

115th Session

Judgment No. 3229

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr O. S. against the European Patent Organisation (EPO) on 24 April 2010 and corrected on 11 October 2010, the EPO's reply of 28 February 2011, the complainant's rejoinder of 14 July and the Organisation's surrejoinder of 27 October 2011;

Considering Article II, paragraph 2, of the Statute of the Tribunal and Article 14 of its Rules;

Having examined the written submissions;

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

A. Facts relevant to this case are to be found in Judgments 3227 and 3228, also delivered this day. Suffice it to recall that, in light of the complainant's serious backlog for the reporting period from February 2004 to April 2005 and in order to enable him to improve his performance, his productivity was subject to a special agreement, concluded on 28 July 2005, with his Director, Mr J. This agreement set productivity targets for two periods: the first was from 15 July to 12 September 2005 and the second from 13 September to 31 December 2005. Subsequent to the first evaluation period, the

Office initiated disciplinary proceedings against the complainant for having fraudulently misrepresented his productivity figures. The President's decision to follow the reasoned opinion of the Disciplinary Committee and to relegate the complainant by three steps is the subject of his second complaint. The content of the staff report covering the reporting period from 1 February 2004 to 30 April 2005 is challenged in his third complaint.

In his staff report for the period from 1 May to 31 December 2005, the complainant received the rating "unsatisfactory" for all five aspects assessed, namely, quality, productivity, aptitude, attitude to work and dealings with others, and overall rating. The report was signed by the reporting officer and the countersigning officer in April 2006. The complainant signed it on 31 July 2006 but, as he disagreed with its content, he requested that each rating be raised, that the corresponding comments be amended accordingly, and that all comments relating to the disciplinary procedure, which was pending at the time, be removed from the report. On 6 September the reporting officer, in his final comments, wrote that after careful consideration he saw no reason to amend the report. At the complainant's request, a conciliation procedure took place in accordance with the General guidelines on Reporting set out in Circular No. 246, but an agreement could not be reached. As a result, the Vice-President of DG1 decided on 15 July 2007 to approve the staff report without amendments.

By a letter dated 12 September 2007 the complainant lodged an internal appeal against his staff report, alleging that it was flawed by procedural errors and therefore breached Circular No. 246, that the reporting officer had abused his discretionary power and that the latter had acted in bad faith. He requested that all his ratings be upgraded, that the inappropriate comments be deleted, in particular those relating to the disciplinary procedure, and that the list of duties shown in the report be amended to include his duties as Chairman in examining divisions. After having heard the complainant and a witness, on 26 November 2009 the Internal Appeals Committee issued its opinion, in which it unanimously recommended that the list of duties should be amended to include his function as Chairman in examining divisions,

that the comments under the section “quality” which had been based on the complainant’s misconduct should be deleted, and that the corresponding rating should be reviewed. The Committee found that the complainant had been duly warned in good time that he ran the risk of obtaining a rating of less than “good” under all sections of the staff report, and they dismissed as unfounded his allegations of misuse of power and bad faith on the part of the reporting officer. A majority of the Committee’s members nevertheless recommended that some comments under sections “Aptitude”, “Attitude to work and dealings with others” and “Overall rating” be deleted, that the corresponding ratings be reviewed and, if necessary, adjusted, and that the complainant be reimbursed 30 per cent of his costs. The minority recommended a complete annulment of the staff report on account of procedural errors, and that all the complainant’s costs should be reimbursed upon providing proof thereof.

By letter of 25 January 2010 the complainant was informed of the decision taken by the President of the Office to follow the Committee’s unanimous recommendations and also those of the majority. The President considered that the minority had not established any mistake of fact or lack of objectivity, nor had it established any breach of the applicable regulations. That is the impugned decision.

B. The complainant contends that his staff report for the period from 1 May 2005 to 30 December 2005 is in breach of Circular No. 246. In particular, he argues that Circular No. 246 requires each aspect to be evaluated independently from the other aspects considered in the report and that the comments made under each section must not contradict the corresponding rating. The complainant submits that the comment under the section “quality”, namely that his work is of satisfactory quality and addresses essential aspects, cannot be reconciled with a rating of less than “good” and that it constitutes evidence of the reporting officer’s bias and bad faith. He draws the Tribunal’s attention to the fact that he was deemed competent enough to fulfil the function of Chairman in examining divisions during the reporting period, a function which is typically assigned to examiners

of grade A3 or higher even though he is grade A2. This fact confirms, in his view, that he should have been given a rating no lower than “good”.

As regards the section of the report on “productivity”, the complainant argues that the minority opinion of the Internal Appeals Committee was correct in finding that the reporting officer had failed to apply the Code of Practice issued on 12 July 2002 to assist managers in evaluating the productivity of examiners. Indeed, the minority concluded that even his productivity factor of 0.27 could lead to a “less than good” rather than an “unsatisfactory” rating, as the productivity factor alone is not a reliable means to determine the appropriate rating. He points out that, compared to his previous staff reports, his productivity has improved, and he submits that a colleague in the same directorate received a rating of “less than good” even though his productivity was also less than 0.50.

The complainant submits that the assessment of his aptitude was contradictory and that it was influenced by the assessment of his productivity, which constitutes a breach of Circular No. 246. Further, he considers that the reporting officer artificially divided the 2005 reporting period and that, in light of the rating and comments found under the same section of his previous staff report, the sudden deterioration of the comments and rating in the present report is not coherent and suggests that the reporting officer’s assessment is tainted with bias and bad faith. Lastly, concerning the comments under the section “attitude to work and dealings with others”, he considers them to be “personal, offensive and speculative” and to lack objectivity. Indeed, the witness heard during the internal appeal proceedings confirmed that, contrary to the view expressed by the reporting officer, his attitude to work and dealings with others were positive and did not have a negative influence on either his colleagues or the EPO. Lastly, the complainant asserts that the reporting officer has not respected the recommendations of the majority opinion, as he has not reviewed his ratings in light of his amended comments, which further demonstrates his bad faith and bias.

The complainant asks the Tribunal to quash the impugned decision and to annul his staff report for the reporting period from 1 May to 31 December 2005. He requests that it be replaced with a new and amended staff report with better ratings under all sections. He also claims moral damages, in an amount to be determined by the Tribunal, for injury to his dignity, as well as costs in the amount of 4,000 euros.

C. In its reply the EPO indicates that it has treated the complaint as being directed not only against the impugned decision but also against the outcome of the review, because a new conciliation procedure and another potential internal appeal would not make sense in the circumstances. On the merits, it recalls that a performance appraisal is discretionary in nature and, therefore, is subject to only limited review. Citing the Tribunal's case law, it stresses that reporting officers must enjoy freedom of expression and that the Tribunal's role is not to replace the reporting officer's assessment with its own. The defendant denies that the reporting officer acted in bad faith and considers this allegation completely unfounded. It points out that the onus of proof is on the party who pleads misuse of authority and considers that the complainant's accusations in this regard are unsubstantiated and unconvincing.

The Organisation shares the Committee's majority opinion according to which the complainant received sufficient warning that he was at risk of receiving a rating of less than "good" in all aspects of his staff report. Indeed, the very purpose of the agreement of July 2005 between him and his Director and reporting officer, Mr J., was to enable him to improve his performance. He also received two written warnings. Moreover, the agreement of July 2005 explained which files the complainant had to complete as a matter of priority. The complainant's contention that he provided work of good quality even though his productivity was below average is not convincing, as he failed to observe priorities and to meet set deadlines. The defendant maintains that quality is reflected not only in the correct processing of final actions, but also in how the procedures are carried out and whether priorities are respected. It asserts that it has

followed the Committee's unanimous recommendation to delete the comment referring to the complainant's misconduct and to review the corresponding rating, which it has increased from "unsatisfactory" to "less than good". It therefore considers that the complainant's allegation that the reporting officer acted in bad faith is unfounded.

The defendant submits that the reporting officer did not exceed his discretionary power when he rated a productivity that is 27 per cent of what is considered normal as "unsatisfactory", considering the complainant's 15 years of experience in examination, inter alia. As can be seen from the complainant's amended staff report, his Director and reporting officer took into account any factor that might have negatively influenced his performance, and he was offered support to overcome the difficulties he encountered. The EPO underlines that it has not been established that the reporting officer committed any obvious mistake of fact, neglected essential facts or was grossly inconsistent or prejudiced in his assessment.

As regards the complainant's aptitude, the EPO emphasises that the complainant was not able to manage his work according to expectations. It points out that the last sentence of the comments under that section was deleted, as unanimously recommended by the Internal Appeals Committee. However, in accordance with Circular No. 246, it was decided to maintain the marking "unsatisfactory", because of the complainant's inability to apply his specialist knowledge in the performance of his duties.

Lastly, the EPO rejects the contention that the reformulated comments in the final version of the report are "personal, offensive and speculative" and that the complainant's attitude to work and dealings with others should have been rated "good" based on the witness' testimony before the Committee. It submits that the comments in question are covered by the great freedom of expression which reporting officers must enjoy, and that they are necessarily "personal".

D. In his rejoinder the complainant presses his pleas. He denies that the reporting officer has correctly implemented the President's

decision and objects to the amended comments under the section “attitude to work and dealings with others”, which he considers false, damaging and prejudiced. The complainant requests the Tribunal to hear a former colleague who can testify to the good quality of his work. He denies the EPO’s assertion that the reporting officer offered him support and requests the Tribunal to order that the costs of his internal appeal be fully reimbursed.

E. In its surrejoinder the Organisation maintains its position in full.

CONSIDERATIONS

1. By a letter dated 25 January 2010 the complainant was informed that the President of the Office had decided to endorse the Internal Appeals Committee’s unanimous and majority opinions and to refer his staff report for the period from 1 May to 31 December 2005 back to the reporting officer for review. The complainant received an amended staff report on 19 April 2010, in which the comments he had contested were modified, although the corresponding ratings remained the same for all but “quality”, which was upgraded to “less than good”. In this fourth complaint, the complainant impugns the President’s decision to endorse the majority and unanimous opinions, as well as the amended staff report.

2. At the outset the complainant asked to be granted a three-month extension to provide the translations required under the Rules of the Tribunal of his appended documents in German. As he has already been granted an extension in accordance with Article 14 of the Rules this claim has been satisfied.

3. As pointed out in Judgment 3228 regarding the complainant’s third complaint, it is clear from the case law that the Tribunal will not interfere with the discretionary assessment of the decision-maker unless there is a reviewable error (see Judgments 806, 973, 1144, 1688 and 2579).

4. With regard to the assessment of the “quality” of his work, the complainant argues in particular that this aspect of performance was not evaluated in isolation but instead was combined with his productivity. This, in his view, was a violation of Circular No. 246. The Tribunal is of the opinion that quality can also encompass efficiency. In that sense it was open to the Office to evaluate the complainant’s quality of work also according to his ability to meet deadlines. Therefore, the assessment of “less than good” does not violate Circular No. 246.

5. As to the “unsatisfactory” assessment of “productivity”, the complainant relies on the method of analysis undertaken by the minority of the Internal Appeals Committee. The minority opinion analysis is flawed as the Office had reduced the number of the complainant’s assigned dossiers, in accordance with the agreement reached on 28 July 2005, in order to minimise his backlog and increase his productivity gradually. The Tribunal notes that, in this case, the agreement in question reflects an implementation of the requirements of the Code of Practice of 12 July 2002. As noted by the majority of the Internal Appeals Committee, the complainant “did not comply with the written accord from 07/2005 for both periods of feedback” and in this case it was foreseen that the complainant would respectively receive a box marking “unsatisfactory” for his productivity. It also noted that contrary to the statement of the complainant “the aims were not set too high but instead below average and tailored towards [his] individual situation”. The rules of the Code of Practice were therefore considered and respected. As such, the Tribunal is satisfied that the reporting officer’s decision to rate the complainant’s productivity as “unsatisfactory” was a proper application of his discretion taking into account the Code of Practice and its implementation through the agreement of 28 July 2005.

6. Regarding “aptitude”, the complainant asserts that “in the artificially divided (by the [reporting officer]) 2005 reporting period starting just one day later from 1 May 2005 onwards”, the aspect of aptitude of his work suddenly deteriorated “literally overnight (!)” to

the extent that the reporting officer claimed overnight in a very negative way the following: “in the context of his daily work [the complainant] does not know how to apply his knowledge, extensive though it is in both technical and legal respects”.¹ The Tribunal notes that the rating and the comment cover the eight-month period under review (1 May to 31 December 2005). Further, in the previous reporting period (1 February 2004 to 30 April 2005) the “aptitude” comment stated, essentially, that considering the complainant’s seniority and experience, he should have a certain level of technical and legal knowledge but he was not able to apply it to his work, which led to a rating of “less than good”. More specifically, the second part of the comment for that period stated: “[...] although the quality of his communications is satisfactory, his output is wholly inadequate. It seems therefore that [the complainant] is not capable of applying his knowledge in his daily work, or organising it efficiently.”² Considering that the complainant was given a reduced quantity of work specifically tailored to his needs within the context of the agreement of 28 July 2005 and that, still, he was found unable to complete the tasks assigned, the Tribunal finds that it was open to the reporting officer to assign a rating of “unsatisfactory” for this period. Moreover, the comment and the rating of “unsatisfactory” were not a sudden change, and they are justified by the facts.

7. With regard to the section entitled “attitude to work and dealings with others”, the complainant considers the rating and comment to be unjustified and tainted with the reporting officer’s bad faith and bias towards him. The complainant asserts that the witness who was heard during the internal appeals proceedings, confirmed that his attitude to work and dealings with others were positive and did not have a negative influence on either his colleagues or the EPO. The Tribunal notes that the witness limited himself to reporting on his experience with the complainant regarding the work they shared, specifically citing three examples in which the complainant delivered

¹ Registry’s translation from a French original.

² *idem*.

work of good quality, but was not able to comment on the complainant's management of time limits or his fundamental attitude. In the Tribunal's view the reformulated comment in the amended staff report met the requirement set by the Internal Appeals Committee in the majority opinion, as it is factually based – “[t]he cumulative delays caused by [the complainant] account for a disproportionate number of arrears. Generally speaking, these arrears excite negative comments from outside. In addition, his low productivity is known to many colleagues and it gives a bad example.”³ – and that no mistake of fact or law, or wrong inference drawn from the evidence, affected this comment and the corresponding rating.

8. The Tribunal notes that, as the first four ratings and associated comments stand, there is no reason for the “overall rating” to be changed. The complainant has not established that the reporting officer drafted the report with bias and bad faith. As the majority opinion pointed out, the complainant was warned in good time and in accordance with Circular No. 246 of the Service Regulations for Permanent Employees of the European Patent Office regarding the “danger of receiving an overall marking or a marking for any aspect under review less than ‘good’ in order to give him a chance to improve before the end of the reporting period”.

9. As the final staff report stands in its entirety, there are no grounds for awarding moral damages. Given that the previous staff report was considered unlawful in part by the Internal Appeals Committee, as endorsed by the President of the Office, the Tribunal finds the award of 30 per cent of costs, set by the Committee for the complainant's internal appeal, to be adequate.

10. In view of the foregoing, the complaint must be dismissed in its entirety.

³ *idem.*

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet