

NINETY-SECOND SESSION

In re O'Reilly

Judgment No. 2115

The Administrative Tribunal,

Considering the complaint filed by Mr Dermot Joseph Kavanagh O'Reilly against the European Patent Organisation (EPO) on 6 October 2000 and corrected on 31 October 2000, the EPO's reply of 25 January 2001, the complainant's rejoinder of 27 March, and the Organisation's surrejoinder of 13 June 2001;

Considering Articles II, paragraph 5, and VII 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 is a British national and was born on 22 June 1940. He joined the staff of the European Patent Office, the EPO's secretariat, on 1 January 1989 as a search examiner at grade A3. This complaint stems from three internal appeals filed by the complainant.

In July 1993 the complainant objected to the "productivity norm" of 2.5 days per file which applied to him in 1993 and would be taken into account in his staff report. A conciliation procedure ensued and in a letter of 10 June 1997 the new Principal Director of Search informed him that no reason had been found to change the norm. In a reply of 7 July the complainant asked him to reconsider his stand on the matter, but the Principal Director told him in a letter of 20 August that the norm had been correctly set. In a letter of 7 November 1997 to the President of the Office, the complainant notified his wish to appeal against that decision "for conservatory reasons"; he would substantiate his appeal if the outcome of a conciliation procedure on his 1993 staff report adversely affected him. In a letter of 11 March 1999 he confirmed that he would like his appeal to be heard "as soon as possible". It was taken up by the Appeals Committee under the reference RI/100/97.

The complainant had received his staff report for 1993 in July 1994, and since he had obtained the marking "less than good" for "productivity", "attitude ..." and the "overall rating" he had contested the report. On 25 May 1998, as a result of the conciliation procedure, he was given a third amended version of his report in which only productivity was rated "less than good". He had also contested his staff report for 1994-95, which led to further conciliation. He was given a second amended version of that report on 27 May 1998. The marking therein was "less than good" for productivity and "good" for all other categories. No final agreement was reached on either report and on 11 December 1998 the President endorsed both as they stood. By a letter of 11 March 1999 the complainant filed an internal appeal against both staff reports, which was registered under the reference RI/32/99.

On 2 July 1998 the President had published a list of employees to be promoted. The complainant's name did not appear on the list. In an internal appeal filed on 10 September 1998 he opposed the decision not to promote him. That appeal was registered as RI/84/98.

The Appeals Committee reported on all three appeals in a single report dated 6 July 2000. Contrary to the view held by the Administration, the Committee concluded that the complainant's appeal against the productivity norm was receivable, but recommended rejecting it as unfounded. It recommended allowing his other two appeals in part. In its view the staff report for 1993 was "grossly inconsistent" in that the report comments were at odds with the box markings; it found that both reports should be drawn up again and the productivity rating for the period 1994-95 should be raised to "good". However, it thought that the Promotion Board should take the matter up "as speedily as possible" and that it would be advisable to forgo a further revision of the comments in the reports and ask the Promotion Board to give its opinion solely on the basis of the box markings.

In a decision of 8 August 2000, which the complainant impugns, the President rejected the appeal regarding the

productivity norm. He agreed that the assessment for productivity in the 1994-95 report should be raised to "good". In view of the complainant's non-promotion, he stated that he was willing to submit the reports for 1993 and 1994-95 to the Promotion Board so that it could review the complainant's case on the basis of the box markings alone and sought the complainant's agreement. In a letter of 14 September 2000 the complainant gave his agreement, imposing two conditions: he wished to reserve his right to challenge several points in the Appeals Committee's report and wanted the Board to see only the box markings and not the written comments. The complainant was promoted to grade A4 with effect from 1 January 2000.

B. Citing the case law of the Tribunal, the complainant lists four grounds that justify not approving a staff report. These being namely: if a reporting officer made an obvious mistake of fact over some important point, neglected some essential fact, was grossly inconsistent or showed prejudice. In his case these factors were disregarded and led to the filing of his three appeals.

He submits that his appeal filed against the productivity norm was filed in due time, and he contests the stance of the Appeals Committee on some points. Contrary to the Committee's opinion he argues that his appeal was well founded. The administration did not take into account the degree of technical difficulty associated with the fields in which he worked: he wanted more time per file. It seemed unfair that his tutor was allowed 3.2 days per file especially since they both worked in the same technical field. Also, the norm conciliation procedure took too long, which "cast doubt" on its legality.

Turning to his appeal against his two staff reports, the complainant notes that the Appeals Committee found that both versions signed by the President on 11 December 1998 should be annulled on the grounds of gross inconsistency. He objects to the fact that the President proposed a compromise solution without referring to the illegality of the two reports. As regards his 1993 report, he disagrees with the Committee's view that the mark of "less than good" for productivity should be allowed to stand. In drawing that conclusion the Committee overlooked essential facts. With regard to his 1994-95 report he finds it odd that his reporting officer calculated his productivity without taking into account twenty-two search reports done in the latter part of 1995. He alleges prejudice on the part of the reporting officer. Communication had virtually broken down between them and in failing to address this matter, the EPO was in breach of its duty of care towards him.

With regard to his third appeal, he submits that the delays in the conciliation and staff reporting procedures had a "disastrous" effect on his promotion prospects, particularly as he could reasonably have expected promotion to A4 in 1992, or at the latest in 1993. Moreover, he still did not have a single valid staff report for the period from January 1993 to September 1996.

The complainant asks the Tribunal to quash the President's decision rejecting his appeal against the productivity norm for 1993, so that his rating for productivity is raised to "good" in his 1993 report. He seeks the annulment of that report and the one for 1994-95 and wants them replaced by "a record of performance" that does not "prejudice his career". He claims promotion to A4 retroactively from 1 January 1993 and back pay due, with interest; moral damages for procedural delays and for prejudice on the part of the reporting officer; and costs.

C. In its reply the Organisation contends that the internal appeal relating to his productivity norm was not filed in due time, rendering the part of the complaint based on that appeal irreceivable. In his letter of 20 August 1997 the Principal Director merely confirmed the information he gave the complainant in his letter dated 10 June, and yet it was not until 7 November 1997 that the complainant filed his internal appeal.

Turning to the merits, it argues that the length of the reporting procedure criticised by the complainant does not affect the validity of the productivity norm to be applied in the complainant's performance appraisal. Production requirements are different for tutors; tutoring duties have to be taken into account, so he cannot compare his situation with that of his tutor. The President adopted the Appeals Committee's subsidiary recommendation to submit the complainant's staff reports to the Promotion Board in their current state, and proposed that course of action to the complainant; it follows that the complainant's acceptance of that proposal can be interpreted as implicit acceptance of the norm applied to assess his productivity. It was a fair proposal, and given that there were differences of opinion between the complainant and his supervisor, setting aside and rewriting the reports "would not have made sense".

The EPO denies that the reporting officer showed prejudice towards the complainant and states that the complainant's allegations are unsubstantiated. A staff member has a legitimate right to comment on his report but a

reporting officer also enjoys wide freedom of expression.

As for his claim to promotion with effect from 1 January 1993, the EPO holds that promotion is not "a foregone conclusion": the conditions for promotion have to be met. Moreover, none of the complainant's arguments support his claim to an award of damages.

D. In his rejoinder the complainant takes up the matter of the receivability of his first internal appeal. He appealed against the productivity norm insofar as it was to be applied to his 1993 staff report. He received the amended version of the report, signed by the President on 13 January 1999, and since his "formal" appeal was lodged on 11 March 1999 it was receivable.

He affirms that it was precisely with a view to accelerating the promotion process that he agreed to the President's proposal. That was the sole reason, and the Organisation cannot assume that he gave his acceptance on any other matter. Moreover, no promotion resulted from the President's proposal; he was promoted on the strength of his performance since 1997. He insists that he is entitled to have his staff reports drawn up properly.

The complainant asks the Tribunal to condemn the Organisation's use of "flawed and prejudiced" staff reports for 1993, 1994-95 and 1996, and wants a memorandum that was attached to his 1996 staff report to be removed from his personal file. While adhering to his main claim to retroactive promotion from 1 January 1993, he subsidiarily asks that - for reasons he lists - the effective date of his promotion should be brought forward to 1 January in either 1994, 1995, 1996 or 1997.

E. In its surrejoinder the Organisation maintains its argument as to the irreceivability of his internal appeal against the productivity norm; the date at which the complainant received his 1993 staff report can have no bearing on the admissibility of his first internal appeal. Although the President's referral of his case to the Promotion Board did not have the result that the complainant was hoping for, it does not mean that the proposal for the Board to consider his reports only on the basis of the box markings was in itself unfair. He is therefore barred from now claiming the redrafting of his reports.

Furthermore, his four subsidiary claims regarding the date of his promotion are unfounded. His ratings since 1993 show that it is only from 1 January 2000 that he fulfilled the conditions for promotion. His claim to the removal of the document from his personal file is not receivable because he has failed to exhaust the internal means of redress.

CONSIDERATIONS

1. Following the filing of three internal appeals, the complainant is now impugning a final decision by the President of the European Patent Office rendered on 8 August 2000. The internal appeals challenged respectively the productivity norm which was applied to him for the year 1993, his staff reports for 1993 and 1994-95, and his non-promotion to A4. He was subsequently promoted to grade A4 in January 2001, with effect from 1 January 2000.

2. By the impugned decision the President, while rejecting the complainant's appeal relating to the productivity norm, adopted a suggestion of the Appeals Committee and proposed to the complainant that his other two appeals be disposed of by sending his 1993 and 1994-95 staff reports to the Promotion Board with a request that it consider only the box markings and not the written comments of the reporting officer. After an initial refusal, the complainant, on 14 September 2000, accepted this proposal subject to the condition that the comments would not be shown to the Promotion Board, and this was done. The complainant also at the same time purported to reserve his rights to contest a number of the opinions expressed by the Appeals Committee.

3. The complainant regards the President's final decision as a compromise solution and wants to raise matters that were mentioned in the Appeals Committee's report but not covered by the President in his decision. He says there were excessive delays in the norm conciliation procedure and he did not have adequate warning about the rating for productivity which would be given in his 1993 report. Essential facts were neglected and there was prejudice on the part of his reporting officer. In his claims he seeks the annulment of both staff reports, and moral damages.

The Organisation argues that the complaint is irreceivable in part, and unfounded in its entirety.

4. Notwithstanding the Appeals Committee's holding to the contrary, it is clear that the complainant's internal

appeal relating to the productivity norm was irreceivable. One of his earlier objections regarding his 1993 staff report was precisely that his request for conciliation on the productivity norm had never been brought to a conclusion. The Organisation had ultimately accepted that view and, on 10 December 1996, asked for the 1993 report to be reviewed. Accordingly, on 10 June 1997, the Principal Director of Search, wrote to the complainant confirming that there was no reason to change the productivity norm that applied for 1993. The complainant protested against that decision by a letter to the Principal Director, dated 7 July 1997, and requested reconsideration. On 20 August the Principal Director of Search wrote back, refusing to change his position. The complainant's internal appeal was filed on 7 November 1997 and specifically attacked the "decision" of 20 August.

It goes without saying that a refusal to reconsider an initial decision does not create a new right of appeal and does not set off a new time limit with respect to the earlier decision. Nor can the complainant argue, as he attempts to do in his rejoinder, that the internal appeal only attacked the application of the contested norm to his 1993 staff report since the final version of that report was not approved by the President until 11 December 1998, some thirteen months after the filing of his first internal appeal. It follows that that internal appeal was irreceivable as it was filed more than ninety days after receipt of the decision of 10 June 1997 and the complainant not having exhausted his internal remedies, his complaint to the Tribunal is also irreceivable.

5. As far as concerns the complainant's claims based on the alleged irregularities in the 1993 and 1994-95 staff reports, it is evident that they no longer have any substance and need not be dealt with in any detail. The complainant accepted the President's proposal that the Promotion Board should consider the matter of his promotion on the basis of upgraded box markings without being shown the written comments. This had the effect of removing all the unfavourable scores and remarks and ultimately the Promotion Board, in December 2000, recommended that the complainant be promoted with retroactive effect from January 2000.

A staff member cannot claim entitlement to promotion at a particular date and the complainant was in fact considered for promotion at the earliest possible time after the impugned decision was taken and in accordance with the proposal which he had himself accepted. His purported reservation of his right to contest the Appeals Committee's opinions, whatever other effects it may have, cannot change his position before the Tribunal which does not have the power to alter the reports of that Committee.

6. The same considerations apply to the complainant's claim to be promoted retroactively. Not only did he not have any automatic entitlement to be promoted, but his acceptance of the President's proposal on 14 September 2000 that amended staff reports for the years 1993 and 1994-95 should be submitted to the Promotion Board necessarily implied that he could not be considered for promotion before the Board had examined the reports. Shortly thereafter the Promotion Board recommended his promotion to A4 and this was done with retroactive effect to January 2000. There is simply no substance to this aspect of the complaint either.

In view of the foregoing the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2001, Miss Mella Carroll, Vice-President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Mella Carroll

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.