

110th Session

Judgment No. 2957

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. R. against the European Patent Organisation (EPO) on 13 March 2009 and corrected on 9 April, the EPO's reply of 21 July, the complainant's rejoinder of 19 August and the Organisation's surrejoinder of 27 November 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant, a French national born in 1952, joined the European Patent Office – the EPO's secretariat – in 1990 as an examiner, grade A2, in The Hague. Since 1 June 2002 he has held grade A4.

On 30 June 2004 he received his staff report for the period 1 January 2002 to 31 December 2003. He obtained the rating "very good" for quality and attitude to work and dealings with others, and the rating "good" for productivity and aptitude; his overall rating was also "good". As he was not satisfied with certain markings and comments contained in this report, he applied for a conciliation

procedure on 21 September 2004. He requested as a minimum that his aptitude be regraded as “very good”, that his search productivity be graded as “in the upper range of ‘good’”, that the comments in the productivity and overall rating headings be reformulated so as to be less pejorative, and that his productivity and overall ratings be regraded to “very good”. As the conciliation procedure proved unsuccessful, the mediator transmitted the file to the competent Vice-President, who decided not to amend the staff report.

The complainant filed an internal appeal on 10 February 2006 challenging his staff report for 2002-2003. He requested that his productivity, aptitude and overall ratings be changed to “very good”, that the reporting officer’s comments be reformulated in line with his requests in the conciliation procedure and that moral damages and costs be awarded to him. By letter dated 2 March 2006 he was informed that the President of the Office had decided that the General Guidelines on Reporting had been correctly applied, and consequently he had decided to refer the matter to the Internal Appeals Committee for an opinion.

In its opinion dated 11 December 2008 the Appeals Committee unanimously recommended that the comments concerning productivity be amended in such a way as to make it clear that the complainant was entitled to a “solid good” for patent searches, that his request for damages be rejected and that his legal costs be reimbursed up to a reasonable limit. It recommended by a majority that the marking for aptitude be upgraded to “very good” and that the possible effects of these changes on the overall rating be examined. By letter of 11 February 2009 the complainant was informed that the President had decided to endorse the Appeals Committee’s recommendations and, with regard to the possible consequences on the overall rating, had decided to refer the matter to the reporting officer who had performed the initial assessment to consider whether any changes were required. On 13 March 2009 the complainant filed his complaint with the Tribunal, challenging the letter of 11 February 2009 insofar as his staff report was sent back to the reporting officer for consideration and his request for moral damages was denied.

Following the letter of 11 February, the complainant's staff report was reviewed in accordance with the President's decision. The comments concerning productivity were modified and the rating for aptitude was changed to "very good". With regard to the overall rating, the reporting officer considered that the rating "good" was appropriate but decided to modify the comments made under that heading. The complainant signed the modified report on 15 May 2009, expressly indicating that he did so without prejudice to his claims before the Tribunal and stating that he disagreed with the assessment of his productivity, aptitude and the overall rating. The parties agree that the complaint must be understood as also challenging the outcome of the review carried out by the reporting officer after the filing of the complaint.

B. The complainant submits that his overall rating should have been regraded to "very good", since after the amendments to his staff report as recommended by the Appeals Committee, all evaluation points had been awarded the marking "very good", apart from a "solid good" for productivity. He considers this result to be a matter of consistency and fairness and points out that, even though assessment involves the exercise of discretion, discretion is not the same thing as arbitrary authority and should be used judiciously.

In his view, the Appeals Committee was competent to assess the consistency of the markings and to review their fairness. It should not therefore have delegated the review of the overall rating to the Administration.

Further, the complainant asserts that the EPO was wrong in sending the staff report back to the same reporting officer for consideration given that, inter alia, the latter took part in the conciliation procedure; therefore, there was a possible conflict of interest. He also contends that the EPO should be held accountable for the excessive delay in the internal appeal.

The complainant seeks the quashing of the decision of 11 February 2009 to the extent impugned; the award of the marking "very good" for his overall performance; deletion of the negative

comments under the heading “overall rating” and amendment thereof as needed to reflect the “very good” marking; moral damages and costs in accordance with Judgment 2418 which states: “Although the EPO has disputed the complainants’ claim for costs of these proceedings on the basis that their counsel is a full-time EPO staff member, it is appropriate to award each complainant 1,000 euros to cover their out of pocket expenses, time and trouble.”

C. In its reply the EPO contends that staff reports are discretionary decisions and that the scope for review by the Tribunal, and consequently also by the Appeals Committee, is limited. It adds that the Committee was right to refrain from making its own assessment, since it is for the reporting and countersigning officers to ensure that the report is consistent and coherently reasoned so that it provides a fair and balanced picture of the individual staff member.

The Organisation emphasises that, even if the Appeals Committee had recommended upgrading the complainant’s overall marking, the President could still have decided not to endorse this recommendation. It also argues that the reporting officer is in the best position to carry out the review of the complainant’s overall performance. The fact that he was requested to review the assessment he originally made of the complainant’s performance does not mean that the reporting officer’s competences should be questioned.

Concerning the alleged procedural delay, the Organisation stresses that the decision to endorse the recommendation of the Appeals Committee to submit the disputed staff report for review was taken in line with applicable rules, and that the complainant has not provided evidence of any unlawful act. In addition, it considers that the request for an award of costs should be rejected since the complaint is devoid of merit.

D. In his rejoinder the complainant reiterates his arguments. He asserts that the Appeals Committee could and should have concluded that the only reasonable overall rating the complainant could have received was “very good”.

He also criticises the fact that the negative comments made under the heading “overall rating” were not removed from his revised staff report. He contends that the comments made therein concerning his productivity, and in particular his documentation productivity, were not justified and not corroborated by any data. In his view, these negative comments are gratuitous and vexatious. He adds that, according to the data produced under the heading “productivity”, his productivity rate in documentation has improved between 2002 and 2003. His dignity having thus been impaired, he considers that he should be awarded damages.

E. In its surrejoinder the defendant maintains its position in full. According to the General Guidelines on Reporting, the only persons who could be charged with the reassessment of the revised staff report were the reporting and countersigning officers.

It points out that the overall rating is not the result of an arithmetical operation but that, pursuant to the General Guidelines on Reporting, “[e]ach Reporting Officer should combine the various aspects previously noted, together with their weighting, so as to give an integrated picture of the person reported upon”. It states that the complainant’s documentation productivity had been an issue since 1998 and that he therefore cannot claim that he did not know that improvement was needed in that area. The EPO argues that the reporting officer made correct use of his “great freedom of expression” through the comments he made concerning the complainant’s overall performance. It also indicates that the reporting officer provided figures illustrating the complainant’s performance in documentation productivity and concluded that his performance in that area needed to be improved.

CONSIDERATIONS

1. Dissatisfied with his staff report for 2002-2003 and the subsequent unsuccessful conciliation procedure, the complainant filed an internal appeal in February 2006. The Internal Appeals

Committee recommended unanimously in December 2008 that the comments regarding his productivity be amended so as to indicate that the marking “good” for patent searches denotes a “solid good”. In addition, the majority of the Committee’s members recommended that his “aptitude” be regraded from “good” to “very good” and that the possible effects of these changes on the overall rating be reviewed. Lastly, the Committee recommended unanimously that the complainant’s costs be reimbursed but that his claim for damages be dismissed. On 13 March 2009 the complainant impugned the decision of the President of the Office, communicated to him on 11 February 2009, insofar as his staff report was sent back to the reporting officer for review and his request for moral damages was denied. Following that decision, the comments made in the complainant’s staff report under the heading “productivity” were modified to reflect a “solid good”, the marking for “aptitude” was changed to “very good”, the marking for “overall rating” was maintained but the comments made in that respect were amended.

2. The parties agree that the complaint before the Tribunal must be understood as challenging the outcome of the review carried out by the reporting officer after it was filed. The complainant’s claims are mentioned under B, above.

