Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

D. (No. 4)

v.

EPO

137th Session **Judgment No. 4795**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 12 March 2020 and corrected on 15 May, the EPO's reply of 20 August 2020, the complainant's rejoinder of 2 October 2020 and the EPO's surrejoinder of 11 January 2021;

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

Having examined the written submissions;

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

The complainant challenges his performance evaluation report for 2018.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat. At the material time, he worked within a Board of Appeal and was an elected member of the Central Staff Committee.

As part of a structural reform of the Boards of Appeal, Communiqué 2/17, setting out new guidelines for the evaluation of the performance of members and chairmen of the Boards of Appeal, entered into force on 1 January 2018.

On 9 February 2018 the chairman of the Board of Appeal to which the complainant was assigned notified him of his objectives for 2018, which were to issue a communication, or a decision without communication, in twelve cases.

In his written opinion dated 11 February 2019, the chairman of the Board of Appeal evaluated the complainant's overall performance for 2018 as satisfactory. In section 1 of his opinion, which dealt with the assessment of achievement of objectives, he noted that, in 2018, the complainant had drafted five communications and settled four cases with action as rapporteur and a further four cases with action as second member. The chairman concluded that the objectives set had therefore not been achieved. However, he noted that this was mitigated by the fact that the objectives had been based on the assumption that the complainant's staff representation work would require at most 50 per cent of his working capacity, whereas the Office now used a higher proportion to better reflect the actual needs of staff representatives. In section 2(c) of his written opinion, concerning the evaluation of organisational skills and ability to deal with workload, the chairman of the Board of Appeal concluded that the complainant fulfilled the requirements described.

On 19 July 2019 the President of the Boards of Appeal finalised the complainant's performance evaluation report, in which he evaluated the complainant's overall performance as satisfactory. In section 1 of the report, he stated that he concurred with the opinion provided by the chairman of the Board of Appeal on the fact that the objectives set for 2018 were not achieved. The President explained that this finding still stood, despite the fact that 50 per cent of the complainant's working time had been allocated to his duties as staff representative and his objectives had been adapted accordingly, as he had only settled four cases with action. The President of the Boards of Appeal concluded in section 2(c) of the report that the complainant had not fulfilled the requirements described, referring to the insufficient number of cases (four) that he had settled. The President also recommended that the complainant take further steps to develop his ability to work in an organised and efficient manner, by planning ahead, setting the right

priorities and taking the organisational requirements of the whole Board into account.

On 2 August 2019 the complainant lodged an objection to his performance evaluation report pursuant to paragraph 7 of Article 110a of the Service Regulations for permanent employees of the European Patent Office, which was sent to an Appraisals Committee. In his objection he asked, in particular, for the appraisal system for members and chairmen of the Boards of Appeal provided for in Communiqué 2/17 and Article 110a of the Service Regulations to be repealed. Alternatively, he claimed that the rating awarded to him in section 2(c) of his performance evaluation report should be modified to state that he fulfilled the requirements described.

Having requested additional information from the President of the Boards of Appeal, the Appraisals Committee delivered its opinion on 7 November 2019. Its conclusion was that the performance evaluation report was arbitrary. The Committee considered that the performance evaluation report did not sufficiently explain why the President of the Boards of Appeal had departed from the opinion of the chairman of the Board of Appeal. It also pointed out that the report only referred to the four cases settled by the complainant and did not mention the five communications that he had also drafted. However, the Committee declared that it lacked the necessary competence to rule on the complainant's request for the appraisal system for members and chairmen of the Boards of Appeal to be repealed or for the modification of the rating awarded in section 2(c) of the performance evaluation report.

On 19 December 2019 the President of the Boards of Appeal took a final decision on the objection lodged by the complainant. In his decision, he stated that he did not share the Appraisals Committee's finding that the performance evaluation report was arbitrary, but that he had nevertheless modified the comment in section 2(c) of the performance evaluation report to mention the five communications prepared by the complainant, although he had not changed the rating itself. That is the impugned decision.

The complainant asks the Tribunal to repeal, declare unlawful or set aside the appraisal system for members and chairmen of the Boards of Appeal provided for in Communiqué 2/17 and Article 110a of the Service Regulations. Alternatively, he asks for the impugned decision to be set aside, for section 2(c) of his performance evaluation report to state "fulfils the requirements" and for a corresponding explanation to be drafted. He also seeks compensation of 10,000 euros for the moral injury which he considers he has suffered.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 19 December 2019 by which the President of the Boards of Appeal of the EPO essentially dismissed the objection lodged by the complainant in relation to his performance evaluation report for 2018.

The dispute relates, more particularly, to the assessment of organisational skills and ability to deal with workload contained in section 2(c) of the form used for performance evaluation reports for members of the Boards of Appeal, which must be based, according to the wording of the form, on the "level of achievement of quantitative objectives" assigned to the official concerned. In the present case, given that the complainant had failed to achieve the objectives set for him for 2018 (a matter which, of itself, is not in dispute), those objectives being to issue a communication or a decision without communication in twelve cases, the President of the Boards of Appeal considered that the complainant "[did] not fulfil the requirements described" in this area. This assessment thus departed from the written opinion expressed by the chairman of the Board of Appeal to which the complainant was assigned, who considered the complainant to have fulfilled those requirements. The chairman of the Board of Appeal had commented that there was a legitimate explanation for the complainant's failure to achieve the objectives set for him in that his working capacity had been

affected more than anticipated by his activities as a member of the Central Staff Committee (CSC).

In the impugned decision, even though the Appraisals Committee had stated in its opinion that the disputed performance evaluation report was "arbitrary", the President of the Boards of Appeal maintained his original evaluation, conceding only to include a reference to the five communications drafted by the complainant, which had gone unmentioned in the original version of the report, in section 2(c) of a new version established on 7 January 2020.

2. The complainant has requested oral proceedings. However, in view of the ample and sufficiently clear written submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and will not, therefore, grant this request.

3. In support of his complaint, the complainant constructs a line of argument seeking to challenge the lawfulness of Communiqué 2/17 of 22 December 2017 by which the President of the Boards of Appeal set out the "[g]uidelines for the evaluation of the performance of members and chairmen of the Boards of Appeal" and introduced the use of the form referred to above for carrying out that evaluation.

In that regard, it must be noted from the outset that, although the complainant asks for the Communiqué to be set aside, the claim he presents to that end is irreceivable. Under the Tribunal's settled case law, a general decision intended to serve as a basis for individual decisions – as is the case of the Communiqué at issue – cannot be impugned, save in exceptional cases, and its lawfulness may only be contested in the context of a challenge to the individual decisions that are taken on its basis (see, for example, Judgments 4734, consideration 4, 4572, consideration 3, 4278, consideration 2, 3736, consideration 3, and 3628, consideration 4).

Under that same case law, the complainant may, however, challenge the lawfulness of the aforementioned Communiqué 2/17 – as indeed he has done – in support of his claims for the impugned decision

and the disputed performance evaluation report, which implement the guidelines contained in the Communiqué, to be set aside.

4. In support of this plea of unlawfulness, the complainant argues, in the first place, that the procedure leading to the adoption of Communiqué 2/17 was flawed because it was not submitted to the General Consultative Committee (GCC), although Article 38(2) of the Service Regulations provides that the GCC – half of whose members are staff representatives – must be consulted, inter alia, on "any proposal which concerns the conditions of employment of the whole or part of the staff to whom these Service Regulations apply".

The Tribunal does not agree with the EPO's contention that the fact that the performance appraisal system specifically applicable to members of the Boards of Appeal is directly based on the provisions of the European Patent Convention and on certain provisions of the Implementing Regulations to that Convention of itself absolves the Organisation from the obligation to submit the documents instituting that system to a consultative body– such as the GCC – pursuant to the Service Regulations. In addition, the EPO's argument that the way in which staff performance is evaluated does not constitute "conditions of employment" within the meaning of the aforementioned Article 38 is unfounded.

However, Article 1(4) of the Service Regulations provides that the regulations are to apply to members of the Boards of Appeal "in so far as they are not prejudicial to their independence". The appraisal of members of those Boards is one of the particular problems associated with the guarantees of independence from which those members benefit. In addition, relating more generally to measures that specifically deal with the conditions of employment of members of the Boards of Appeal, it is apparent from the file – and especially from the relevant information supplied by the EPO in its submissions – that, in view of this requirement for independence, it was increasingly seen as inappropriate for such measures to be subject to consultation with the GCC, especially given that that body is chaired by the President of the Office and half of its members are appointed by him. As a consequence, it became the

practice, for measures of this type, to replace consultation with the GCC by consultation with the Presidium of the Boards of Appeal, an autonomous authority provided for in Rule 12b of the Implementing Regulations to the Convention, whose role, under paragraph 3 of that rule, includes "advis[ing] the President of the Boards of Appeal on matters concerning the functioning of the Boards of Appeal Unit in general" and whose members are elected by the chairmen and members of the Boards of Appeal, thus including a representative element of the staff concerned. This practice was eventually codified in 2019 by the insertion of paragraph 8 into Article 38 of the Service Regulations, which expressly provides for consultation with the Presidium in such a situation rather than with the GCC.

This is the procedure that was followed for the drafting of Communiqué 2/17. Admittedly, the new version of Article 38 was not in force at that time. However, as just explained, even before the amendment was made to the Service Regulations, a practice existed to that effect and, contrary to what the complainant maintains, was already in use at the time when the Communiqué was issued, as evidenced by examples supplied by the EPO of previous consultations on other matters. Furthermore, although it is well-established case law that a practice cannot become legally binding where it contravenes rules already in force (see, for example, Judgments 4555, consideration 11, and 4026, consideration 6), the Tribunal considers that, in view of the aforementioned wording of Article 1(4) of the Service Regulations, the practice in question cannot be regarded as contravening the applicable rules. The lack of consultation with the GCC did not, therefore, constitute an irregularity.

5. In the second place, the complainant submits that Communiqué 2/17 is unlawful because Rule 12d of the Implementing Regulations to the European Patent Convention, concerning the appointment and re-appointment of the members of the Boards of Appeal, which is one of the provisions forming the basis for the Communiqué, was itself adopted under a flawed procedure. He considers that, to the extent that Rule 12d governs the way in which the performance of the members of the Boards is evaluated, it should have

been submitted for an opinion to the Committee on Patent Law which was created by a decision of the Administrative Council (CA/D 3/94) dated 13 December 1994.

Under paragraph 5 of Decision CA/D 3/94, "[t]he Committee [on Patent Law] shall advise the Administrative Council" on various questions connected with its object including, under subparagraph (a), "on any proposal relating to the amendment of time limits laid down in the European Patent Convention or the amendment of the Implementing Regulations".

It is not disputed that the amendment to the Implementing Regulations to the Convention which gave rise to Rule 12d was not submitted to the committee in question. However, it is clear from the aforementioned provisions, and also from other provisions of paragraphs 5 and 6 of Decision CA/D 3/94, that consulting the Committee on matters falling within the scope of its competence is merely an option for the Administrative Council and not a mandatory formality. In addition, it is clear from the reasoning set out in the decision that the purpose of setting up the Committee on Patent Law, which is composed of representatives of all the Contracting States to the Convention, was to allow the Administrative Council to "take its decisions in matters concerning the development of European patent law with the benefit of advice from legal experts from the Contracting States". But the conditions for evaluating the individual professional merits of members of the Boards of Appeal do not fall within the scope of European patent law in the sense in which this concept is to be understood here. It is therefore completely understandable that the Council did not deem it appropriate to seek the Committee's opinion on the amendment of the Service Regulations at issue.

6. In the third place, the complainant submits that Communiqué 2/17, which was drafted in English, was not published in either French or German and so was only made available to members of the Boards of Appeal in one of the three official languages of the Office recognised under Article 14(1) of the European Patent Convention. However, it cannot be deduced from that provision, nor from any other legal

standard mentioned in the file, that a text issued by the Office is unlawful simply because official versions of it do not exist in each of those languages. Regrettable as it is, the fact that only an English version was available of Communiqué 2/17 – which has since been repealed and replaced by a new communiqué published in all three of the languages mentioned – is not such as to justify its setting aside by the Tribunal.

7. In the fourth and last place, the complainant, this time criticising the actual wording of Communiqué 2/17, challenges the lawfulness of certain provisions of Article 11 thereof, which governs the objection procedure. He considers that Article 11(4), concerning the composition of the Appraisals Committee, fails to safeguard the impartiality of the Committee because it provides for all its members to be appointed by the President of the Boards of Appeal and therefore does not guarantee any staff representation. He also maintains that Article 11(1), which restricts the Committee's power of review to determining whether a performance evaluation report is arbitrary or discriminatory, thus creates "an intentional legal void and, therefore, a denial of justice" by not allowing for a complete re-examination of the contested performance evaluation.

It should be noted that these features of the procedure in question actually derive from Article 110a of the Service Regulations, and more particularly from Article 110a(7) relating to challenges by members of the Boards of Appeal to their appraisals, while Communiqué 2/17 simply provides more details of how this is to be applied. The complainant also criticises Article 110a in his arguments.

However, the Tribunal has already ruled, in relation to the objection procedure applicable to appraisals of other permanent employees of the Office, which shares these same features *mutatis mutandis*, that the fact that no staff representatives were included on the Appraisals Committee competent to review the appraisal reports of those other employees did not mean that the Committee's composition was inadequate, and the fact that the Committee's mandate was confined to determining whether such reports were arbitrary or

discriminatory was legally admissible (see Judgments 4637, considerations 11 and 13, and 4257, consideration 13). The Tribunal sees no reason to depart from the solutions adopted by the case law on these two points in the context of very similar provisions, especially given that the specific aspects of the Service Regulations applicable to members of the Boards of Appeal are of no relevant effect in this regard.

Lastly, although the complainant submits that the time limits prescribed by the aforementioned Communiqué for submitting comments on the opinion issued by the chairman of the Board and for lodging an objection to the performance evaluation report are unreasonably short, that is ten days in each case, the Tribunal considers that, while the periods are indeed brief, they are not so to a degree that would breach the principles of the right to effective appeal and the right to due process.

8. The plea of unlawfulness raised against Communiqué 2/17 will therefore be rejected in its entirety.

9. In support of his claims, the complainant also alleges that his individual appraisal was itself tainted by flaws.

As the Tribunal has repeatedly held in its case law, assessment of an employee's merits during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment. Of course, it must ascertain whether the ratings given to the employee have been determined in full conformity with the rules, but it cannot substitute its own opinion for the assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene only if the staff report was drawn up without authority or in breach of a rule of form or procedure, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, or if there was abuse of authority (see, for example, Judgments 4564, consideration 3, 4267, consideration 4, 3692, consideration 8, 3228, consideration 3, and 3062, consideration 3).

10. Among the various pleas entered by the complainant to challenge the disputed appraisal, there is one that is decisive for the outcome of this dispute, falling as it does within the scope of the Tribunal's limited power of review, as defined, since it relates to a material fact that was allegedly overlooked. This is the plea that the President of the Boards of Appeal refused to take account of the fact that the 50 per cent exemption from duties granted to the complainant as a full member of the CSC, pursuant to Article 3(2) of Circular No. 356 concerning the resources and facilities to be granted to the Staff Committee, was insufficient in the light of actual needs observed.

11. It is apparent from the file that the complainant's performance objectives for 2018 – which was the first year when the new appraisal method for members of the Boards of Appeal established by Communiqué 2/17 was applicable – had been set at the beginning of February on the basis of that 50 per cent exemption, which of itself, appears entirely lawful.

However, in September 2018 the complainant, whose quantitative performance was lower than that set in his objectives, had notified the chairman of his own Board and the President of the Boards of Appeal that the exemption provided for in Circular No. 356 was insufficient in the light of the actual needs of full members of the CSC. Given the difficulties faced more widely by many members of that committee in fulfilling their obligations in their respective posts, the question of increasing the exemption led, at that time, to negotiations between staff representatives and EPO management. Those negotiations concluded in the President of the Office issuing a communiqué (01/2019) on 8 February 2019, in which he announced that the exemption from duties of full members of the CSC would be increased to 75 per cent and that Circular No. 356 would be amended accordingly with effect from 1 January 2019.

Having taken these various matters into consideration, the chairman of the Board to which the complainant was assigned stated, in his opinion on the complainant's performance evaluation – issued on 11 February 2019, that is just after the publication of Communiqué

01/2019 – that, while "the objectives set for 2018 were nominally not achieved", "this [was] mitigated by the fact that [those] objectives [...] were based on the assumption that staff representation work would require at most 50% of [the complainant's] working capacity", whereas "[t]he [A]dministration [had] reconsidered this assumption and [had] adjusted time deductions to reflect actual needs". However, when the performance evaluation report was drawn up, the President of the Boards of Appeal dismissed that reasoning on the grounds, set out in his reply to a request for information sent to him by the Appraisals Committee, that, since the increase in the exemption from official duties to 75 per cent for members of the CSC did not take effect until 1 January 2019, "there was no legal basis for increasing the maximum [...] 50% exemption [...] in 2018".

12. The Tribunal considers that the position thus adopted by the President of the Boards of Appeal must be regarded as unlawful. While it is true that the exemption from duties in force in 2018 for members of the CSC was only 50 per cent, the question that arose during the complainant's appraisal was not whether the performance objectives assigned to him had been lawfully set on that basis – which, as already noted, is not in doubt – but whether the grounds relied on by the complainant to explain why he had not met those objectives were well founded, meaning that all the factual circumstances that could affect attainment of the objectives had to be taken into account. From this perspective, the fact that the 50 per cent exemption from duties awarded to members of the CSC had, according to the complainant, proved insufficient in view of actual needs and had been recognised as such by the Administration itself – at least implicitly – clearly constituted an essential element of the assessment. The President of the Boards of Appeal was, therefore, obliged to take it into account in the disputed performance appraisal, as indeed the chairman of the Board had rightly suggested he do.

The complainant, who was the only member of the Boards of Appeal to sit on the CSC, asserts that the other full members of the Committee found their own reporting officers to be sympathetic with regard to the achievement of their respective objectives for 2018. The

Organisation, which simply submits in this regard that those other employees were also subject to the 50 per cent exemption in force at the time, thus fails in his challenge of that assertion since, as has been stated, it is not the relevant point under discussion here.

The Tribunal notes that the complainant states in his submissions that he was nonetheless forced to devote 50 per cent of his working time to his duties as a member of the Boards of Appeal, not least – as he points out – because a failure to fulfil that obligation would have amounted to a breach of his professional duties, capable of leading to disciplinary action. However, when explaining why his working capacity was nonetheless reduced by an amount greater than the exemption he had been granted, the complainant describes how his responsibilities as a member of the CSC led to an "inevitable fragmentation" of his work within the Board, resulting in a loss of efficiency, and that certain tasks essential to the work of a member of the Boards of Appeal, such as the regular monitoring of case law necessary to maintain professional knowledge, are "incompressible" and therefore more onerous in the context of part-time hours.

Whether these arguments are sufficient to justify the complainant's under-performance in terms of the objectives assigned to him for 2018 is a matter for discussion. However, it is a matter which can, in any event, only lawfully be examined in the context of an appraisal which takes due account of the material fact that, as stated, the adequacy of the exemption from duties for members of the CSC was reviewed in the light of actual needs. By deliberately refusing to take that fact into consideration in the assessment of the complainant's merits, even though the disputed performance evaluation report post-dated the publication of the aforementioned Communiqué 01/2019, the President of the Boards of Appeal thus acted unlawfully.

13. As a result of the foregoing, both the impugned decision of 19 December 2019 and the complainant's performance evaluation report for 2018 must be set aside, without there being any need to rule on the other pleas raised against them by the complainant.

14. The complainant asks that he be awarded the "average rating of 'fulfils the requirements'", rather than the one initially given to him by the President of the Boards of Appeal, for the assessment of his organisational skills and his ability to deal with his workload.

It is not for the Tribunal, whose role is not to supplant the administrative bodies responsible for staff appraisals within an international organisation, to determine the rating to be given to an employee in a performance evaluation report (see, for example, Judgments 4564, consideration 2, and 4258, considerations 2 and 3). Furthermore, it must be noted that the finding of unlawfulness above does not necessarily mean that the complainant should be regarded as having fulfilled the requirements in the area concerned.

However, it is appropriate to order the EPO to invite the President of the Boards of Appeal to draw up a new performance evaluation report for the complainant for 2018, taking due account of the review of the adequacy of the 50 per cent exemption from duties on the basis of which his performance objectives had been set, in the light of actual needs of members of the CSC and the specific line of argument put forward by the complainant. It will be for him to make any consequential modification, if appropriate, to the rating given to the complainant in section 2(c) of the old report and, in any event, to review the wording of the various assessments in the report – including the overall assessment – of his merits which, in relation to the achievement of the objectives in question, incorrectly failed to take account of the matters referred to above.

15. The complainant requests that the EPO be ordered to pay him damages of 10,000 euros for the moral injury that the impugned decision allegedly caused him.

The Tribunal considers that the arguments put forward by the complainant in support of this claim, which essentially posit that the grading of a member of a Board of Appeal is by its very nature a "sensitive matter", must, for the most part, be rejected, since such a consideration is not, in any event, in itself capable of demonstrating that the complainant personally suffered any discernible injury as a result of

the irregularity found in the performance evaluation contested in the present case. However, the fact remains that this evaluation contained some disparaging comments about the complainant, such as "[h]e should take further steps to develop his ability to work in an organised and efficient manner" and "he should strive for further developing his organisational skills and ability to deal with the workload", which were liable to harm his professional reputation and clearly offended him. Those comments therefore caused him moral injury. Since it is clear from the performance evaluation report that those comments stemmed directly from the assessment of whether the complainant had achieved his performance objectives and, as stated, there was an irregularity in that assessment, the source of the injury was thus an unlawful act and compensation is therefore justified. In the circumstances of the case, the Tribunal considers that this moral injury will be fairly redressed by awarding the complainant moral damages of 2,000 euros.

DECISION

For the above reasons,

1. The decision of the President of the Boards of Appeal of the EPO dated 19 December 2019 is set aside, as is the complainant's performance evaluation report for 2018.

2. The EPO shall draw up a new performance evaluation report for 2018, as indicated in consideration 14, above.

3. The Organisation shall pay the complainant moral damages in the amount of 2,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 16 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER