Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 9)

v.

EPO

138th Session **Judgment No. 4890**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 14 December 2011, the EPO's reply of 30 March 2012, the complainant's rejoinder of 28 December 2012 and the EPO's surrejoinder of 11 April 2013;

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

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

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

The complainant challenges his staff report for 2004-2005.

At the material time, the regulatory framework within the EPO for creating and reviewing staff reports was embodied in Article 47 of the Service Regulations for permanent employees of the Office and in Circular No. 246, entitled "General Guidelines on Reporting". Section D of the Circular detailed the conciliation procedure to which staff members could resort in the event that a dispute arose in connection with their staff report. More specifically, paragraph 1 of that Section permitted the Organisation's executive head to appoint a mediator to undertake the conciliation process. Paragraph 8 provided for the possibility to lodge an appeal before the Internal Appeals Committee (IAC) pursuant to Articles 107 and 108 of the Service

Regulations in cases where the staff member was dissatisfied with the outcome of the conciliation procedure. Moreover, in January 2002, a new method of calculating and assessing the productivity of examiners, known as “Propro II”, was introduced in Directorate-General 1 (DG1) and Directorate-General 2 (DG2). Under the new method, the productivity of examiners was expressed in terms of a productivity factor, which resulted from comparing their productivity with the expected average productivity in the technical area or areas in which they worked. The productivity factor constituted 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 joined the European Patent Office, the EPO’s secretariat, in November 1987, as an examiner.

His staff report covering the period from 1 January 2004 to 31 December 2005 was completed by his reporting officer on 20 March 2006 and signed by the countersigning officer on the following day. He received the marking “very good” under each section of the report, that is under “quality”, “productivity”, “aptitude”, “attitude to work and dealings with others”, as well as for the “overall rating”. On 2 June 2006, he signed the report noting that he intended to comment on its content as soon as he was in a position to do so, which he eventually did on 22 August 2006 requesting that his productivity rating be changed from “very good” to “outstanding”. In November 2006, both the reporting and the countersigning officers decided to maintain the ratings given.

On 23 December 2006, the complainant requested a conciliation procedure in accordance with Section D of Circular No. 246. A meeting took place on 6 December 2007, but the parties were not able to reach an agreement. Pursuant to paragraph 6 of Section D of the Circular, the staff report and the mediator’s report were then transmitted to the Vice-President of DG1, who decided to confirm the staff report.

As he was dissatisfied with the outcome of the conciliation procedure, on 25 April 2008, the complainant lodged an appeal requesting that a new staff report be drawn up identical to the one which had been prepared for the 2003 reporting period and in which his productivity

had been rated as “outstanding”. On 20 June 2008, he was informed that the President of the Office had decided that the relevant rules had been correctly applied and that, consequently, his appeal had been referred to the IAC.

A meeting was held on 4 April 2011 by the IAC where the parties were heard. In its opinion of 26 July 2011, the IAC unanimously recommended rejecting the appeal as unfounded in its entirety. By a letter dated 19 September 2011, received by the complainant on 21 September 2011, he was informed by the Director of Regulation and Change Management that the latter had decided, by delegation of power from the President, and in accordance with the unanimous opinion of the IAC and for the reasons set out by the Administration during the appeal proceedings, to reject the appeal. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as his staff report for 2004-2005, and to order the issuance of a new version of the report “duly and officially confirmed and explicitly hand-signed by the President [...] himself”. He also seeks the award of moral damages for the undue delay in the internal appeal procedure, in an amount left to the discretion of the Tribunal, as well as costs. In his rejoinder, he makes a request to the Tribunal for “explanations and advices” on the specific issue of delegation of power.

The EPO requests that the complaint be dismissed as unfounded. It also considers the rejoinder to be “inadmissible” as the complainant has not provided any explanation as to the circumstances leading to the lengthy delay between the date of dispatch of the reply – which was sent to the Tribunal’s Registry on 30 March 2012 – and the date of its alleged receipt by him, that is 2 November 2012. Moreover, it notes that all facts and events, to which the complainant referred in his rejoinder, and which occurred since April 2012, are irrelevant to the present dispute.

CONSIDERATIONS

1. The complainant asks the Tribunal, on the one hand, to quash what he describes as "the explicit and impugned decision of the President of the [...] Office [...] himself, as notified on 21 [September] 2011 by the [Organisation] to [him], of accepting and endorsing definitively the impugned [s]taff [r]eport" regarding his work appraisal for the 2004-2005 period. On the other hand, he asks the Tribunal to quash this "impugned" staff report as lacking compatibility with the applicable rules and being derived from a flawed and biased assessment of his work.

In this regard, he requests that the Organisation be ordered to draft "an entirely new version of said impugned [s]taff [r]eport [...] hand-signed by the President". In his complaint, he maintains that the "very good" rating given to him under the heading "productivity" should be changed to "outstanding". He does not, however, challenge the "very good" rating received under each of the headings: "quality", "aptitude", "attitude to work and dealings with others" and "overall rating". In essence, for the years 2004-2005, he wants to receive a staff report rating for each of the contemplated headings that would be the same as for the preceding reporting period, namely 2003.

The award of moral damages that the complainant claims is solely related to the alleged undue delay in the internal appeal procedure. While he indicates in his claims that he leaves the amount to the discretion of the Tribunal, in his complaint, he refers to an amount of 2,000 euros which he had claimed in the internal appeal process in this respect.

2. After having filed a complaint of 83 paragraphs, covering 25 pages, the complainant filed a rejoinder of some 93 paragraphs, covering 38 pages, following the receipt of the Organisation's reply of less than 15 pages. The Organisation maintains that this rejoinder is inadmissible for two reasons.

First, the EPO points to the fact that, following its reply which was sent to the Tribunal's Registry on 30 March 2012, the rejoinder was filed on 28 December 2012, well after the period provided for in the

Tribunal's Rules to that effect, on the basis that the complainant allegedly received this reply only on 2 November 2012 but without providing any explanation in support. But the Tribunal's record indicates that, at the relevant time, the complainant requested and was granted an extension of the time limit until 2 January 2013. This suffices to deny this ground of contestation.

Second, the EPO contends that the facts and events to which the complainant alluded in this rejoinder, which all occurred, in major part, since April 2012, are simply irrelevant to the current dispute. The Tribunal observes that a rejoinder is not a proceeding by which the complainant is expected to reiterate, with a different wording, the same arguments that he developed in his complaint; it is rather a proceeding pursuant to which the complainant has an opportunity to answer any new argument raised in the reply and not already addressed in his complaint. But that is insufficient by itself to render a rejoinder inadmissible at this stage. However, the Organisation is correct in asserting that all the facts and events referred to by the complainant in his rejoinder and which occurred since April 2012 are irrelevant to the present complaint pertaining to his staff report for 2004-2005. These facts and events will not be considered by the Tribunal as part of this judgment.

3. As the Organisation indicated in its surrejoinder, the complainant appears to dispute in his rejoinder the lawfulness of the delegation of power allowing the Director of Regulation and Change Management to render the impugned decision on behalf of the President, thus bringing into question whether the impugned decision was rendered by the proper authority. In his rejoinder, the complainant indeed points to the lack of any proper formal, official and final presidential decision regarding the underlying internal appeal, maintaining that the signatories of the acts of delegation communicated to him following his request to the EPO in this case had left the Organisation at the relevant time such that these acts of delegation were consequently obsolete or moot. In his rejoinder, the complainant is "ask[ing] directly and very humbly to the [Tribunal] to give him, if possible, some explanations and advices about what to do in order to

get satisfaction on [the] specific matter" of this allegedly confusing situation about the authority and the delegation power of the person who signed the impugned decision.

4. This claim of the complainant, contained in his rejoinder, is devoid of any merit and outside the competence of the Tribunal. It is not the role of the Tribunal to provide explanations and advice about what to do to the parties (see, for example, Judgment 3989, consideration 5). The Tribunal simply does not issue declarations or orders of that nature.

In any event, the record indicates that, immediately upon receipt of the impugned decision on 21 September 2011, the complainant asked, on 17 October 2011, the Director of Regulation and Change Management, with a copy to the President, the basis upon which the former was advising him of the impugned decision. In his letter of 10 November 2011, the same Director answered that the power of decision in situations where a unanimous opinion of the Internal Appeals Committee (IAC) is to be followed is delegated to him. As recognised by the complainant in his submissions, the relevant acts of delegation in this regard were notified to him as an attachment to this letter. Not only was this done, but the complainant clearly understood then that the impugned decision had in effect been rendered by the President and that the latter had accepted and endorsed definitively the staff report at issue.

The complainant cannot in these circumstances now maintain that the impugned decision suffers a procedural flaw because of an alleged lack of proper delegation of authority. The Tribunal is satisfied that the impugned decision was taken by the proper authority having regard to the acts of delegation filed in the record and provided by the Organisation to the complainant. In his brief, the complainant indeed indicated that he is filing his complaint "against the indirect but very official, explicitly written, duly signed and clearly final decision of the President [...], of which [he] was notified [...] on 21 [September] 2011". He also confirmed that, on 15 November 2011, he received a letter from the Department of Regulation and Change Management "in which was enclosed a copy of the relevant proofs of delegation and sub[-]delegation,

on which were based the [...] final decision regarding [his] [i]nternal [a]ppeal". He finally noted that, even if what he describes as the "perfectly clear, explicit and even yet unambiguous presidential final decision [...] was issued indirectly, by means of delegation and sub[-]delegation, [this was] a priori perfectly lawful and acceptable".

5. In his complaint, the complainant raises in essence two arguments.

First, he considers that there was a "blatant misassessment" of the work he effectively performed and an undue degradation or devaluation of the rating of his work. He adds in this regard that, in assessing his productivity for the preceding period, namely the year 2003, the rating given was "outstanding" and this rating should be the same for the period at issue. He considers that, in this regard, the Organisation and the IAC failed to take into due consideration two crucial facts of the underlying dispute, which are explained in consideration 7 below.

Second, the complainant contends that there was a "blatant bias" of the reporting officer against him with respect to the assessment of the work he performed.

6. The Tribunal has a limited power of review in situations involving performance appraisals of staff members. It is not the role of the Tribunal to supplant the administrative authorities of an international organisation in the assessment of the merits of a staff member. The Tribunal must rather recognize the discretionary authority of the bodies responsible for conducting such assessment which involves a value judgement. In Judgment 4795, consideration 9, the Tribunal indeed recalled the following regarding its limited power of review in matters of staff appraisals:

> "[...]
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> 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).”

(See also, to the same effect, Judgments 4731, consideration 4, and 4713, consideration 11.)

Moreover, in Judgment 4794, consideration 12, the Tribunal said the following in a situation where, like here, the complainant was asking that the assessment of his productivity be reviewed:

“Furthermore, aside from the fact that the Organisation has responded to the complainant’s criticisms factually, precisely and clearly in its submissions, the exercise that the complainant is asking the Tribunal to undertake with regard to the assessment of his productivity and his overall evaluation amounts in reality to a re-evaluation of his performance for 2016. However, that is a misconstruction of the Tribunal’s role, given the limited power of review the Tribunal may exercise in this matter according to its settled case law (see, for example, the aforementioned Judgment 4564, consideration 3, which was cited in the aforementioned Judgment 4637, consideration 13).”

7. In this regard, the complainant maintains that the “impugned” staff report unfairly reflected his performance and that it amounted to a serious deterioration and devaluation of his productivity compared to the prior year. He wants in essence a staff report identical to the report prepared for the preceding reporting period. The alleged lack of consideration of two essential facts by the Organisation and the IAC turns upon the circumstance that he worked hard in the period 2004-2005 and that he had a rating of “outstanding” on his productivity for the period 2003.

8. To support his argument, the complainant points to the fact that, in the assessment of his productivity, the Organisation allegedly forgot to take into account three searches and three examinations that he had conducted. But the Tribunal notes that the IAC was of the

opinion that this assertion was not established and that, while the Organisation and the complainant had different views on the accuracy and completeness of the figures used, in view of the Organisation's discretionary power in assessing staff performance, these allegations were insufficient to justify setting aside the staff report.

The Tribunal agrees and also observes that the missing searches or examinations that the complainant had pointed to, the number of which has changed from the internal appeal process to the complaint before the Tribunal, remain unsubstantiated and unproven.

9. The Tribunal further considers that the complainant's productivity rating for the 2003 period is not the basis to determine his productivity rating for the period 2004-2005. Reporting officers are not bound by ratings of previous staff reports and they must in all situations fairly and objectively assess the staff member's productivity analysing each reporting period separately (see, for example, Judgments 4564, consideration 6, and 1688, consideration 6). It is worth mentioning as well, as the Organisation rightly emphasised, that the EPO reporting system is a relative system, meaning that the staff members are evaluated against the performance of their peers. The record moreover shows that a very small percentage of staff members receive the outstanding rating in any given period. Given this, and as already recalled in consideration 6 above, it is not the role of the Tribunal to substitute its own assessment to the value judgement made by the competent bodies of the Organisation in their rating of the work productivity of the complainant.

10. As for the assertion of the complainant that he worked as hard as he could during the relevant period and that the reporting officer noted that it was not in doubt that the complainant indeed considered that he had tried his utmost in that period, it does not amount, contrary to what the complainant suggests, to an acknowledgement that he worked as hard as in the preceding period or that his productivity was the same. This argument does not justify setting aside the staff report and quashing the impugned decision.

11. The complainant further contends that his reporting officer was biased and unable to assess fairly and objectively his performance as a result, and that this amounted to an additional ground to set aside the “impugned” staff report. In support of his plea of “blatant bias”, the complainant points to the fact that the same reporting officer had made four successive drafts of his staff report, ranging from “good” to “very good”, for the preceding period of 2003 before the final staff report of that period where he ended up rating the overall performance of the complainant as “very good”.

12. But this falls short of establishing with convincing evidence the alleged “blatant bias” upon which the complainant tries to rely. Indeed, besides pointing to these four drafts of his staff report for the preceding period, the complainant does not identify any other circumstance supporting an alleged bias of this reporting officer for the period at issue, namely 2004-2005. The complainant bears the burden to provide evidence of sufficient quality and weight to persuade the Tribunal that his allegations of bias are well founded (see, for example, Judgments 4713, consideration 12, 4543, consideration 8, and 3380, consideration 9). This burden has not been discharged in the present case.

13. Turning to the moral damages claimed by the complainant, the Tribunal observes that they are limited to the impact of the undue delay in handling the internal appeal process. The complainant insists that two and a half years elapsed between the lodging of his internal appeal and the filing of its reply by the Administration. Relying on some prior judgments of the Tribunal, the complainant notes that, while he had claimed an amount of 2,000 euros in the internal appeal process in this regard, he leaves it to the discretion of the Tribunal at this stage.

But the Tribunal’s case law has recognized that the amount of compensation for unreasonable delay is ordinarily influenced by two considerations, one being the length of the delay and the other the effect of the delay (see, for example, Judgments 4655, consideration 21, and 3160, consideration 17). In Judgment 4799, consideration 7, the Tribunal recalled that its recent case law holds that an unreasonable delay in an internal appeal is not sufficient in itself to award moral damages. The

complainant must also articulate the adverse effects which the delay has caused (see also Judgment 4563, consideration 14). Furthermore, the Tribunal has regularly stated that, in terms of damages, a complainant seeking compensation must provide clear evidence of the alleged unlawful act, of the injury suffered and of the causal link between the unlawful act and the injury, and that she or he bears the burden of proof in this regard (see Judgments 4556, consideration 12, 4158, consideration 4, 4157, consideration 7, and 4156, consideration 5).

The complainant has not discharged this burden in the present case. The evidence of any injury suffered in terms of moral damages or of the detrimental effect of the delay on his situation is barely articulated, if at all, in his submissions. He is therefore not entitled to any compensation in this regard.

14. As each of the arguments of the complainant are unfounded, his complaint should be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Mr Clément Gascon, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

MIRKA DREGER