Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

T. (No. 24)

v.

EPO

138th Session **Judgment No. 4891**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-fourth complaint filed by Mr I. H. T. against the European Patent Organisation (EPO) on 5 April 2013, the EPO's reply of 23 August 2013, the complainant's rejoinder of 6 September 2013 and the EPO's surrejoinder of 9 December 2013;

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 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.

The complainant joined the European Patent Office, the EPO's secretariat, in November 1987, as an examiner at grade A2. On 1 September 1989, he was promoted to grade A3 and, on 1 December 1996, to grade A4. Since 1 December 2003, he held grade A4(2).

His staff report covering the period from 1 January 2004 to 31 December 2005 was completed by his reporting officer – holding grade A5 at that time – on 15 March 2006 and signed by the countersigning officer on 14 April 2006. He received the markings "very good" for the sections "quality", "productivity", "aptitude" and for the "overall rating", and "good" for his "attitude to work and dealings with others". On 16 May 2006, he signed the report and made some comments on its content requesting that some markings be reconsidered. On 22 and 31 May, both the reporting and the countersigning officers decided to maintain the ratings given.

On 22 June 2006, the complainant requested a conciliation in accordance with Section D of Circular No. 246. A meeting took place on 17 November 2006, 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 Directorate-General 1, who decided to confirm the staff report.

As he was dissatisfied with the outcome of the conciliation procedure, on 25 June 2007, the complainant lodged an appeal requesting that some comments be deleted from his staff report and that the markings given for "quality", "aptitude" and "attitude to work and dealings with others" be either removed from the report or replaced by those awarded in his prior reports for 2000-2001 and 2002-2003. On 24 August 2007, 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 7 December 2011 by the IAC where the parties were heard. In its opinion of 30 November 2012, which was transmitted to the President on 4 December 2012, the IAC, by a

majority of its members, recommended rejecting the appeal as unfounded in its entirety. By a letter dated 29 January 2013, the complainant was informed by the Vice-President of Directorate-General 4 that he had decided to follow this majority's recommendation. 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 award him an amount of 30,000 euros in moral damages and 5,000 euros in costs.

The EPO requests that the complaint be dismissed as unfounded.

CONSIDERATIONS

1. In the impugned decision of 29 January 2013, the Vice-President of Directorate-General 4 (DG4) endorsed the majority opinion of the Internal Appeals Committee (IAC) and its conclusion that the reporting and countersigning officers who signed the complainant's staff report for 2004-2005 enjoyed a wide discretion when assessing his performance and that their assessment was subject only to limited review. The majority considered that there were no reasons in this case, nor any flaws or contradictions, that could warrant raising or deleting the awarded markings. The Vice-President of DG4 added that, especially with regard to the marking for "attitude to work and dealings with others", the comments made by the reporting officer were within his discretion and that, since no unlawful acts had been established, as the IAC had found, the claim for moral damages was also unfounded. The Vice-President of DG4 therefore rejected the internal appeal of the complainant in its entirety.

2. The complainant requests that oral proceedings be held. But given the complete written submissions made by the parties in their pleadings and through the filing of their supporting documents, the Tribunal is properly informed of all the arguments and of the relevant evidence. This request is therefore rejected.

3. The complainant advances six arguments in support of his claims to set aside the impugned decision and his staff report for 2004-2005 and to award him moral damages.

First, he claims that there was a fatal procedural error in that the impugned decision was made by the Vice-President of DG4 instead of the President of the Office, contrary to the provisions of the Service Regulations for permanent employees of the Office. Second, he argues that the reporting officer was not authorized to prepare his staff report because both were at the same hierarchical level. Third, he considers that there was an absence of an objective evaluation of his performance and that the staff report included subjective, arbitrary and personal elements exceeding the reporting officer's discretionary power. Fourth, he maintains that the reporting officer failed to comply with the administrative instructions that he was expected to follow. Fifth, he claims that the Organisation had been negligent in the exercise of its duty of care in that the allocation of duties for the period covered disregarded his personal health condition. His sixth and final argument is that he is entitled to moral damages because of the severe negligence of the Organisation, the lack of respect of its own regulations and the undue delay in the internal appeal process.

The Tribunal will deal with each of these arguments in turn.

4. Before considering the complainant's arguments, the Tribunal finds it convenient to recall the following statement that it made in Judgment 4795, consideration 9, concerning the limited power of review that it exercises in matters of staff appraisals:

"[...]

> 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)."

In other words, given that the staff report calls for a value judgement and the exercise of a discretionary power by the responsible bodies of the Organisation, the complainant must convince the Tribunal that the EPO breached a procedural requirement, that the staff report was made without authority or by an incompetent authority, or resulted from an abuse of authority, that a manifest error of law or fact was made, or that clearly wrong conclusions were reached from the record or from the overlooking of material facts (see also Judgments 4731, consideration 4, and 4713, consideration 11).

5. With respect to his first argument, the complainant does not identify any provisions of the rules and regulations of the Organisation that were allegedly violated to support his plea that there was here a fatal procedural error. To the contrary, in its reply, the Organisation specifically clarified that the impugned decision to reject the complainant's internal appeal and endorse the staff report at issue was made by the Vice-President of DG4 by delegation of authority from the President. Yet, the complainant does not challenge this statement in his rejoinder and it can be taken to be an admitted fact. Moreover, he never asked the Organisation to provide the instruments of delegation to which it referred in its reply.

This argument must be rejected.

6. In his second argument, the complainant raises the illegitimacy of the reporting officer to prepare the staff report for 2004-2005. According to the complainant, the reporting officer was not authorized to do so because both were at the same hierarchical level. In this regard, the complainant's contention is that, although he was at the time a senior examiner at grade A4(2) while the reporting officer was a director at grade A5, they were effectively at the same grade. This argument is unfounded for many reasons.

7. To start with, the complainant does not identify any specific provision pertaining to staff reports that would support this assertion, be it in Article 47, in Circular No. 246 or in the Communiqué No. 9 of 23 December 2005 pertaining to the 2004-2005 reporting exercise. While it is true that Article 3(3) of the Service Regulations states that each post is classified in one of the grades or group of grades, and that, with respect to category A, "[g]rades A5 and A4(2) are both regarded as immediately above grade A4 for the purposes of the present Regulations", that does not entail that the Director assigned to Directorate 2119 at grade A5, in which the complainant was working as a senior examiner at grade A4(2), is not authorized or disqualified as a result to be the reporting officer for the purposes of his staff report.

8. The complainant explains his reasoning in this regard as follows. Because, in his view, grade A4(2) and grade A5 are of the same hierarchical level, the reporting officer could not be the administrative superior drafting his staff report. For the complainant, such a situation would lead to a conflict of interest because both he and the reporting officer were entitled to compete for a post at the next higher grade, namely grade A6, such that the reporting officer could then easily have belittled his qualifications to reduce competition.

But the Tribunal observes that grades A4(2) and A5 are clearly foreseen to be unequal in levels in the applicable provisions. For instance, in the Administrative Council's decision CA/13/02 of 26 April 2002 pertaining, among other things, to the pay scale of permanent employees of the category A staff, it was notably indicated that "creating a complete scale for A4(2) between A4 and A5 must not lead to promotion from A4 to A5 being regarded as leapfrogging a grade". Contrary to the assertion of the complainant that this indicates that there does not exist an intermediate grade between grades A4 and A5, this suggests the contrary, namely that grade A4(2) lies between grades A4 and A5 and therefore cannot be seen as equivalent to grade A5 as it is rather of a level below.

9. In addition, the job descriptions for posts at grades A4(2) and A5 confirm that the level of duties pertaining to both grades are different. While the job description for a director's post at grade A5 entails supervision responsibilities, detailed knowledge of the law of the EPO and running an organisational unit, the job description for a post such as senior examiner at grade A4(2) notably indicates that such an employee may be called upon to "assis[t] the director and project management", which is particularly informative in assessing the relationship between the two grades.

10. Furthermore, the Tribunal observes that this plea of the complainant pursuant to which the situation allegedly led to a conflict of interest that was either established or apparent is at odds with his own behaviour at the relevant time. After the staff report for 2004-2005 was finalized, the complainant never raised or alluded to this alleged conflict situation for more than five years. This assertion was not raised by the complainant in his comments to the staff report of 16 May 2006. He did not do so either in his remarks of 7 December 2006 in answer to the conciliation procedure and the mediation report of the same day. He did not do so as well in the reasons that he expressed in support of his internal appeal of 25 June 2007. It is only in the reply that he submitted on 29 June 2011 to the position paper of the EPO of 10 May 2011 in the internal appeal process before the IAC that the complainant raised for the first time this argument of illegitimacy or lack of authority of the reporting officer. One would have expected the complainant to raise the issue as soon as the situation of this alleged conflict of interest materialized. Here, it is telling that he remained silent when, according to his own assertion, he should have voiced without delay his concern.

11. On conflict of interest, in Judgment 4711, consideration 5, the Tribunal recalled as follows its case law on this issue:

> "[...] it is a general rule of law that an official who is called upon to take a decision affecting the rights or duties of other persons subject to her or his jurisdiction must withdraw in cases in which her or his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, the official may consider herself or himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect

> its author of prejudice (see Judgments 4240, consideration 10, and 3958, consideration 11). A conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest (see Judgment 3958, consideration 11). However, an allegation of conflict of interest or lack of impartiality has to be substantiated and based on specific facts, not on mere suspicions or hypotheses. The complainant bears the burden of proof of conflict of interest (see Judgments 4617, consideration 9, and 4616, consideration 6) [...]"

On the one hand, the Tribunal considers that the situation to which the complainant pointed does not give rise to an objective partiality. On the other hand, as an allegation of conflict of interest or lack of impartiality must be substantiated and based on specific facts, raising it, as the complainant does, based on mere suspicion or hypothesis, is clearly insufficient.

This second argument is devoid of any merit.

12. With respect to his third argument to the effect that there was an absence of objective evaluation since the staff report included subjective, arbitrary and personal elements going beyond the reporting officer's discretionary power, the complainant has simply not discharged his burden of providing evidence of sufficient quality and weight to persuade the Tribunal that his allegations of bias or partiality were well founded (see, for example, Judgments 4713, consideration 12, 4543, consideration 8, and 3380, consideration 9). The complainant cannot point to any precise indication of bias within the staff report. The comments of the reporting officer indeed point in the opposite direction and include many that praised the complainant's performance when appropriate.

In the staff report at issue, the Tribunal notes that the complainant in fact received an overall rating of "very good" which, according to the record, is a rating that only a limited percentage of the staff members achieve in any reporting period. In this regard, the Tribunal also observes that, in summarizing the discussions of the parties with respect to the rating for "attitude to work and dealings with others", where he indicated that the complainant's relations with others were at times an

issue, the reporting officer noted that it was the complainant who had told him that he felt he should have been the one taking over Directorate 2119 instead of him, that he had some level of "bitterness" as a result and, on one occasion, that he wanted to be left in "peace".

The suggestion that the assessment for the "attitude to work and dealings with others" was made incorrectly or arbitrarily by the reporting officer is not supported by the record and does not fall within the scope of the limited grounds of review of the Tribunal regarding staff reports recalled in consideration 4 above.

The third argument is unfounded.

13. The fourth argument of the complainant focuses on the alleged non-compliance with the administrative instructions and the lowering of markings in comparison to the prior reporting periods. Regarding this argument, the Tribunal observes that the complainant, while recognizing that the reporting officer has a wide discretionary power and that the Tribunal's intervention remains limited in the review, if any, of the content of staff reports, only refers to general unsubstantiated assertions to the effect that staff reports are comparative, that each aspect must be evaluated on its own merits, that such reports should be objective and free from personal, subjective and emotional remarks, and that the material lowering of earlier markings should not occur without prior warning.

In essence, the main issue identified by the complainant in support of this argument relates to the lowering of his earlier markings on "attitude to work and dealings with others" because of the alleged personal resentment of the reporting officer towards him. But in Judgment 4564, consideration 6, the Tribunal observed that a staff report "is an entirely separate document from previous staff reports [and that] a staff member cannot reasonably expect that favourable ratings that may previously have been awarded to her or him will automatically be maintained" (see also Judgment 1688, consideration 6). In that same judgment, in consideration 9, it added that "Circular No. 246 setting out '[g]eneral guidelines on [r]eporting', which was in force at the time, did not require an employee to be formally notified in advance of a

proposed rating unless 'he [was] in danger of receiving an overall marking or a marking for any aspect under review less than '"good"'". In addition, in the present case, the alleged personal resentment of the reporting officer does not stand scrutiny in view of the earlier comments of the Tribunal about the unfounded conflict of interest and bias allegations discussed before. Besides that, the complainant simply does not substantiate his plea that the staff report was tainted by non-compliance with administrative instructions or by arbitrary behaviour.

This fourth argument is unfounded and must be rejected.

14. With respect to the fifth argument of the complainant to the effect that the Organisation did not comply with its duty of care by allocating duties to him in disregard of the health challenges that he was facing, the Tribunal observes that, inasmuch as the impugned staff report is concerned, the strength of this assertion is dependent on whether the complainant can establish that the reporting officer was influenced in lowering his performance assessment as a result of his medical or health condition. However, the record simply does not support that. It rather indicates that the reporting officer took into account these health challenges of the complainant when he assessed positively the latter's "attitude to work and dealings with others". On this specific point, the IAC indeed noted that there was no suggestion that the complainant's performance ratings had been lowered because of delays or that his state of health had further impacted his performance.

In his complaint, the complainant in fact insisted upon the fact that the Organisation allegedly disregarded for over seven months his request that some of his responsibilities be reduced because of a health issue with his vision. He added that the Organisation had severely neglected its duty of care and the effects felt by him by taking too long to address this issue such that it became a "nightmare" for him and caused him very severe consequences. But in a situation where the complainant fails to establish any breach of the duty of care from the EPO and, *a fortiori*, any plausible link between this alleged negligence and the marking in his staff report, this bears no relevance to the current dispute.

This penultimate argument is therefore rejected as well.

15. The last argument of the complainant pertains to his claim for moral damages. In his complaint, he seeks compensation in an amount of 30,000 euros in view of the undue belittling of his qualifications in the staff report and the lack of recognition by the Organisation that it failed to abide by its duty of care in respect to the incidents affecting his performance in the reporting period. Since these pleas are unfounded, any claim in compensation of the alleged damages suffered as a result must be rejected too.

16. But the complainant also requests moral damages for the unjustified delay in dealing with his internal appeal on an issue that he qualifies as "vital for his further career". To that end, he points to the circumstance that he lodged his internal appeal on 25 June 2007 and that it took more than four years for an oral hearing before the IAC, at the end of 2011, and another year for the latter to transmit its opinion to the President on 4 December 2012. The Tribunal observes that, in its submissions, the Organisation completely ignored this claim for moral damages for the undue delay in dealing with the internal appeal and did not offer any explanation or justification.

17. The Tribunal has long recognized that "international civil servants are entitled to expect that their cases will be considered by internal appeal bodies within a reasonable timeframe and that failure to comply with this requirement of expeditious proceedings constitutes a failing on the part of the employer organisation" (see Judgments 4655, consideration 21, 3510, consideration 24, and 2116, consideration 11). An organisation is indeed expected to process internal appeals with the requisite promptness and diligence, and it has a positive obligation to see to it that such procedures move forward with reasonable speed (see, for example, Judgments 4173, consideration 12, and 3755, consideration 15).

Under the Tribunal's case law, 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).

However, the complainant has failed to provide any persuasive evidence of the moral injury stemming from the delay notwithstanding it was over five years and was unreasonable. This claim is therefore rejected.

18. It follows from the foregoing that the complaint will be dismissed.

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