Registry's translation, the French text alone being authoritative.

EIGHTIETH SESSION

In re KOSTER

Judgment 1489

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain Koster against the European Patent Organisation (EPO) on 3 November 1994 and corrected on 31 December, the EPO's reply of 24 March 1995, the complainant's rejoinder of 30 May and the Organisation's surrejoinder of 29 June 1995;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Frenchman who was born in 1964, joined the staff of the European Patent Office, the secretariat of the EPO, on 1 December 1986 as a clerk at grade B2 in the Documentation Service of its Sub-office in Berlin. In September 1988 he had an accident, and the treatment of his injuries included two operations on a shoulder. The Pension Office of Berlin later declared the degree of his invalidity to be 30 per cent because of stiffness in the shoulder, degenerative spinal lesions and high blood pressure.

Over the next few years his relations with his supervisor, the head of the Documentation Service, grew steadily worse. The head of the Service found fault in particular with his low output and many absences. A staff report dated 19 June 1992 on his performance in 1990-91 gave him a general rating of only 4 ("adequate"). On 25 August 1992 he entered comments on the report but in final comments dated 4 December 1992 the reporting officer confirmed the earlier reservations about his fitness for work. The Principal Director of the Sub-office, who was the countersigning officer, asked the EPO's medical officer how far the accident might have affected performance. On 30 December 1992 he raised the rating to 3 ("good") and asked the reporting officer to amend his comments of 4 December. That officer did so on 1 July 1993.

On 2 March 1993 the complainant had started what is called the "C4" procedure for conciliation about his report. He also sent the President of the Office a letter in German, headed "Appeal against the behaviour of the head of the Documentation Service", in which he alleged injury under several heads and described his supervisor's comments of 4 December 1992 as unwarranted. He claimed damages from the Office and an apology from his supervisor.

By a letter of 22 March 1993 the Director of Staff Policy told the complainant that the President of the Office had provisionally rejected his appeal and put his case to the Appeals Committee. In its report of 4 July 1994 the Committee recommended rejecting his appeal on the grounds that it was not challenging any decision and was therefore irreceivable. By a letter of 2 August 1994, the impugned decision, the Director told him that on the Committee's recommendation the President had rejected his appeal.

B. The complainant submits that the Appeals Committee was mistaken in treating his internal appeal as irreceivable. The word "Beschwerde", which he used in his letter of 2 March 1993, may have been confusing because it can mean both "grievance" and "appeal". But that letter was not an appeal under Article 107(2) of the Service Regulations: its sole purport was to ask the President to have his supervisor behave differently. The true purpose of his complaint is to appeal against the letter of 22 March 1993 refusing those claims, and that letter did notify an adverse individual decision.

He says he was free to file an internal appeal outside the context of the procedure for conciliation about his staff report for 1990-91. That procedure does not amount to an appeal under Articles 106 to 109 of the Service Regulations or even internal means of redress within the meaning of Article VII(1) of the Tribunal's Statute.

He wants the Tribunal to award him 30,000 German marks in damages for his supervisor's behaviour and for the Organisation's failure to take prompt remedial action; order the President of the Office to take action within two months of the date of judgment to protect him from harmful treatment by his supervisor, subject to the payment of a penalty of 2,000 marks a month for any delay in the performance of the obligation; and award him 5,000 marks in costs.

C. In its reply the EPO challenges the receivability of his internal appeal and so also of the complaint. In its submission he may not dodge the issue by saying he never lodged an internal appeal. His letter of 2 March 1993 did amount to an appeal against his supervisor's behaviour and comments, since in it he used several times the word "Beschwerde", the term that the German version of the Service Regulations applies to an internal appeal. That such was his intent was plain from the comments, also dated 2 March, which he appended to his staff report. Besides, in his letter of 22 March 1993 the Director of Staff Policy confirmed that the case was going to the Appeals Committee. He was not free to lodge an appeal against the reporting officer's comments in the staff report inasmuch as they formed part of that report and were not a separate challengeable decision. On 2 March, the day on which he lodged his internal appeal, he applied for the "C4" procedure. Since the report was not final until that procedure had been completed it could not form the subject of an appeal.

In subsidiary argument on the merits the EPO observes that as countersigning officer the Principal Director of the Sub- office gave the complainant satisfaction by raising his rating from 4 to 3. So after the removal on 1 July 1993 of the unfavourable comments the report no longer caused him any injury.

D. In his rejoinder the complainant points out that his appeal of 2 March 1993 was not about the staff report but about the injury his supervisor's behaviour had caused him, a matter that went far beyond the C4 procedure. Though his letter of 2 March 1993 alluded to the comments by the head of the Service it referred to other forms of injury as well. Likewise, his own remarks on his staff report came under the reporting procedure and fell outside the context of an appeal. Besides, it was not until 6 April 1995, after the President had endorsed the staff report, that he filed the internal appeal against that report.

E. In its surrejoinder the EPO contends that the appeal did concern comments in the staff report and that it was only after 9 January 1995, when the President endorsed the report, that it became appealable.

CONSIDERATIONS:

1. The complainant joined the EPO's Sub-office in Berlin in 1986. He is seeking redress for injury which he says he suffered on account of his supervisor's behaviour and the Organisation's failure to take reasonably prompt remedial action.

2. There were incidents in 1992 over the appraisal of his services in 1990-91, and his supervisor, the head of the Documentation Service, made criticisms about his performance, attendance and time-keeping. The complainant wrote the President of the Office a letter on 2 March 1993 in which he referred to his difficulties at work. In his letter he spoke of an accident that had left him disabled; he accused his supervisor of lack of understanding and mistrust; and he objected to the use of information about his private life that in his view was calculated to discredit him. He concluded:

"Because of constant harassment at work I am suffering from psychosomatic disorders and high blood pressure, and I am claiming proper financial compensation.

I also want the EPO to order [my supervisor] to apologise for his behaviour, to treat me with proper respect and to stop harassing me."

3. After preliminary consideration the President decided on 22 March 1993 not to allow his claims and referred them to the Appeals Committee for report. The Committee did not meet until 4 July 1994. It then declared the appeal irreceivable on the grounds that the complainant was not challenging any individual decision; that "the behaviour of an immediate superior is not a decision against which an appeal may be filed"; and that he could not expect assistance from the Office under Article 28 of the Service Regulations since the purpose of that provision "is not to settle a dispute that has arisen within the Organisation itself". By a decision of 2 August 1994, the one impugned, the Director of Staff Policy told the complainant that the President had decided to endorse the Committee's recommendation and reject his appeal.

4. The EPO submits that the Committee and the President were right to treat the complainant's appeal as irreceivable because he was not challenging any adverse individual decision, and that because that appeal was irreceivable so is the present complaint.

5. The plea fails. The complainant did misstate his case in heading it "Appeal against the behaviour of the head of the Documentation Service". But what he wanted from the President was two decisions: an award of damages for the injury he said he had sustained, and action by the President to deal with the head of the Service. There is no doubt that his claims were rejected, if only in the reply of 22 March 1993. And it is that reply, which does amount to an adverse decision, that he says he is challenging in his pleadings on the complaint.

6. As the EPO points out, the complainant's criticisms of the reporting officer's remarks cannot be distinguished from his objections to the appraisal report itself, which is covered by a different procedure. But the complainant is at pains to show that his purpose is not to challenge that report as such but to get redress for the injury which he attributes to his supervisor's behaviour and which in his view includes the appraisal of his performance.

7. The complaint challenges the President's refusal to grant him such redress, and for the above reasons it is receivable. But for the reasons that are set out below it

is devoid of merit.

8. The complainant submits that his supervisor has been victimising him since late 1989, refusing to take account of his disability and poor health, constantly making unwarranted charges and allegations about his work and private life, and blocking his many applications for transfer. The Organisation, he says, has done nothing to help, and he has suffered moral injury, including damage to his good name; physical injury; and injury to his prospects of promotion. He says the Organisation owes him redress because it is liable for any mistreatment of its staff by a supervisor; because it owes its staff a duty of protection and care under the Service Regulations; and because it is guilty of gross negligence in failing to solve a problem that goes back five years, to transfer him to a more suitable job, to ensure that the appraisal of his performance makes allowance for his poor health and to require his supervisor to apologise and behave properly towards him.

9. His arguments cannot be sustained. The first point is that he may not rely on Article 28 of the Service Regulations. That article does entitle officials to protection against attacks related to their status or duties and to compensation for injury. But, as was said in Judgment 1270 (in re Errani No. 2) and as the Appeals Committee also observed, its purpose is not to settle a dispute that has arisen within the Organisation itself. So it affords no basis for a claim to help from the Organisation against treatment by a supervisor.

10. Secondly, the President's refusal to order the complainant's supervisor to offer him an apology cannot in the circumstances of the case be deemed to constitute an actionable wrong.

11. And there is a third point. The Organisation is no doubt liable for any mismanagement and for any mistake its staff may commit and must offer redress to anyone who suffers thereby. But the Tribunal is satisfied on the evidence that the complainant's objections are in substance devoid of merit. To be sure, he did not get on well with his supervisor, and transfer would probably have been in everyone's interest. Yet there is no proven act of mismanagement. Though the EPO had him promptly examined by its medical officer, there was nothing about the state of his health that was thought to keep him from carrying out his duties. The procedure for review of his staff report was properly followed. And the reasons why the EPO rejected his applications for transfer are not questionable on the evidence before the Tribunal. Nor is there any evidence of improper delay in his advancement. On that score it is worth citing the EPO's surrejoinder, which says that his supervisors "consistently stress his potential", "are urging him to fulfil it" and want him to "attain a higher grade as soon as he qualifies for promotion".

12. The conclusion is that the wrongs he imputes to the Organisation and the injury he alleges are not proved. The Tribunal will not interfere in management by ordering the Organisation to transfer the complainant or to replace his reporting officer. Besides, his claims on those counts are irreceivable because he did not make them part of his internal appeal. So his complaint must fail.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.