M. (J.)

v.

EPO

122nd Session **Judgment No. 3697**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. M. against the European Patent Organisation (EPO) on 17 December 2013, the EPO's reply of 4 August 2014, the complainant's rejoinder of 1 October and the EPO's letter of 15 October 2014 informing the Registrar that it did not wish to enter a surrejoinder;

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 contests the decision to reject his internal appeal against the written notification issued to him by his Director in the context of the performance appraisal process.

The complainant joined the EPO in 2008 as an examiner. In February 2011 the rate of productivity expected of him was reduced by 20 per cent on health grounds. On 18 February 2011 his Director issued him with a written notification under Section A(6) of Circular No. 246 entitled "General Guidelines on Reporting" to warn him that, in view of a decline in his performance and in particular his productivity during 2010 and early 2011, he was in danger of receiving in his staff report a marking of "less than good" for production and productivity as well as

for his overall rating. By an e-mail of the same day, also copied to his Principal Director, the complainant replied that he considered this notification to be inappropriate and ill-timed, because it failed to take into consideration the state of his health.

On 15 March the complainant sent another e-mail to his Director, again copying his Principal Director, in which he requested that the written notification of 18 February be withdrawn. In the event that his request was not granted, he asked that his e-mail be treated as an internal appeal under Articles 106 to 108 of the Service Regulations for permanent employees of the European Patent Office. By a letter of 9 May 2011, the Director of the Employment Law Directorate informed the complainant that, after an initial examination, the President of the Office had decided not to grant his request and to refer the matter to the Internal Appeals Committee (IAC). He pointed out that a written notification under Section A(6) of Circular No. 246 was not a decision adversely affecting the complainant within the meaning of Article 107(1) of the Service Regulations, as it did not *per se* have an effect on his rights and obligations. Consequently, it could not be challenged by means of an internal appeal. The letter stated that his appeal was thus irreceivable.

Having held a hearing in November 2012, the IAC submitted its opinion on 30 July 2013. It found that the appeal was admissible, since it considered that a written notification under Section A(6) of Circular No. 246 was in fact an act adversely affecting the complainant. It concluded unanimously that, while a written notification may have been justified for the reporting period 2010-2011, the fact that it was issued at that particular time and in those particular circumstances was "appalling and callous" and amounted to a violation by the EPO of its duty of care towards the complainant. It recommended that the EPO award the complainant moral damages in the amount of 3,000 euros and costs upon the presentation of evidence.

By a letter of 24 September 2013, the Vice-President for Directorate General 4 (DG4), acting by a delegation of power from the President, informed the complainant of the decision to reject his internal appeal as irreceivable and unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to determine that the written notification of 18 February 2011 was issued by the EPO in breach of its duty of care towards him. He claims moral damages in the amount of 3,000 euros and an award for costs.

The EPO requests the Tribunal to reject the complaint as irreceivable in its entirety.

CONSIDERATIONS

1. The complainant impugns the decision of the Vice-President of DG4, taken on 24 September 2013 by delegated authority from the President, to reject his internal appeal against the written notification he received regarding his performance for 2010-2011. The Vice-President found his appeal to be irreceivable based on the Tribunal's case law, specifically noting the Tribunal's ruling in Judgment 3198 that appeals against notifications under Section A(6) of Circular No. 246 are irreceivable. The Vice-President also decided not to endorse the IAC's unanimous recommendation that the issuing of the notification at that particular time amounted to a breach of the EPO's duty of care, which should be remedied by an award of moral damages. He noted that the IAC had "overlook[ed] the fact that a line manager is under an obligation to inform each staff member about the minimum required to justify a 'good' marking and to notify him 'as early as possible, with confirmation in writing' if he is in danger of receiving a lesser overall or partial marking, 'in order to give him a chance to improve before the end of the reporting period' (Circular No. 246, [Section] A(6))". He considered that it was in the complainant's best interest to receive the notification without delay, as any such delay would have reduced the time available for the complainant to take remedial steps.

2. The complainant submits that it is a long-standing practice of the IAC to consider a written notification pursuant to Circular No. 246 as an act adversely affecting a staff member, thus his internal appeal

before the IAC was considered admissible. In this regard the IAC, in its opinion dated 30 July 2013, stated inter alia:

> "[A] reporting officer cannot give a marking of less than good, if he has not properly warned the staff member before. Legally speaking, the staff member concerned, once he receives a warning, loses his original right to a 'good' marking in the staff report. Since a legitimate expectation is taken away, his position in law changes, therefore there is an 'act adversely affecting him'."

The complainant asserts that his Director, in keeping with the duty of care owed to him, should have considered his health issues to be more important than the obligation to notify him as soon as possible of the danger of receiving a marking of "less than good" in accordance with Circular No. 246, Section A(6). He adopts the reasoning and conclusions of the IAC and asks the Tribunal to award him 3,000 euros in moral damages for the breach of the EPO's duty of care, and to award him costs. He also asks the Tribunal to set aside the decision of 24 September 2013 and to hold oral hearings.

3. The EPO was allowed by the President of the Tribunal to limit its submissions to the issue of receivability. It submits that the complaint should be declared irreceivable on the ground that a written notification under Section A(6) of Circular No. 246 is not an act adversely affecting an employee and is, consequently, not a final decision eligible for review within the meaning of the Service Regulations and the Tribunal's Statute. The EPO also notes that a conciliation procedure under Section D of Circular No. 246, with regard to the complainant's staff report for the relevant period, was ongoing at the time it filed its reply.

4. The complainant has applied for oral proceedings but has given no justification for his application and, in fact, does not even mention it in his complaint brief. As the facts are fully documented and uncontested and the case turns on a question of law, the application for oral proceedings is rejected.

5. The Tribunal finds that the complaint is irreceivable. Consistent case law holds that a written notification issued within the context of a performance evaluation is not a final measure adversely affecting an

employee (see, for example, Judgment 3629, under 3). The Tribunal considers that such written notifications are administrative acts forming part of the procedure which concludes in the drafting of a staff report. Their aim is to help the staff member reach the required marking by notifying her or him of the potential for a marking of less than "good" while giving her or him time to correct it (see Judgment 3433, under 8). The assertion that an employee has a "right" to a marking of "good" in the absence of a written notification is mistaken. What an employee has is a legitimate interest in having her or his performance fairly evaluated in accordance with the relevant rules and procedures of the Organisation and also in being warned in a timely manner if she or he is at risk of receiving a marking of less than "good". The Tribunal finds that the aim of these written notifications is to give the employee the benefit of an opportunity to improve before the end of the reporting period and that a written notification cannot be taken into account to the detriment of the employee (see Judgment 3629, under 3). As the written notification itself had no adverse effect on the complainant, the complaint in relation to that notification is irreceivable and will be dismissed.

6. Inasmuch as the claim relating to the breach of the duty of care arises directly from the claim concerning the notification of the warning, it is also irreceivable and will likewise be dismissed.

7. In light of the above considerations, the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