3. The grounds for complaint are as follows:

- (a) the Appeals Committee should not have sent the staff report back for review by the Administration given that it was competent to assess the consistency of the markings and to review their fairness;
- (b) even if the Appeals Committee had the prerogative to send the matter back to the defendant for review, the latter should not have referred it to the same reporting officer who had already unsatisfactorily reviewed it;
- (c) the marking “good” for the “overall rating” is not reasonable considering that of the four aspects assessed, three are marked “very good” and one “good”; and

- (d) the negative comments under the heading “overall rating”, specifically those referring to documentation productivity, were not justified and not corroborated by data.

4. Regarding the legitimacy of the proceedings, as challenged in the grounds for complaint listed above in 3(a) and 3(b), the Tribunal notes that as an administrative body the Appeals Committee has the authority to recommend that a case be sent back for review or, in an appropriate case, to recommend a precise remedy. Therefore, the Tribunal states that in the present case the Appeals Committee properly exercised its authority by recommending that the matter be remitted for review. Furthermore, as no evidence of bias, discrimination or bad faith has been raised against the reporting officer, it was not unreasonable that the report was sent back to him for further review.

5. Regarding the grounds for complaint listed above in 3(c) and 3(d), the Tribunal rejects the view of the complainant that the overall rating of “good” instead of “very good” was unreasonable and that the corresponding comments were not justified. Part V of the General Guidelines on Reporting requires that the marking for the overall rating must be made according to the relevant weights of all aspects of the performance so as to give an integrated picture of the person being reported upon. In this case, as noted in the comments under the heading “overall rating”, the marking “good” is clearly motivated by the fact that productivity (for which the complainant was marked “good”) carried significant weight. In these comments the complainant is described as a dependable and very conscientious competent examiner who produces very good quality work. With respect to productivity, it is indicated that the complainant has improved and reached the level of “solid good” in research but that in documentation productivity further efforts must nevertheless be made before reaching a level considered commensurate with his experience in the technical field. It is further indicated in the report that considering the comments and markings of the various sections of the

staff report, as well as their respective weight and importance, the overall rating has to be considered as placed in the high end of “good”.

6. Regarding documentation productivity, the complainant observes that “the data show that [he] classified 664 documents in 16 days in 2002, and 791 documents in 20 days in 2003 [...] at an average rate of 12 minutes per document [and that] [t]here is no data available to justify a negative appraisal of [his] performance in classification”. The Tribunal observes that under the heading “productivity” of the revised report, the reporting officer indicated that the complainant’s research productivity had improved and had reached a level of “solid good” and that his documentation productivity had to be reviewed. Moreover, during the conciliation procedure the complainant expressed his disappointment with the comments on his overall rating, noting that they did not properly represent the improvements he had made nor did they show that his performance was in the high end of “good”. Also, the reporting officer and the countersigning officer both noted that the complainant’s documentation productivity rate of about 11 minutes and 30 seconds per document was significantly lower than the office average and that he should improve.

Considering the details of the conciliation report, as well as those listed in the comments of the revised staff report regarding the complainant’s productivity rates, it is clear that the Organisation has justified the marking for productivity and, contrary to the complainant’s belief, this marking is in no way to be considered a negative appraisal in light of section III.2 of Communiqué No. 99 which states in particular that “staff whose performance has met the

standards required of them will be rated ‘good’. Thus ‘good’, the mark awarded to the large majority of staff, is a positive rating.” In the light of these considerations, the Tribunal is of the opinion that the first three claims, as listed in B above – quashing of the decision of 11 February 2009 to the extent impugned, award of the marking “very good” for the overall performance, deletion of the negative comments under the heading “overall rating” and amendment thereof as needed to reflect the “very good” marking – are unfounded, that the comments made under the heading “overall rating” in the staff report are justified and that the overall rating of “good” does not involve reviewable error.

7. The Tribunal finds that the Organisation failed to deal with the complainant’s appeal in a timely and diligent manner. In the present case the appeal was filed in February 2006 and the President’s decision to endorse the appeal was communicated to the complainant three years later on 11 February 2009, which is an unacceptable delay requiring an award of moral damages in the amount of 1,000 euros. As the complainant succeeds in part he is entitled to costs in the amount of 500 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 1,000 euros in moral damages and 500 euros in costs.
2. All other claims are dismissed.

In witness of this judgment, adopted on 29 October 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet