

SEVENTY-SECOND SESSION

***In re* POPINEAU (No. 2)**

Judgment 1135

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gérard Jean Paul Popineau against the European Patent Organisation (EPO) on 13 May 1991, the EPO's reply of 1 August and the complainant's letter of 9 September 1991 informing the Registrar of the Tribunal that he did not wish to rejoin;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 32, 93(2) and 96 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. As was said in Judgment 1028 under A, the complainant, a Frenchman, is employed by the EPO as a patent examiner in General Directorate 1 at The Hague.

Having learned that the Administration had passed on his yearly salary statement for 1989 to the Dutch tax authorities, he informed the competent personnel officer by a minute of 9 February 1990 that for tax purposes he wished to be treated as resident in France, not the Netherlands.

Finding the tone of the minute offensive, the Head of the Personnel Department forwarded a copy to the Principal Director of Administration, who by a letter of 6 March 1990 informed the complainant that the letter was put in his personal file as evidence of "negative behaviour".

On 4 June 1990 he lodged an internal appeal against the decision.

By a letter of 15 June the Principal Director of Personnel informed him that the President had confirmed the decision but added the letter of 6 March to his personal file and referred his appeal to the Appeals Committee.

In its report of 23 November 1990 the Committee said that only the letter of 6 March 1990 from the Principal Director of Administration, together with the complainant's minute "could be regarded as a report on [his] behaviour or a disciplinary measure". Since the letter of 6 March had not been put in his file the Committee unanimously recommended allowing his appeal.

By a letter of 21 December 1990, the decision under challenge, the Principal Director of Personnel informed the complainant that the President had decided in the light of the Committee's recommendation to confirm his decision to place both the letter and the minute in his personal file.

B. The complainant submits that the EPO's sending his yearly salary statement to the Dutch inland revenue was misguided and "highly damaging" to his dealings with the Dutch authorities. The decision to put the minute of 9 February 1990 in his personal file was in breach of Article 32(1)(a) of the Service Regulations which says that an official's personal file shall contain "all documents relating to his administrative position and all reports relating to his ability, efficiency and conduct". His minute of 9 February, he contends, does not fall under any of those heads.

The Administration sought to punish him for what was just a reasonable response to its unwarranted and unyielding attitude. It was in breach of Article 93(2) of the Service Regulations, which does not provide for disciplining an official by putting in his personal file a minute from him that it objects to.

C. The Organisation replies that it is immaterial whether the Personnel Department was right or wrong to forward the complainant's yearly pay statement to the Dutch rather than the French tax authorities. It was sent to the French after he had filed his internal appeal and it is up to them to work out with the Dutch whether his residence for tax purposes was in France or the Netherlands under the agreements between the two countries.

The EPO describes his minute of 9 February as aggressive in tone and offensive and disparaging for the personnel officer. The Principal Director of Administration acted properly to protect that officer from his invective and the decision was in keeping with the ruling in Judgment 1028 that freedom of speech is no excuse for insult.

The minute of 9 February affords evidence of the complainant's behaviour at work and, when taken with the Principal Director's comments, constitutes a report "relating to his ... conduct". It is just quibbling to maintain that the only papers to be put in a personal file are probation or staff reports. The only restriction Article 32 sets is that the official must have seen the document before it is put in his file.

The complainant is mistaken in relying on Article 93(2). Putting adverse comment on file is no disciplinary measure, and if his letter may put him in a bad light in others' eyes he has only himself to blame.

The Organisation asks the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. The complainant, who is a grade A3 search examiner at the EPO, is stationed at its General Directorate in the Netherlands. He is seeking the deletion from his personal file of correspondence prompted by the Organisation's disclosing information on his pay to the Dutch inland revenue.
2. According to the EPO's Service Regulations staff pay is subject to tax to be levied by the Organisation. At the end of each year the EPO draws up a "yearly salary statement" which lists payments made to the staff member and deductions made by way of tax. It forwards the statement to the tax authorities of the country where the staff member is presumed to be resident for the purposes of taxation. If the place of residence is unclear it sends copies of the statement to any governments that may be concerned and leaves them to sort out between themselves any dispute there may be over competence.
3. The complainant maintains that he is still resident in France for tax purposes. He therefore objects to the EPO's having forwarded his salary statement to the Dutch inland revenue, which has on that account exacted large sums from him. On 9 February 1990 he sent the competent EPO officer a written protest demanding in fairly strong language to be treated as still resident in France for tax purposes.
4. Finding that protest improper, the Head of the Personnel Department referred the matter to the Principal Director of Administration. By a letter of 6 March 1990 the Principal Director described the tone of the minute as "aggressive" and had it put in his personal file as evidence of his "negative behaviour" while on duty.
5. The complainant at once lodged an internal appeal. In a report dated 23 November 1990 the Appeals Committee referred to EPO practice in keeping personal files and recommended removing the complainant's minute from his file unless the Principal Director's letter of 6 March 1990 was filed as well. In the Committee's view only if that letter was taken together with the minute that had prompted it could there be said to be a "report" on his conduct such as was meant in Article 32(1) of the Service Regulations.
6. Acting on that recommendation, the President of the Office had the letter of 6 March 1990 put in the complainant's file once he had acknowledged receipt of it. A letter of 21 December 1990 from the Principal Director of Personnel informed the complainant that, taken together, the letter of 6 March 1990 and his minute did, in the President's view, amount to a "report" on conduct within the meaning of 32(1) and that his appeal was therefore rejected. That is the decision - including the order to put the letter of 6 March 1990 in his file - that he is impugning.
7. The complainant submits that the two texts are not documents of a kind that Article 32 provides for putting in a personal file. The Organisation answers that so as to give the fullest possible idea of a staff member's conduct and performance it may file any assessment of him, even an unscheduled one, provided that he himself has seen it; that condition was met in this case, since one item was the complainant's own minute and the other the letter he acknowledged receipt of.

8. Article 32, which is headed "Personal file", reads:

"(1) The personal file of a permanent employee shall contain:a) all documents relating to his administrative position and all reports relating to his ability, efficiency and conduct;

b) any comments by him on such documents and reports.

(2) The documents and reports referred to in paragraph 1 shall be registered, numbered and filed in serial order; the documents referred to in paragraph 1 a) may not be used or cited by the office against a permanent employee unless they were communicated to him before they were filed."

9. Some light is indirectly cast on the meaning of 32 by Article 96, which is about references in the personal file to disciplinary measures. Though such a measure is recorded in the file the staff member may in time apply, save in the event of dismissal, to have the record struck out.

10. Those provisions show that the make-up of the file is subject to formal rules calculated to guard against the filing throughout the staff member's career of documents about his conduct which have not been drawn up with due regard to elementary safeguards of his rights.

11. The firm response by the Principal Director of Administration to the complainant's improper minute is beyond reproach. Yet his letter of 6 March 1990 may not be treated as a "report" within the meaning of Article 32, nor the mere acknowledgement of receipt signed by the complainant as exercise of his right of reply, the less so since those texts are to remain on file longer than any duly imposed disciplinary measure would.

12. The conclusion is that the Principal Director of Personnel acted ultra vires in having the two documents put in the complainant's personal file. His order and the President's decision upholding it must therefore be set aside.

13. Since the complainant does not claim costs no award is made.

DECISION:

For the above reasons,

The Tribunal quashes:

1. the decision to put in the complainant's personal file his own minute of 9 February 1990 and the Principal Director of Administration's letter of 6 March 1990; and
2. the President's confirmatory decision of 21 December 1990.

In witness of this judgment Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

(Signed)

Mohamed Suffian
Mella Carroll
P. Pescatore
A.B. Gardner