The Administrative Tribunal,

Considering the complaint filed by Mr A. P. against the European Patent Organisation (EPO) on 10 January 2006 and corrected on 22 May, the EPO's reply of 28 August, the complainant's rejoinder of 1 November 2006 and the Organisation's surrejoinder of 23 January 2007;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a French national born in 1975, joined the European Patent Office – the EPO's secretariat – in February 2000 as an Examiner at grade A1 in Directorate-General 1 (DG1) in The Hague (Netherlands). He was promoted to grade A2 on 1 February 2002. He was subsequently assigned to Directorate-General 2 (DG2) in Munich (Germany) as from 1 February 2003.

In January 2002 a new method of calculating and assessing the productivity of examiners, known as "Propro II", was introduced in DG1 and DG2. Under the new method the productivity of examiners is expressed in terms of productivity factor, which results from comparing their productivity with the expected average productivity in the technical area or areas in which they work. The productivity factor constitutes the starting point for the assessment of productivity and the awarding of a mark for productivity in an examiner's staff report (outstanding, very good, good, less than good, or unsatisfactory).

The complainant, together with other colleagues, met with his Director on 29 and 30 August 2002, and asked him for clarification on what was required from him to justify a "good" marking for productivity. Section A(6) of the General Guidelines on Reporting contained in Circular No. 246 reads as follows:

"[d]iscussion between staff member and Reporting Officer at the start of each year, together with regular review and feedback, is an important aspect of management and staff guidance. In particular each staff member should be informed about what is at least required from him to justify a 'good' marking."

The Director was unwilling to specify the minimum level of productivity corresponding to a "good" marking, and when the same question was put to him in writing, he expressed the view, in an e-mail of 2 September, that "this figure [was] not really needed in advance". A further request, signed by 17 staff members, including the complainant, was submitted to the same Director on 24 October. That request having likewise been refused, the complainant, by a letter of 13 December 2002, asked the President of the Office to indicate what was the "minimal productivity factor" expected from him to justify a "good" marking for productivity or otherwise treat his letter as an internal appeal.

The Directorate of Employment Law informed the complainant on 12 February 2003 that the President of the Office considered that his request could not be granted; the matter had therefore been referred to the Internal Appeals Committee. In its opinion dated 12 October 2005 the Committee recommended, by a majority, that the appeal be dismissed as unfounded. It concluded that a director was no longer obliged to provide examiners with the productivity factor needed for a "good" productivity marking in advance of the reporting period, because under the new method of calculating productivity, introduced in January 2002, there was no correlation between the personal productivity factor and a corresponding marking. The examiner's productivity was now assessed by comparing computer-generated productivity figures with the expected average productivity in the technical area or areas in which the examiner works, and other factors with an impact on productivity might also be taken into account. The Committee also concluded that the General Guidelines on Reporting do not require that marking guarantees be given; it was sufficient, in its view, that examiners should know what they have to do to ensure that a "good" productivity marking is "in the bag", and "the limit below which their productivity figures may not make the grade

‘good’”. It noted that, according to a communiqué of 18 December 2001, with a personal productivity factor above unity, staff members could assume that they would obtain a “good” marking.

By a letter of 26 October 2005 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to reject his appeal in accordance with the majority opinion of the Appeals Committee. That is the impugned decision.

B. The complainant contends that in refusing to indicate the minimum productivity factor taken into account to justify a “good” marking for productivity in the staff report, the Office has disregarded Section A(6) of Circular No. 246 and therefore acted arbitrarily. In this respect, he submits that the Office has ignored the importance of dialogue between line managers and staff members.

He argues that staff members face uncertainty if they are not given, at the beginning of the year, the minimum productivity factor required to justify a “good” marking in that respect. He explains that since the average productivity can be “higher than anticipated”, individual productivity can appear to be relatively low without in fact being in any way weak. As an example of the uncertainty that staff members may face, he points to his staff report for the period from 1 January 2002 to 31 January 2003, in which he obtained the marking “good” for productivity while being notified that his productivity had been weak during the first half of 2002. He emphasises that the report does not indicate to what extent “his particular circumstances” were taken into account. Furthermore, the reporting officer, his director, stated that although his productivity was very weak during the second half of the year, the marking “less than good” did not come into consideration for the “formal reason” that no written warning had been given to him in advance. The assessment in his staff report thus appears to be incoherent and contradictory. In addition, he asserts that he had not been given an opportunity to “defend his position in good time”, nor was he given a chance to improve his productivity.

The complainant asks the Tribunal to quash the impugned decision and to order the Office to comply in future years “with the required dialogue at the beginning of each year, with communication of the minimum [productivity factor]”. He also claims moral damages and costs.

C. In its reply the EPO submits that the complaint is irreceivable in part since the failure to indicate the personal productivity factor expected for a “good” rating did not impair the complainant’s rights nor did it affect his position. Furthermore, his productivity was consistently rated “good”. Consequently, the decision cannot be considered as adversely affecting him, and he therefore shows no cause of action.

On the merits, it submits that the complaint is ill-founded. It points out that in deciding to replace the existing procedure for production and productivity assessment as of 1 January 2002, the President of the Office exercised his discretionary power. Indeed, Article 10(2)(a) of the European Patent Convention provides that the President shall take all necessary steps to ensure the functioning of the European Patent Office. Moreover, according to Article 47 of the Service Regulations for Permanent Employees of the European Patent Office,he is empowered to establish the conditions under which staff reports are drafted. Thus, a “Code of Practice”, which identifies productivity-related factors not reflected in the personal productivity factor, was issued on 12 July 2002 to ensure that all aspects having an impact on the assessment of productivity are taken into account.

Contrary to the complainant’s assertion, it submits that the General Guidelines on Reporting do not prescribe that staff members should be notified of the minimum factor justifying a “good” marking for productivity, but simply provide that persons reported upon are entitled to know, in due time, what work performance, aptitude and conduct are required from them to get a “good” marking.

With regard to the uncertainty allegedly faced by staff members, the Organisation explains that since the Code of Practice does not mention any correlation between the productivity factor and a corresponding marking, directors are no longer obliged, as they were under the previous system, to provide examiners with the productivity factor needed to justify a “good” marking for productivity in advance of the reporting period. Nevertheless, it submits, it had notified the complainant of the expected average productivity for his technical field at the beginning of the reporting period and told him that “a [productivity factor] of 1, as indicated in the Code of Practice, corresponds to the uppermost end of the region for a productivity box marking of ‘good’”. In its view, since the complainant was aware of what he had to do to ensure that a “good” productivity marking was “in the bag”, and of the limit below which his productivity figures might not justify a “good” rating, it fulfilled its obligations towards him. Thus, the complainant was informed of the yardstick by which his future performance would be assessed, in accordance with

the Tribunal's case law.

Noting that the General Guidelines on Reporting do not require that marking guarantees be given, it denies that Circular No. 246 entitles the complainant to know the personal productivity factor required for a "good" rating. It stresses that the personal productivity factor is only one of a number of factors which play a role in determining the mark given for productivity in the staff report. It further submits that the only guarantee provided by the new method of calculating productivity is that, before giving a "less than good" or "unsatisfactory" rating, a written warning should be issued.

Contrary to the complainant's view, the defendant asserts that his performance report is neither contradictory nor incoherent. It explains that in November 2003 the complainant submitted reasons as to why he disagreed with the assessment made in his staff report and requested conciliation proceedings in accordance with Section D of the General Guidelines on Reporting. At the conclusion of those proceedings no agreement could be reached. The Vice-President of DG1, acting on behalf of the President of the Office, had subsequently decided on 2 November 2005 that the complainant's staff report for 2002-2003 would remain unchanged. After the complainant had filed an appeal on 7 February 2006 challenging that decision, he was informed on 29 June that the President of the Office considered that the wording of the report was in part inappropriate and consequently had decided to replace the contested comment on productivity by a more positive one, as proposed by the complainant's reporting officer and countersigning officer during the conciliation proceedings; the report was thus no longer contradictory. The complainant was requested to indicate in writing, by 30 July, whether he considered his internal appeal to be settled. He replied on 31 July that he disagreed with the proposed amendments and therefore wished to maintain his internal appeal. Recalling the Tribunal's case law, it underlines that decisions concerning staff reports are discretionary and consequently subject to only limited review.

D. In his rejoinder the complainant presses his pleas. He adds that the "second decision of the President" has to be seen as a final decision and requests that the Tribunal "admits an appeal against the last decision of the President and hears the two related issues together".

E. In its surrejoinder the EPO maintains its position. Concerning the second decision taken by the President of the Office, that is to say the decision of 29 June 2006, it stresses that the complainant is mistaken in claiming that the subject matter of his appeal against that decision is so closely related to that of the present case that there is no longer any justification for dealing with the two cases separately. It further states that the complainant should await the outcome of the internal appeal lodged against the decision of 29 June 2006.

CONSIDERATIONS

1. The complainant is an Examiner in the EPO. In January 2002 a new method was introduced to calculate and assess the productivity of examiners. The new method, known as "Propro II", was explained in a communiqué dated 18 December 2001; the term "productivity" is defined as "the ratio of the time available to the achieved production, […] assessed by comparison with the expected average productivity in the technical area or areas in which the examiner works". The communiqué also explains that a productivity factor is to be calculated for each examiner by comparing the actual time taken for the various types of work performed with the expected time. The communiqué states:

"If the value of this factor is greater than unity, the examiner has achieved his production in a time less than expected, [i.e.] the productivity is better than the expected average."

2. The productivity factor is not the only matter taken into account in assessing an examiner's productivity. The communiqué of 18 December 2001 states that that assessment is to be made "using the achieved productivity factor, taking into account any related relevant factors such as significant deviations from the average complexity of the work […], [or] a learning curve […]". Additionally, it is said that other duties are to be taken into account "in determining the box-marking for productivity".

3. In August 2002 the complainant and some of his colleagues asked their director to inform them of the minimum productivity factor necessary to obtain a "good" marking in their annual staff reports. Apparently, the director tried to convince the examiners that this information was not needed. Thereafter, on 24 October 2002, 17 examiners, including the complainant, submitted a written request, signed by each of them, to their director that he

“provide[s them] with the minimum productivity which [was] expected from [them] to justify a ‘good’ marking”. The request was purportedly made pursuant to Section A(6) of the General Guidelines on Reporting contained in Circular No. 246, which provides for discussions between staff members and reporting officers at the start of each year and states that “each staff member should be informed about what is at least required from him to justify a ‘good’ marking”. Again, their request was refused. On 13 December 2002 the complainant formally requested the same information from the President of the Office and asked that, if he could not accede to the request, the letter be treated as an internal appeal.

4. The Appeals Committee issued its report on 12 October 2005. All members expressed the view that the appeal was receivable. However, the majority of the Committee recommended that the appeal be dismissed. The President of the Office accepted that recommendation and the complainant was so informed on 26 October 2005. That decision is the subject of the complaint.

5. The EPO contends, as it did before the Appeals Committee, that the complainant has no cause of action and that the complaint should on that account be dismissed. In this regard, it acknowledges that, as held in Judgment 1712, “[t]he necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury”. Moreover, the case law has it that “receivability does not depend on proving actual and certain injury”, all that a complainant need show is that the decision under challenge “may impair the rights and safeguards that an international civil servant claims under staff regulations or contract of employment” (see Judgment 1330, under 4). However, the EPO contends that the information requested by the complainant would not have had any impact on the assessment of his work performance and thus the failure to communicate that information to him could not adversely affect his rights or interests.

6. The complainant contests the EPO’s argument as to the existence of a cause of action by referring to his 2002-2003 staff report which was the subject of unsuccessful conciliation proceedings and is now the subject of an internal appeal. The complainant contends that this establishes that he “has had his rights impaired and has been adversely affected in his interests”. Additionally, he asks that his internal appeal be joined with the complaint and that the Tribunal hear the two matters together. That application must be rejected as internal remedies have not been exhausted in relation to the appeal.

7. As it happens, the question whether the complainant has a cause of action necessarily invites consideration of the merits of the complaint. If an examiner’s productivity factor were determinative of that person’s annual productivity assessment, the withholding of information as to the factor necessary to obtain a “good” marking would not only be likely to “impair the rights and safeguards” but would also constitute a breach of the obligation in Section A(6) of Circular No. 246 to inform a staff member as to what is required to obtain a “good” marking. Similarly, if no particular factor is determinative, the failure to specify a particular factor can neither “impair the rights and safeguards” nor constitute a breach of the obligation imposed by Section A(6) of Circular No. 246.

8. The various parts of the communiqué of 18 December 2001 set out above make it clear that the productivity factor is not the sole determinant of the marking to be given to an examiner for productivity. Accordingly, no precise answer could be given to the complainant’s question as to the minimum factor necessary to justify a “good” marking. All that could be said with accuracy with respect to “Propro II” was that a productivity factor of unity would in practice guarantee that marking. However, that had already been explained in paragraph 11 of the communiqué in these terms:

“As regards the attribution of box-markings for productivity, the general principle holds that normally the higher the productivity factor above unity the greater will be the likelihood of obtaining a marking of ‘very good’ or ‘outstanding’, although in exceptional circumstances a ‘very good’ marking might still be attributed if the productivity factor is less than unity. As regards markings ‘less than good’ or ‘unsatisfactory’, these will be attributed when the productivity factor is significantly below unity; however, Directors will inform examiners when the development of their productivity risks the issue of a written warning in accordance with the Guidelines on Reporting […].”

9. In Judgment 2414, the Tribunal stated:

“A staff member […] is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed.”

Paragraph 11 of the communiqué makes it clear that to obtain a “good” marking, the relevant objective is a productivity factor of unity but that other work-related factors might lead to that marking even if the objective is not achieved. The requirement in Section A(6) of Circular No. 246 that an examiner be informed about “what is at least required from him to justify a ‘good’ marking” entails no more. Certainly, it does not require that the examiner be provided with a productivity factor less than unity which, regardless of other work-related factors that might change throughout the year, would guarantee a “good” marking.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2007.