

SIXTY-FIFTH SESSION

In re SCHMID (No. 3)

Judgment 920

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Rudolph Schmid against the European Patent Organisation (EPO) on 27 May 1988, the EPO's reply of 28 July, the complainant's rejoinder of 7 September and the EPO's surrejoinder of 17 October 1988;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 47 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Facts relevant to this case appear in Judgments 918 and 919, under A. The complainant served the EPO as a search examiner at The Hague from 1981 until 1987. The EPO transferred him on trial from one branch, where he had come under Mr. Peeters (see Judgment 918) to another, where he answered to Mr. Pasturel and was expected to find the work easier. He is challenging the report, required by Article 47 of the Service Regulations, on his performance from 1 June 1984 to 31 May 1985.

Mr. Pasturel, who drafted that report on 1 July 1985, rated him 3 ("good") under four headings, 4 ("adequate") under 5, and 5 ("unsatisfactory") for "quality" and "penetration". The general rating was also 5 and Mr. Pasturel's general comments were unfavourable. The countersigning officer signed under point VII on 1 July, expressing doubt that the complainant would ever come up to the mark. On 6 July the complainant stated his general objections to the report under point VIII. Mr. Pasturel signed it again and Mr. Phillips, observing that he had raised no specific objections, endorsed it on 31 July. On 8 August 1985 the complainant applied under point X for the conciliation procedure. That procedure having failed, the Vice-President of The Hague office had the report - and the one that forms the subject of the second complaint - put to the President of the Office for confirmation.

The President having endorsed Mr. Pasturel's report on 14 April 1987, the complainant lodged three internal appeals on 11 June under Article 108 of the Service Regulations, the second one being directed against confirmation of that report. In the Committee's report of 1 February 1988 the majority held that the low mark for "quality", which was the reason for the low general rating, ought to have been supported by samples of poor work done in the report period; the reporting officer should be asked to provide, say, five such samples and an independent assessor should look them over to see whether any of the marks called for review. The dissenting member of the Committee recommended rejecting the appeal. The letter of 4 March 1988 from the Principal Director of Personnel, which, as in the second complaint, is the decision under challenge, informed the complainant of the rejection of his appeal.

B. The complainant alleges many flaws in the report and breach of circular 124 of 21 December 1983, which sets out the rules on the reporting procedure. In particular he says he was not warned that the quality of his work was poor in time for him to be able to improve it. Nor can his performance have been so consistently poor as to warrant the lowest general rating. After all, in earlier reports it had been rated 3. The period covered by the report was too short. Mr. Pasturel having given no "detailed breakdown" on the grounds of his assessment as required by circular 124, the complainant could not defend himself properly. He asks that the report be withdrawn and that he be awarded damages for injury to his professional career.

C. The Organisation replies that the complaint is irreceivable. The complainant's allegations of flaws in Mr. Pasturel's report are new in that he did not make them, or any others for that matter, in the internal appeal proceedings and he has therefore failed to meet the requirement in Article VII(1) of the Statute of the Tribunal that he exhaust the internal means of redress.

In any event his objections to it are unfounded. Mr. Pasturel often told him that his performance was unsatisfactory.

The period covered by the report - one year - was not too short. The shortest period a report may cover is three months. Though a few intermittent pieces of poor work will not warrant the lowest rating, the complainant's work was consistently below standard. Mr. Pastural gave full explanations in his comments of any ratings lower than 3. The complainant was often warned that his work was not up to standard and Mr. Pasturel often discussed the matter with him.

D. In his rejoinder the complainant contends that the EPO's objections to the receivability of his complaint are unsound. His complaint is, in his submission, an elaboration of his internal appeal, which forms part of it, and the statement of his claims matches in substance the claims he put forward in that appeal.

As to the merits, he observes that in the conciliation proceedings and in the Appeals Committee he was unable to defend himself against the criticisms by his supervisor, who offered no evidence in support of them.

He presses his claims.

E. In its surrejoinder the EPO maintains that the complaint is irreceivable because the complainant is raising issues that he did not address in his internal appeal. The Organisation discusses the opinions expressed in the Appeals Committee's report, observing that what matters is that the complainant had the opportunity of commenting on his staff report before it was sent to the President for final decision. He was entitled to seek discussion with the reporting officer in the conciliation proceedings but failed to do so. He was free to state his case to the Appeals Committee, but he left it to the Committee to discover grounds to justify his own appeal.

CONSIDERATIONS:

1. The complainant took up duty with the EPO at The Hague on 1 February 1981 as a search examiner and had his appointment confirmed a year later. Several unfavourable reports were made on his performance in 1984 and 1985 by three directors of different branches, Mr. Peeters, Mr. Pasturel and Mr. Schoofs. He tendered his resignation by a letter dated 22 May 1986. The Principal Director of Administration accepted it on the same day and the President of the Office formally confirmed the acceptance on 1 August. It was agreed that he would resign on 31 January 1987 and he left the EPO at that date.

!J2200!2. In his first complaint, on which the Tribunal rules in Judgment 918, he appeals against the acceptance of his resignation. In his second complaint he objects to the appraisal of his performance in the period from 1 January to 31 May 1984, and the Tribunal dismisses that complaint in Judgment 919. In this complaint he is challenging the report on his performance in the following twelve months, from 1 June 1984 to 31 May 1985.

3. In that report his supervisor, Mr. Pasturel, rates him 3 ("good") for productivity, application, self-expression and dealings with colleagues; 4 ("adequate") for judgment, responsibility, commitment, accuracy and reliability; and 5 ("unsatisfactory") for quality and penetration. Mr. Pasturel also gave him a general rating of 5. The gist of Mr. Pasturel's general comments was that he still had not proved himself; he needed supervision; those who had been asked to train him had given up because of his lack of interest; and on 19 June 1985 he had had to be transferred to another branch. The countersigning officer, Mr. Phillips, doubted that he would ever pass muster as a search examiner.

On 6 July 1985 the complainant stated his general objections, but on 31 July Mr. Pasturel endorsed the report and so did Mr. Phillips, observing that the complainant had raised no specific objections.

4. On 8 August the complainant applied for the conciliation procedure, but the procedure failed and the matter was referred to the President at EPO headquarters in Munich, who on 14 April 1987 endorsed the report. In the internal appeal lodged on 11 June 1987 the complainant challenged the earlier report by Mr. Peeters as well as the one by Mr. Pasturel.

The Appeals Committee reported on 1 February 1988. The majority held that, since it was the rating for quality that had prompted Mr. Pasturel to give him a general rating of 5, it ought to have been justified by samples of bad work. They recommended asking the reporting officer to provide five samples and appointing someone independent to review the ratings. By a letter of 4 March 1988, the decision impugned, the Principal Director of Personnel informed the complainant that the President's decision was to reject the appeal.

5. There is no need for the Tribunal to rule on receivability since in any event the complaint is devoid of merit.

It is clear from the evidence before the Tribunal that the complainant's objections to the report are unfounded. He knew already, because Mr. Pasturel had often told him, that his performance was considered poor. The period covered by the report was not too short because the minimum period a report may cover is three months. Although a few unsatisfactory pieces of work will not justify the lowest mark, the complainant's work was continuously poor during the report period. Mr. Pasturel gave full explanations of any ratings below 3. The complainant was not denied the opportunity of defending himself, an objection that he raises for the first time before the Tribunal.

Lastly, he does not even plead the flaw which the majority of the Appeals Committee found, namely that there ought to have been specific evidence supporting the low rating.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux
Mohamed Suffian
H. Gross Espiell
A.B. Gardner