

SIXTY-FOURTH SESSION

***In re* BENZE (No. 5)**

(Judgment on the merits)

Judgment 880

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 6 March 1987;

Considering Judgment No. 852 of 10 December 1987, whereby the Tribunal ordered that the proceedings should resume on the merits;

Considering the EPO's reply of 15 March 1988 on the merits, the complainant's rejoinder thereto of 21 March and the EPO's surrejoinder filed on 5 May 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 47(1) 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. The facts of this case were summed up in Judgment 852 under A and 1 to 8.

B. The complainant's pleas on the merits were set out in that judgment under B and 6. By a minute of 27 May 1987 the President of the Office informed him that "a 3, albeit inclining to 2, corresponds to your general performance in the period under review". What he wants is to have the general rating, which is 3 ("good"), changed to at least 2 ("very good").

C. In its reply the EPO submits that the complaint is devoid of merit. The staff reports made in accordance with Article 47(1) of the Service Regulations are discretionary decisions which the Tribunal will set aside only in the exceptional circumstances defined in its case law, and with greater caution where, as here, the case has been considered under the procedure for conciliation and by the Appeals Committee, whose members are familiar with the reporting system.

The standards of comparison to be applied in assessing the complainant are for the Administration alone to determine. The Organisation explains the criteria and the data that are used in assessing an examiner's productivity. It observes that there was proper exercise of discretion in applying those criteria and data to the complainant's case and in rating his productivity 2 rather than 1. He misunderstands the reporting system, which is based, not on any mechanical tally of marks, but on the opinion of those who are familiar with his work. His application for the disclosure of the findings of quality checks is fishing for evidence on mere surmise.

D. In his rejoinder the complainant enlarges on his submissions. He seeks to refute the EPO's pleas about discretionary authority. He submits that an increase in one of the most important marks, the one for productivity, must bring about an increase in the general rating. His mark for productivity should take account of the difficulty of the technical field he was working in and be increased to 1 ("outstanding"). Even if that mark were left at 2 his general rating ought to be changed to 2 as well because to surpass the average either in productivity, as he did, or in quality warrants 2: he need not surpass in both. The average quality of examiners at the EPO merits 2 and anyone, like him, who far exceeds the average in any one respect deserves 1. In any event his general rating was in the upper range of 3 even before his rating for productivity was increased, so that after the increase it should go up

too.

E. In its surrejoinder the EPO maintains that the pleas in the rejoinder betray the same misunderstandings as those it pointed out in its reply on the merits. It enlarges on that reply and again invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. The complainant, a search examiner at grade A3 with the European Patent Office, wants his performance report for 1982-83 to be revised in part. The history of the dispute, his claims and his pleas were summed up in Judgment 852 of 10 December 1987, which ruled on the issue of receivability.

2. Disallowing the EPO's plea that the complaint was irreceivable, the Tribunal ordered submissions on the merits. The Organisation filed a reply explaining further how it had assessed the complainant's productivity, observing that reporting on performance was at the Administration's discretion anyway, and adding that his application for information on how his work had been appraised for quality was irreceivable because he had not made it in the conciliation proceedings or in his internal appeal.

3. In his rejoinder on the merits the complainant presses his claims and says his productivity deserved mark 1 ("outstanding") because the search work he was doing was very difficult. Believing that "a 3, albeit inclining to 2" is not high enough, he asks that his general rating be raised to 2 ("very good"). He seeks disclosure of the quality checks the EPO applied.

The merits

4. As the Tribunal has often said, performance reports serve no purpose unless the supervisor has full freedom in commenting on performance. As a rule there must be faith in the reporting officer's independence and sense of fairness. The Tribunal will review the decision only where there has been blatant abuse of authority or breach of a formal or procedural rule: Judgments 599 of 12 April 1984 (in re Morley) and 806 of 13 March 1987 (in re Hakin No. 8, 14 and 15). Such are the principles to be applied to this case.

5. As to the rating of his productivity, the complainant has on the whole got satisfaction because his mark was reconsidered and raised from 3 ("good") to 2. His demand that it be 1 is unreasonable: "outstanding" is an epithet which the Organisation must be free to choose and only when it finds performance exceptional. It is not something the staff member may properly claim.

6. The general rating is a synthesis of the marks in the staff member's report and of several imponderables that also count in giving a fair opinion of his services to the Organisation. The complainant is mistaken in claiming a better general rating on the strength of his higher mark for productivity. Even though that mark has been raised the others are not above 3 and a higher general rating would require special justification the Tribunal does not find. There has been no misappraisal, let alone blatant error.

7. Where the complainant is right is in objecting to the rating "a 3, albeit inclining to 2". The rules on reporting on the report form stipulate choice of a mark from 1 to 5: "outstanding", "very good", "good", "adequate" and "unsatisfactory". Reporting officers may not, to suit themselves, make up vague in-between ratings of their own but must put against each head of assessment one of the marks on the scale. If they do want to qualify it the proper way is to add comments.

8. The rules on reporting do not allow "a 3, albeit inclining to 2", a term that makes one wonder whether the mark should really be 2 rather than 3. The general rating serves in comparing staff members and therefore matters a great deal to their career, and that sort of marking is in breach of a formal rule.

9. The complainant also wants to know what checks were applied in gauging the quality of his work. In every assessment there is, besides quantifiable items, appraisal by many qualitative and other tests, but disclosing them would put undue constraint on the reporting officer. The assessment is subject to review, within the limits set out above, only on the strength of what it actually says and the accompanying evidence in support of it.

10. The conclusion is that the President's decision of 27 May 1987 and the relevant part of the amended report for 1982-83 should be quashed insofar as the general rating is "a 3, albeit inclining to 2". It should be replaced with

one that complies with the rules on reporting. The other claims fail.

11. Since the complainant has succeeded entirely on the issue of receivability and in part on the merits, he is entitled to a fair amount against costs and it is set at 2,000 Deutschmarks. His other claims to financial compensation are dismissed.

DECISION:

For the above reasons,

1. The President's decision of 27 May 1987 and the relevant part of the complainant's performance report for 1982-83 are quashed insofar as the general rating is "a 3, albeit inclining to 2", the case being sent back for a new decision on that rating in keeping with the rules on reporting.
2. The EPO shall pay the complainant 2,000 Deutschmarks in costs.
3. His other claims are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner