of 21 June 2000, to send the case back to the Organisation for a new decision on his three staff reports and to award him 500 euros in costs.

C. In its reply the EPO submits that the case law recognises reporting to be a discretionary matter. The complainant's first two reports were drawn up properly and the reporting officers made a cogent assessment of all the relevant aspects of his work and of his strengths and weaknesses as a liaison officer. The reporting process set in the general guidelines on reporting provides quite logically that the staff member reported on will make comments if he wishes and that the reporting officer will reply to them before the countersigning officer makes his final comment. The EPO observes that the Appeals Committee found that the lengthy adoption procedure did not affect the content of the report for 1992-1993.

It adds that the ratings "very good" and "good" cannot be compared because measurement of productivity in the reporting period 1996-1997 meant comparing the complainant's performance with that of other examiners in the same directorate during the same period. The improvement in his productivity did not necessarily warrant a more favourable rating. The EPO denies any *de facto* downgrading and rebuts the charge that it made no attempt to find him a post where he could put to good use the experience he acquired during his mission: that accusation was prompted by his own misreading of the vacancy notice announcing the post of liaison officer. Though the notice did say that a successful mission would affect the development of the incumbent's career, that did not mean that he could expect a change in duties immediately on return.

D. In his rejoinder the complainant submits that in its reply the EPO disregards the effort he devoted to his duties as liaison officer. He observes that, for the reporting period 1996-1997, he was not in the same position as the other examiners because he had just returned to DG1 after his mission.

E. In its surrejoinder the EPO denies overlooking the complainant's efforts while he was on mission.

CONSIDERATIONS

1. The complainant, an examiner at grade A3 in Directorate-General 1 (DG1) of the European Patent Office, at The Hague, was seconded to Portugal as a liaison officer from 1 May 1992 to 31 December 1995. He then returned to DG1 where he resumed his former duties as an examiner, again at grade A3, as from 1 January 1996.

Relying on assurances he said the EPO gave him, he asked to be promoted to grade A4. His request was refused by a decision of 2 September 1997. In Judgment 1910, of 3 February 2000, the Tribunal quashed that decision and sent the matter back to the EPO for a new one. Before leaving for Portugal, and again during his mission, the complainant had obtained a limited assurance that a successful mission would be treated as an additional point in his favour for the development of his career. The Tribunal found that neither in considering his claim to promotion nor when deciding to reject it did the Office take account of the additional point as it ought to have done.

When the decision of 2 September 1997 was taken the complainant's staff reports had not yet been finalised. Following the delivery of Judgment 1910, the President told the complainant that he would not reconsider the matter of his promotion until the decisions on his staff reports became final.

2. The complainant challenged his staff reports for the years 1992-1993, 1994-1995 and 1996-1997. The gist of his arguments is that the ratings he was given failed to take full account of the quality of his performance, particularly as a liaison officer in Portugal, contrary to the assurance he received before he left.

The first two reports were submitted to a single conciliation procedure, but no agreement was reached. The complainant therefore filed two internal appeals.

As to the third report, he accuses the reporting officers of overlooking both the experience he acquired in Portugal,

to the detriment of his career, and the improvement in his productivity as compared to the period 1990-1991, for which he had been rated as "very good". The conciliation procedure again failed to produce an agreement and, the report having been approved by the President of the Office, the complainant appealed against that decision too.

The Appeals Committee joined the three appeals and in its report unanimously recommended rejection. The President endorsed its recommendation and rejected the appeals by a decision of 21 June 2000.

3. The complainant is asking the Tribunal to quash that decision and to send the case back to the EPO for a new decision on his staff reports.

The Organisation seeks dismissal of the complaint as being unfounded.

4. Firm precedent has it that issues raised by staff reports are discretionary and that the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or of law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence (see for example Judgments 1221 (*in re Amé de Saint Didier* Nos. 1, 2 and 3) under 5, 1394 (*in re Dietrich*) under 5, 1463 (*in re Weber*) under 14, and the others cited therein, and 1688 (*in re Moran*) under 5).

It is for the complainant to provide evidence to show that the decision on his report is challengeable on one of the above grounds.

5. The complainant's first objection is to the amount of time the EPO took to finalise the first two reports: it overstepped the deadline set by the general guidelines on reporting appended to communiqué No. 206 of 14 February 1992. He cites in particular one provision of the guidelines, which says: "If a staff report is not finalised within one year, all the relevant documents shall be referred immediately to the President for a decision." [\(1\)](#)

It is clear that the EPO did not respect all the time limits, which caused considerable delay. Such delay could *per se* have adverse effects, particularly on the way relatively distant facts are perceived. But performance reports continue to be useful even if deadlines have not been respected. Failure to meet a deadline cannot on its own be a reason for setting aside reports but, depending on the case, the effect that the delay has on the report's content will be taken into account (see Judgment 1394).

In this case the delay can be explained: the complainant had been on mission in Portugal; and he challenged his reports. Furthermore, there is no convincing evidence that the content of the first two reports was affected by the delay in finalising them.

The plea fails.

6. The complainant contends that the conciliation procedure was detrimental to him: the mediator at the first conciliation meeting of 17 December 1996 appeared favourably disposed towards him whereas the mediator at the second meeting wrote an unfavourable report. The EPO points out that it deferred the conciliation meeting at the complainant's request, and because the first mediator was seriously ill, someone else had to be called in.

The complainant does not allege that the Organisation acted maliciously. The procedure had to be resumed, so the second mediator's report is the one that counts. The evidence adduced by the complainant in support of his plea affords no grounds for setting aside the impugned decision.

7. Citing Judgments 1667 and 1910 the complainant appears to take the Organisation to task for overlooking the success of his mission in Portugal in his reports.

Those judgments found that, before leaving for Portugal and while he was there the complainant had been given a limited assurance that a successful mission "would be taken into account as a point in his favour" in view of any promotion. In Judgment 1910 the Tribunal stated that it had no reason to suppose that it was taken into account either in establishing his reports or considering his claim to promotion. However, that does not imply that the Tribunal found that it ought to have been taken into account right from the reporting stage.

Although he was given a limited assurance that a successful mission would be taken into consideration, the complainant has no grounds for objecting to the fact that the EPO did not give him higher ratings on that account.

8. The complainant seems to consider that there is a contradiction between a letter from the Principal Director of Patent Information dated 5 October 1995 noting the success of his mission to Portugal, and the content of his staff reports.

The Principal Director countersigned the first two reports, which were not unfavourable to the complainant. Consequently, there is not necessarily a contradiction between the success of his mission to Portugal and certain reservations about his performance expressed by the reporting officers.

The plea fails.

9. The complainant submits that if his performance was unsatisfactory the EPO should have told him so in order that he might improve it.

The EPO rightly retorts that the guidelines provide for no such warning unless the staff member's performance warrants a rating of less than "good", the purpose being to enable him to attain the requisite standard. That was not the complainant's case.

10. According to the complainant, the "principal reporting officer" lacks authority to countersign a report after the staff member concerned has commented.

The argument is unsound since part IX of the general guidelines allows for final comments by the reporting officer and countersigning officer.

11. As to the reporting period 1996-1997, the complainant points out that the overall assessment of his duties as an examiner went from "very good" in 1991 to "good" despite an improvement in his performance (his output increased by 50 per cent) and an additional effort (because he had done a different job for nearly four years in Portugal). He submits that the reporting officers should also have taken into account the success of his mission, in accordance with the assurance given him before he left.

The Organisation retorts that his arguments are immaterial. It contends that his output should be compared with that of other officials for the same period, 1996-1997, and not his own output for 1990-1991. Working methods had changed since then, and 1990-1991 is not an appropriate period for comparison because a review of the marking system known as the "stamp operation" (see Judgment 1264, *in re* Herbelet) was carried out at the time.

In rebuttal the complainant argues that to compare his output with that of other colleagues was inappropriate since, unlike him, they had not had a four-year interruption of their careers as examiners. The use of new computer tools could explain a slight improvement in productivity, but not an increase of 50 per cent.

The Tribunal points out that, the choice of terms of comparison and ratings given in performance appraisals being discretionary, the offending reports show no flaws that warrant setting them aside.

It is nonetheless worth noting that reports could be based solely on objective results and ignore the staff member's efforts. But in the interests of equal treatment any difference in the position of officials compared warrants recognition. It could be reflected in some other manner, however, and not necessarily in staff reports. In this case, having been sent on mission to Portugal in the Organisation's interests, it took the complainant some time to readapt and bring his performance back onto a par with that of his colleagues, with the result that he was given a lower rating. It would be unfair to penalise him on that account; however, that issue may be considered later and taken into account whenever a decision is made about his promotion.

12. The following points should be noted:

(a) the Organisation overlooked the success of the complainant's mission in Portugal and, consequently, account was not taken of the limited assurance given to him;

(b) the Organisation does not deny the "positive results of the complainant's mission in Portugal". Indeed, it recognised them in a letter of 5 October 1995 addressed to the complainant by the Principal Director of Patent Information, even if it had a number of reservations.

As Judgment 1910 held, it is in taking a decision about his promotion that the appointing authority must consider the scope of the limited assurance given by the Office. Although the President has broad discretion in determining how successful the mission was and in comparing the complainant's position with that of officials who stayed in The Hague, he must not overlook the fact that the success of the mission is an additional point in the complainant's favour, and the assurance, albeit limited, that he was given must not remain a dead letter. Even if he is not to benefit from promotion immediately, the Organisation's duty of consideration towards him requires it to inform him in what conditions he might expect a promotion to be awarded.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2001, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

1. Registry's translation.