

## SIXTY-FIFTH SESSION

### *In re TOTI (No. 2)*

#### **Judgment 930**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Luciano Toti against the European Patent Organisation (EPO) on 31 March 1988, the EPO's reply of 23 June, the complainant's rejoinder of 10 August and the EPO's surrejoinder of 28 September 1988;

Considering Articles II, paragraph 5, and VII, paragraph 2, 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. The complainant, an Italian born in 1933, joined the EPO in 1979. Article 47 of the Service Regulations requires the making of reports on the performance of employees. This case is about the complainant's staff report for 1980-81, when he was serving in Munich at grade B2 as a clerical assistant to patent examiners. One of the complainant's supervisors, Mr. Chesi, drafted the report on 29 October 1982. Though it acknowledged some merit, the report accused him of indifference and touchiness with other staff and with his supervisors: it rated him only 4 ("adequate") for productivity and 3 ("good") for quality and gave him a general rating of 4. He was sent the draft on 2 February 1983. In his comments dated 28 March under point VIII of the report form he said that it had been written far too late and not by his immediate supervisor, Mr. Kröner, and that the assessment of him was wrong. Under point IX(i) of the form Mr. Chesi wrote on 4 May that though Mr. Kröner had been ill he had consulted him and others about the complainant's work and the assessment stood. The countersigning officer endorsed Mr. Chesi's comments on 9 May under IX(ii). On 30 June 1983, commenting under point X, the complainant asked that the procedure for conciliation provided for in disputed cases should be followed. The outcome of that procedure was that the President of the Office endorsed the report on 9 January 1986, consenting, at Mr. Chesi's suggestion, to strike out remarks under points III(i) and V but confirming the particular and general ratings. The complainant signed the report on 31 January 1986. After further correspondence he lodged an internal appeal on 10 April 1986 under Article 108 of the Service Regulations.

In its report of 27 March 1987 the Appeals Committee found no mistake over any important point, no neglect of any important fact and no evidence to support the complainant's charges of personal prejudice; but it did find "gross inconsistencies" between comments on the complainant's "judgment" and "responsibility" under points I.B(2) and (3). It recommended sending the report back to the reporting officer for removal of those inconsistencies and rejecting the appeal on all other points. In a letter of 5 May 1987 to the complainant the Principal Director of Personnel said that the President accepted that recommendation. In a letter of 8 January 1988, the decision impugned, the President informed him of a new text that replaced the comments under I.B(2) and (3).

B. The complainant observes that according to Judgment 722 a staff report will be flawed if the reporting officer made an obvious mistake over some important point, or neglected an essential fact, or was grossly inconsistent, or was prejudiced. Going over the report in detail, he submits that the comments under I.A(1) ("productivity"), I.B(4)(iii) ("commitment to his work") and I.B(9) ("reliability") are at odds with the ratings; that at least one essential fact has been overlooked in assessing his productivity, namely that he did additional work; that he should have been warned that his productivity was too low; and that the general rating in III(ii) is based on obvious mistakes. The report is neither fair nor objective. The general rating harms his prospects of promotion and is tantamount to a disciplinary sanction. He asks the Tribunal to order the EPO to change to 3 the particular and general ratings under the four points mentioned above and award him 3,000 Deutschmarks in moral damages and DM 2,000 in costs.

C. The EPO replies that the complaint is irreceivable. The President's decision of 5 May 1987 was to send the report back to the reporting officer for review in the light of the "gross inconsistencies" between I.B(2) and (3),

take a final decision on that matter later, and to reject the rest of the appeal. Only I.B(2) and (3) formed the subject of the impugned decision of 8 January 1988. The time limit for challenging the final decision on all other points expired 90 days after the complainant got the letter of 5 May 1987. Since he is challenging points other than I.B(2) and (3) his complaint is time-barred under Article VII(2) of the Statute of the Tribunal.

D. In his rejoinder the complainant alleges that he never got the letter dated 5 May 1987. The first time he heard of it was when he got the one of 8 January 1988 and the first time he saw the text was when he got the reply to his complaint. Since it was not notified to him at the time it did not set off the 90-day time limit.

Besides, what he is challenging is a staff report, and the report cannot, as the EPO suggests, be valid in part: it must be taken as a whole, and until the President took his decision of 8 January 1988 it was not final.

E. In its surrejoinder the Organisation observes that it is in his rejoinder that the complainant first declares he did not see the letter of 5 May 1987 until he got its reply to his complaint. He has apparently forgotten that it sent him a copy with a minute of 18 February 1988. Besides, he had got the Appeals Committee's report of 27 March 1987 and, had the letter of 5 May not reached him, he might have been expected to ask whether any decision had been taken on his appeal. Yet he did not. Again, the letter of 8 January 1988 mentioned the one of 5 May 1987, and if he had never received the latter he would surely then have asked for a copy.

His assertion that a report can be valid or invalid only as a whole is irrelevant. The decision of 5 May 1987 rejected all the claims in his internal appeal, and the Committee held that the comments under two headings of the report had no bearing on the general or other ratings, which it recommended confirming whatever the outcome of any action taken on its recommendations.

#### CONSIDERATIONS:

1. The complainant was not satisfied with his staff report for 1980-81. After the conciliation proceedings the President of the Office endorsed it on 9 January 1986, subject to two deletions.

2. The complainant lodged an internal appeal against that decision. In its report dated 27 March 1987 the Appeals Committee unanimously recommended that the President of the Office should:

(a) send the report back to the reporting officer for removal of the "gross inconsistencies" referred to in paragraph 15 of the Committee's report; and

(b) reject the appeal on all other grounds.

3. The Principal Director of Personnel wrote the complainant a letter dated 5 May 1987 to say that on the Committee's recommendation the President of the Office had decided to return the report to the reporting officer for early review in the light of point 15 of the Committee's opinion and ask him to make new proposals on which the President would in due course take a final decision; for the rest the President rejected the appeal as recommended by the Committee and for the reasons it had stated.

4. On 8 January 1988 the President wrote to the complainant referring to the letter of 5 May 1987 and stating the final decision, which was that the two comments under points I.B(2) and (3) of the report form should be deleted and replaced by a single comment covering both points.

5. Though that is the decision the complainant is impugning, he asks the Tribunal to order the President to amend the report under points I.A(1), I.B(4)(iii), I.B(9) and III(ii) by marking him 3 ("good") instead of 4 ("adequate").

6. The Organisation was authorised to confine its reply to the issue of receivability. It argues that since an appeal on any matter other than those mentioned in paragraph 15 of the Committee's report was clearly rejected by the decision of 5 May 1987, this complaint, which does not relate to points I.B(2) and (3), was not made in time and is irreceivable.

7. In his rejoinder the complainant says that he did not receive the letter of 5 May 1987 and that the full text of it was not made available to him until he got the Organisation's reply to the complaint.

8. The onus is on the Organisation to prove that the decision of 5 May 1987 was notified to him. Yet it is unable to

show that the letter was delivered to him at the time. The head of the reports branch does confirm that a copy of the letter was sent to the complainant on 18 February 1988 in response to a telephone call from him asking for it. That tends to show a mistake on the complainant's part as to when he first got a copy of the letter. But it also tends to show that he did not have a copy before February 1988, that is to say, that he got it only after the date of the decision impugned.

9. Since the Organisation has failed to discharge the onus of proof the complaint should be held receivable.

DECISION:

For the above reasons,

1. The complaint is receivable.
2. The Tribunal orders further submissions on the merits.

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 8 December 1988.

(Signed)

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