

**116th Session**

**Judgment No. 3249**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 28 April 2010 and corrected on 3 July 2010, the EPO's reply of 22 February 2011, the complainant's rejoinder of 16 May and the EPO's surrejoinder of 29 August 2011;

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

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

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 Judgment 3151 delivered on 4 July 2012. Suffice it to recall that the complainant filed three internal appeals with the Internal Appeals Committee (IAC) challenging inter alia his staff report for the period 1 January 2002 to 31 January 2003, and the date of his promotion to grade A4.

In its opinion of 1 April 2009 the IAC, after joining the three appeals as they were interconnected, unanimously recommended that a new version of the complainant's staff report for the period

from 1 January 2002 to 31 January 2003 be drawn up, either by re-evaluating each aspect of his performance or, if he agreed, by using the version of the staff report established for the period 2000-2001 as a basis for the 2002-2003 evaluation. It indicated that if the complainant's performance was re-evaluated, his former Principal Director should be the reporting officer and the Vice-President in charge of Directorate-General (DG1) should be the countersigning officer. It added that the new staff report should be submitted to the Promotion Board to determine whether the complainant's date of promotion to grade A4 should be earlier than 1 July 2004, in which case he should be paid salary arrears with interest at the rate of 8 per cent per annum.

By a letter dated 29 May 2009 the Director of Regulations and Change Management informed the complainant that the President of the European Patent Office had decided to endorse the Committee's recommendation to allow his appeals in part. Consequently, the complainant's former Principal Director would re-evaluate his performance and complete a new staff report for the period from 1 January 2002 to 31 January 2003 by adding comments, particularly in Parts III and V. The appraisal would be countersigned by the Vice-President in charge of DG1. Furthermore, in accordance with the Committee's recommendation, the new version of the staff report would be forwarded to the Promotion Board.

On 9 October 2009 a new version of the staff report for the period from 1 January 2002 to 31 January 2003 was handed in to the complainant. He signed it on 6 November 2009 and submitted his comments thereon stating inter alia that it was flawed. He noted a few clerical mistakes and contended that even though comments were added by the reporting officer in Parts III and V of the staff report, the evaluation remained substantially the same as in the second version and consequently was tainted by the same flaws. Having received no reply to his comments, the complainant wrote to the President on 30 November 2009 requesting her inter alia to take a final decision concerning his three internal appeals and to annul the third version of his staff report for 2002-2003. The complainant impugns in the

present complaint the implicit rejection of his request of 30 November 2009 because no decision was notified to him within two months, as required under Article 106(2) of the Service Regulations.

B. The complainant contends that the third version of his staff report is flawed. Firstly, it was not signed by the President. Secondly, he was not informed of the names of the reporting and countersigning officers designated to establish the third version of the staff report, as required under part B of Circular No. 246. Thirdly, no preliminary meeting was held between the complainant and the reporting officer prior to the establishment of the third version of the staff report, as required by the aforementioned part B of Circular No. 246. The date of 18 February 2003, which is indicated on the third version of the staff report as the date on which they met, must have been copied from the previous versions of the staff report. The complainant stresses that the IAC held in April 2009 that the previous version of the staff report was flawed and that a new version had to be completed, which means that the entire process of drafting and establishing a new report should have been carried out. Fourthly, he alleges “[g]ross misassessment” of his performance given that the third version of the staff report is very similar to the previous version, which the IAC and the President considered not to be valid. Indeed, only a few comments were added on the staff report without the complainant’s performance being re-evaluated.

Lastly, he alleges undue delay in the processing of two of his internal appeals and in providing him with the third version of his staff report.

The complainant asks the Tribunal to set aside the third version of his contested staff report “insofar as it is considered as having been implicitly endorsed by the President” or, “by default”, to set aside the third version of his contested staff report “insofar as it is considered as having not been endorsed, even implicitly, by the President”. He also asks the Tribunal to order that a new version of the staff report be “duly and officially confirmed and explicitly hand signed by the President”. He claims moral damages and costs.

C. The EPO contends that the complaint is irreceivable as premature. It indicates that the process of endorsing the contested third version of the complainant's staff report is pending; therefore the third version cannot yet have any legal effect.

On the merits, it indicates that there is no doubt as to the fact that the issue of the disputed staff report had been duly considered by the President and that it would be submitted to him for endorsement.

It indicates that, as recommended by the IAC, the contested staff report was signed by the complainant's Principal Director as reporting officer and the Vice-President in charge of DG1 as countersigning officer. It draws attention to the particular circumstances of the case: the complainant's first reporting officer retired in February 2003 and the complainant's then countersigning officer was the Principal Director in charge of DG1 who signed the first two versions of the staff report in that capacity. In fact, the Principal Director was the only officer who had full knowledge of the complainant's case and who was able to evaluate his performance for the disputed reporting period and to sign the third version of the staff report as reporting officer. Consequently, the Principal Director's immediate supervisor, i.e. the Vice-President in charge of DG1, was competent to countersign the third version of the disputed staff report.

The EPO submits that there was no need to carry out the entire reporting procedure anew emphasising that the IAC had merely recommended that a new version of the staff report should be drawn up and not that the reporting process be started anew. Moreover, the reporting officer knew the complainant's case in detail and was therefore able to properly evaluate his performance taking into account his claims. Hence, it was not necessary to hold a meeting prior to drawing up the third version of the staff report.

Regarding the alleged "[g]ross misassessment" of the work performed by the complainant, the EPO submits that the latter does not provide enough detail and does not specify how he would have liked the staff report to be amended. It adds that the President did follow the first option proposed by the IAC as it met the best interest of the complainant. It explains that in the new version of the disputed

staff report none of the five ratings were modified but the reporting officer added positive comments concerning the complainant's "attitude" (Part III of the report) and his "overall rating" (Part V of the report). Hence, the new version of the contested staff report is free from the flaws identified with respect to the second version of the report.

D. In his rejoinder the complainant alleges bias on the part of the Principal Director in charge of DG1 who prepared the third version of the staff report given that he countersigned the first two versions of the staff report, which were considered to be flawed.

He asserts that he clearly indicated during the internal appeal proceedings the way in which he wanted his staff report to be amended. Indeed, he asked that the report be cancelled and that "the drafting of a completely new [staff report] be homogeneous with the other (partial) staff report that he [had] already received for the year 2003 and which is related to the very same reporting period (2002-2003). To be considered as 'homogeneous' means, of course, to incorporate the very same box markings and to be endowed with substantially similar, if not identical comments, among other things."

E. In its surrejoinder the EPO indicates that the contested staff report was endorsed by the President and then notified to the complainant on 16 March 2011. The latter signed it on 15 April, stating that he would pursue the matter using all available means of redress. The EPO adds that the contested staff report will be forwarded to the Promotion Board. However, for "procedural economy", it accepts that the complainant challenges the version of the staff report which was notified to him on 16 March 2011.

The EPO denies any bias on the part of the complainant's Principal Director, reiterating that he was the only person in a position to act as reporting officer for the disputed reporting period. It emphasises that, according to the Tribunal's case law, there is a presumption that the assessment of a staff member is made in good faith.

The Organisation explains that two separate staff reports were prepared for the period from 1 January 2002 to 31 January 2003 and

for the period from 1 February 2003 to 31 December 2003, and submits that the complainant is not entitled to have his staff report for the first period drafted in the same terms as the one established for the second period; each staff report stands on its own.

### CONSIDERATIONS

1. The facts of the case can be found detailed in Judgment 3151, delivered on 4 July 2012. Essentially, the first and second versions of the complainant's staff report for the period from 1 January 2002 to 31 January 2003 were contested in three joined internal appeals which led to the complainant filing his first and identical second complaints before the Tribunal. In those cases the complainant impugned the President's decision to endorse the first recommendation of the IAC that a new version of his staff report for 2002-2003 should be drawn up by re-evaluating each aspect of his performance or, alternatively, and subject to the complainant's approval, by using the version of the staff report established for the previous reporting period, i.e. 2000-2001, as a basis for the 2002-2003 evaluation. It also recommended that the new staff report should be submitted to the Promotion Board to determine whether the complainant's date of promotion should be earlier than 1 July 2004, in which case he should be paid salary arrears with interest at the rate of 8 per cent per annum.

2. In the present complaint, filed on 28 April 2010, the complainant contests the President's implicit decision to reject his request of 30 November 2009 by which he contested the third version of his staff report, delivered to him on 9 October 2009. He asserts that his staff report was not signed by the President, that it is fundamentally flawed as three of the five parts of the report remain unchanged which represents a gross misassessment of his performance, that there was no preliminary meeting between him and the reporting officer, and that the staff report does not comply with the recommendation of the IAC.

He requests the Tribunal to quash the third version of his staff report if the Tribunal finds that it had been duly endorsed by the

President or, alternatively, to set aside the third version of the staff report “insofar as it is considered as having not been endorsed, even implicitly, by the President”. He requests the drafting of a new and fourth version of the staff report to be “duly and officially confirmed and explicitly hand signed by the President”, as well as an award of moral damages and costs in amounts to be determined by the Tribunal.

3. The Tribunal is of the opinion that as the complaint is unfounded on the merits, there is no need to rule on its receivability. The complainant grounds his complaint on the fact that the third version of his staff report shares some unchanged ratings with his first and second versions. He misinterprets the IAC’s recommendation that a new version of the complainant’s staff report for 2002-2003 should be drawn up by re-evaluating each aspect of his performance to mean that the new (third) version of the staff report should have different ratings for each category. This is not supported by the IAC’s recommendation which stated explicitly that “the contested version of the staff report should be annulled and that a new version should be prepared but no new report should be drafted”. More specifically, the IAC noted that it would not be appropriate to change the complainant’s ratings in categories such as “Productivity” as he had provided no evidence that his productivity was “Outstanding”. Considering this, the third version of the staff report included the same ratings as in the second version, but two positive comments were added under the categories “Attitude” and “Overall rating” as the IAC had ruled that they “could not remain without comment”.

4. The Tribunal finds that the complainant’s claim that no proper meeting with the reporting officer was held prior to the new version of the staff report being drawn up, is unfounded. The reporting officer was the countersigning officer on the previous versions of the report and had full knowledge of the complainant’s work. The IAC did not recommend that a new report be established but merely that a new version of the report be drafted. As such, and considering that the new version was signed by the complainant’s Principal Director in his capacity as reporting officer and countersigned by the

Vice-President in charge of DG1 as requested by the IAC, the EPO correctly believed the report to be devoid of the flaws identified by the IAC regarding the second version. The Tribunal recalls that, as stated in Judgment 1688, under 5:

“The Tribunal has already made many rulings on staff reports of EPO employees. Firm precedent has it that issues raised by such reports are discretionary and the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence. Those criteria are the more stringent because the EPO has a procedure for conciliation on staff reports and the Service Regulations entitle officials to appeal to a joint body whose members are directly familiar with the workings of the Office.”

5. Considering that the complainant has raised the question of whether or not the President’s signature must appear on a final decision, the Tribunal finds it useful to recall that, as stated in Judgment 3151, under consideration 6:

“The letter of 29 May 2009 constitutes the official communication of the President’s decision to follow the Internal Appeals Committee’s recommendation. As the Director of Regulations and Change Management has the authority to communicate such decisions, there is no need for the President’s signature to be on the letter. The complainant’s arguments to the contrary are unfounded. Furthermore, his assertions that the decision was taken *ultra vires*, or without delegation are inconsistent with the facts. In accordance with the standard practice, often used in international organisations, the aforementioned letter specifies that ‘[the Director of Regulations and Change Management was] asked to inform [the complainant] that the President has decided’, which is a clear indication that the Director was not taking the decision himself, but was merely communicating the President’s decision to the complainant. This is consistent with the case law (see Judgments 2833, under 3, and 2915, under 14). As such, the claims regarding delegation of authority and lack of an official decision by the President, are unfounded.”

## DECISION

For the above reasons,  
The complaint is dismissed.



In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo  
Dolores M. Hansen  
Hugh A. Rawlins  
Catherine Comtet