

## SIXTY-SIXTH SESSION

### *In re* MONDI (No. 3)

#### Judgment 965

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Edoardo Mondì against the European Patent Organisation (EPO) on 10 August 1988, the EPO's reply of 28 November 1988, the complainant's rejoinder of 29 January 1989 and the EPO's surrejoinder of 14 April 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 14(1), 16(1), 106(2) and 109 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application of 17 April 1989 for oral proceedings;

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

A. At the material time the complainant was a grade C3 clerk in the EPO's library in Munich.

This case is about his staff report for 1986-87. He was on sick leave from 23 January until 22 September 1987. At some unstated date he received a draft report which one of his supervisors, Mrs. Oberwinder, had signed on 27 August 1987. By a minute of 6 January 1988 the Principal Director of Personnel told him that the reporting officer would be Mr. Kruse and the countersigning officer Mr. De Vries; if he wanted to have a discussion beforehand with the reporting officer he should say so. On 8 January he added his own comments, to be appended to section VIII of the report form, observing in particular that the "prefabrication" of the report by Mrs. Oberwinder prevented him from having such prior discussion with the reporting officer. By a letter of 17 February the Personnel Department told him, among other things, that section IX, intended for "final comments" by the reporting and countersigning officers, had not yet been filled up. In the letter which he wrote on 23 March to the President of the Office and which is mentioned under A in Judgment 964, on his second complaint, he asked that if he did not get the completed report for 1986-87 by 21 April his letter should be treated as an appeal against the delay. On 19 July the Personnel Department sent him the report with IX filled up and asked him to comment under X. He filed his complaint on 10 August 1988.

B. The complainant points out that the reporting officer was not the author of the report. Since it was drafted while he was on sick leave he was denied his right to prior discussion with that officer. Such treatment was calculated to cause "pain and suffering" to someone like him with an "impeccable official record".

Mr. Kruse is acting from personal prejudice. His malicious refusal to write the report himself and engage in the conciliation procedure is in breach of the rules on reporting and harms the complainant's career.

The complainant asks for (1) an increase in all the ratings in the report and a change in the comment on his knowledge of English and (2) deletion of the appraisal by Mrs. Oberwinder and insertion of a statement that he has suffered "degrading and inhuman treatment as the result of a conspiracy" between his supervisors. (3) He claims 25,000 Deutschmarks in damages for "pain and suffering". (4) He claims damages, in an amount he reserves, for injury to his career caused by Mr. Kruse's refusal to write the report and engage in the conciliation procedure. (5) He claims DM 7,670 in costs.

C. Authorised by the President of the Tribunal to address only the issue of receivability of claims (1), (2) and (3), the Organisation submits that as to those claims the complainant has not exhausted the internal means of redress, as Article 109 of the Service Regulations and Article VII(1) of the Statute of the Tribunal require.

In his letter of 23 March 1988 to the President of the Office he lodged an internal appeal about his report for 1986-87. What he objected to in that letter was the absence of final comments by the reporting officer in section IX of the report on the grounds that it prevented him from applying under section X for conciliation. But his letter did not challenge the actual contents of the report, which form the subject of claims (1), (2) and (3) and which are not yet

final.

Claim (4), too, is irreceivable insofar as it purports to relate to refusal of conciliation. In his letter the complainant was objecting to the refusal of conciliation over his report for 1984-85, not over the one for 1986-87. So to that extent he has failed to exhaust the internal means of redress.

The claim serves no purpose insofar as it relates to the absence of comments by the reporting officer in section IX of the report and to failure to forward it to the complainant. Since IX was duly filled up and the report sent to him on 19 July 1988 the claim is met. The delay in filling up IX was partly his own fault because he took a long time to supply an extra copy of his comments of 8 January that had to be appended to section VIII of the report. Besides, he offers no evidence of any injury.

D. In his rejoinder the complainant objects to letting the EPO address only the receivability of claims (1), (2) and (3). He withdraws those claims but presses (4) and (5).

As to claim (4), he objects to the distorted construction the Organisation puts on his letter of 23 March 1988 and to its mistranslation of the text into English: what he was appealing against was not just the delay in filling up IX but the accumulated delay in producing the report. The claim is receivable because the EPO failed to respond in time to that appeal.

He acknowledges an error in the text of claim (4), which rests on Mr. Kruse's refusal to take part, not in the conciliation, but in the reporting procedure. He maintains that he has not had satisfaction because Mr. Kruse has not yet filled up IX. He observes that he has never been given an opportunity to hold a discussion with Mr. Kruse and submits that it was improper for Mrs. Oberwinder to comment under IX. He describes as tendentious the EPO's version of the dispute and deplores the "glaring incompetence" of everyone. He declines blame for any of the delay: he acted promptly throughout and the text of his comments of 8 January 1988 got lost through no fault of his. He repeats that Mr. Kruse acted from malice and in breach of the rules by refusing to act as reporting officer.

The injury he has suffered is obvious. He is seriously ill, and the Organisation has treated him without compassion. Its representative in the present proceedings and Mr. Kruse are in breach of their obligations under Articles 14(1) and 16(1) of the Service Regulations. Mr. Kruse and Mrs. Oberwinder have subjected him to degrading treatment: indeed the Tribunal might consider ordering that they undergo psychiatric examination.

E. In its surrejoinder the EPO submits that the complainant may not now amend the text of claim (4) since Mr. Kruse's "non-participation" in the reporting procedure did not form the subject of the internal appeal of 23 March 1988, which related only to the delay. The arguments about who should have written the report are therefore immaterial to the complaint.

In any event the first-level supervisor is the person best fitted to appraise performance and in the complainant's case it was Mrs. Oberwinder. He knew that she was to write his report because she told him at the time, and so it was to her he should have addressed his request for preliminary discussion. Indeed in a minute of 8 November 1984 about another staff report he demanded that his first-level superior should write his report.

The Organisation enlarges on the pleas in its reply, recounting how the report came to be written and seeking to account for the delay. It submits that the complainant obtained satisfaction on 19 July 1988, when his report was sent to him with IX filled up.

#### CONSIDERATIONS:

1. The decision impugned is an implied one to reject the claims in the complainant's letter of 23 March 1988 to the President of the European Patent Office, which amounted to a request for a decision under Article 106(2) of the EPO Service Regulations about his staff report for 1986-87. What he asked for in that letter was that the report be sent to him by 21 April with section IX filled up and, failing that, that his letter be treated as an internal appeal "against this delay".

Under Article 106(2) the President had two months in which to take a decision on the complainant's request, and under Article 109(2) another two months had to elapse before his internal appeal might be "deemed to have been rejected". The cumulative time limits expired on 23 July 1988, and the complainant filed this complaint on 10 August 1988.

The Tribunal takes up only claims (4) and (5), the complainant having withdrawn (1), (2) and (3).

2. In claim (4) the complainant asks the Tribunal "to record the reservation as to compensation of damages to his career" on account of Mr. Kruse's allegedly unlawful refusal to draw up the 1986-87 report and to engage in the conciliation procedure.

Insofar as it relates to conciliation the claim is irreceivable because the matter is not covered by the implied decision to reject the claims in his letter of 23 March 1988 and he has therefore failed to satisfy the requirement in Article VII(1) of the Tribunal's Statute that he should have exhausted the internal means of redress. In fact when he signed section X of the report - on 19 January 1989, long after he lodged his complaint - he did not apply for the conciliation procedure.

3. The point that his letter of 23 March 1988 did cover was the failure to forward his staff report to him. But that claim has been met, because the EPO sent him the report on 19 July 1988, several days before expiry of the cumulative time limits stated in 1 above. Accordingly, by 10 August 1988, when he filed the complaint, he had got satisfaction.

4. In any event it is plain from correspondence between the Organisation and the complainant that some time was lost because of his own failure to supply a paper required of him and that the EPO was not to blame for any serious delay in dealing with the matter.

5. Since claim (4) fails, so too does claim (5), to an award of costs.

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 Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner