

**109th Session**

**Judgment No. 2930**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. S. against the European Patent Organisation (EPO) on 10 July 2008 and corrected on 15 October 2008, the EPO's reply of 27 February 2009, the complainant's rejoinder of 18 May, and the Organisation's surrejoinder of 19 August 2009;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant is a German national born in 1965. He joined the European Patent Office, the EPO's secretariat, at its Headquarters in Munich, on 1 March 1991, as an examiner at grade A2. As from 1 January 1993 he was assigned to the Principal Directorate of Examination and Opposition 1.

On 31 May 2000 the complainant's director, who was also his reporting officer, issued a written warning to the complainant as he would, he explained, to any person in his directorate whose

performance is likely to result in a marking of less than “good”. He informed him that he might no longer be his director in September because of a reorganisation within the directorate. Consequently, an intermediate staff report might be written with regard to his performance at the end of August and he might get a marking “less than good” as his productivity was below average for the period 1 January to 27 May 2000. A meeting was held on 19 July between the complainant and his director in which they discussed his low productivity and the measures that could be taken to increase it. Hence, the complainant agreed to participate in training courses. On 9 November 2000 the director notified the complainant that he was worried about the processing backlog of two years for some of his files and set precise deadlines for the processing of these files. On 13 February 2001 he commended the complainant’s increased productivity but at the same time called on him to improve the setting of priorities in his work. He also exhorted him to observe the Office’s working hours.

On 17 August 2001 the director issued another written warning drawing the complainant’s attention to the fact that, for the period from January to July 2001, he would award him a marking less than “good” with regard to the quantity and quality of work as well as for his attitude, unless he met the objectives determined therein. By a letter of 25 September he notified the complainant that he was not satisfied with his attitude as he had postponed a course without informing him. He also set a deadline for the processing of his overdue files. The complainant replied on 11 October that, despite his efforts to increase his productivity, he would not be in a position to meet the deadline. He applied for an immediate transfer to another directorate alleging that he was subjected to written threats, bullying, intimidation, and unfounded accusations. The Principal Director of Examination and Opposition 1 informed the complainant by a letter of 29 October 2001 that he was the competent authority with regard to transfers but that he was unable to accede to his request on the ground that the directorate had recently been reorganised and that his two-year reporting period was about to come to an end.

In the meantime, on 10 October 2001 the complainant and his director met with a view to preparing his staff report for 2000-2001. On 11 September 2002 the director signed the staff report. The complainant signed it on 30 January 2003; however, he appended a letter in which he explained why he did not accept the marking given to him. The overall level of his performance was considered to be “unsatisfactory”; his aptitude was considered “less than good”, the quality of his work, his productivity and his attitude to work were deemed “unsatisfactory”. The director stated as a supplementary remark in the staff report that the complainant took an amount of sick leave which “far exceede[d] the average taken by other examiners in the directorate”. Following the complainant’s letter, his director signed the report on 3 February without modifying his assessment. The following day, the countersigning officer signed the report without adding any comments.

On 6 October 2003 the complainant applied for a conciliation procedure, which resulted in a partial agreement. Hence, some of the comments made in the staff report under the following headings: “productivity”, “dealings with others” and “overall rating” were modified. The Vice-President in charge of Examination and Opposition signed the report on 14 September 2004 stating that no further amendments, other than those agreed, were necessary. In turn, the complainant signed the report on 29 November 2004.

The complainant filed an internal appeal on 14 February 2005 challenging his staff report for the period 2000-2001. He alleged that it was procedurally flawed, that some markings were unjustified and unfair, and that it was tainted with abuse of authority. He also criticised his director’s behaviour towards him, alleging, inter alia, bullying. By a letter of 3 March 2005 he was notified that the President of the Office had considered that the statutory requirements on staff reports had been followed and, consequently, that the matter was referred to the Internal Appeals Committee. On 1 May 2007 the complainant was transferred to The Hague.

The Committee heard both the complainant and his director before issuing its opinion of 14 February 2008. It recommended therein that

the appeal be allowed in part. It unanimously considered that the assessment of the complainant's productivity should be reviewed taking into account his improved performance over the period under review. It was also unanimous in holding that the assessment of his aptitude to work was procedurally flawed for lack of warning. It therefore recommended that the comments accompanying the assessment for productivity be amended in the light of the 2001 productivity data and that on the basis of these data the reporting officer, i.e. the complainant's director, subsequently assess whether the rating for productivity should be modified or not. It also recommended that the rating and comments concerning the complainant's aptitude be reviewed and that he be awarded a marking of not less than "good". It further held that the amendments agreed during the conciliation process should be inserted in the revised staff report and that the supplementary remark on sick leave should be reformulated in neutral terms. Lastly, it unanimously recommended that half of the reasonable and documented costs be reimbursed. With regard to the assessment of the quality of work and attitude, all of the members of the Committee did not share the same view. Thus, only the majority held that the staff report was not vitiated in that respect, and recommended that the assessment concerning quality and attitude remain as it was. In addition, only the majority took the view that the reporting officer should assess whether the overall rating should be modified based on the results of the review concerning productivity and aptitude. The minority was of the view that the report was tainted with prejudice and recommended that it be set aside in its entirety.

By a letter of 15 April 2008, which is the impugned decision, the complainant was informed that the President had decided to endorse the unanimous recommendations of the Internal Appeals Committee and to follow the majority opinion with regard to the issues on which there was disagreement. On 20 June 2008 the complainant received a revised staff report indicating that his aptitude to work was "good" but that the quality of his work, his productivity and his attitude were "unsatisfactory"; the overall rating was "unsatisfactory".

B. The complainant submits that neither the nature of his duties nor the quality of his work for the period 2000-2001 justify a rating below “good”. He stresses that part of his duties included being chairman in the examination procedure, which is a duty usually undertaken by examiners holding grade A3. It shows that his director considered him competent enough to carry out duties of a higher level.

He contends that, in accordance with Circular No. 246, each aspect evaluated in the staff report should be assessed separately. He therefore contests the “unsatisfactory” rating attributed for the quality of his work explaining that his director took into consideration the fact that he did not meet the deadlines, which was a matter relating to his productivity and not to the quality of his work. Moreover, there was a discrepancy between the director’s comments and the rating he gave him. Thus, although he had acknowledged that the quality of his work was good he gave him the rating “unsatisfactory”. He adds that the good quality of his work was confirmed by a quality test carried out by the Directorate of Harmonisation and Quality. He calls on the defendant to produce the reports established by that Directorate in 2000 and 2001. In addition, he argues that other examiners for whom the test showed some deficiencies obtained a better rating than him with regard to the quality of their work.

The complainant considers the revised staff report he received on 20 June 2008 to be unacceptable and he asks that it be modified. He explains that his director amended the rating with regard to his aptitude from “less than good” to “good”, as requested by the President, but maintained his negative comments. It shows a lack of objectivity in drafting the report since different ratings were granted on the basis of the same remarks. He also points out that his director’s negative comments concerning sick leave were not removed contrary to the President’s decision. In addition, he criticises his director’s “overall behaviour” and contends that his staff report for the period 2000-2001 should be annulled on the ground that it was tainted with bias and bad faith.

The complainant asks the Tribunal to quash the impugned decision, to annul the staff report for the period 2000-2001 and to

award him moral damages. He asks for a new staff report to be issued for that period with “better box markings” regarding quality, productivity, attitude and overall rating. He claims costs in the amount of 2,500 euros.

C. In its reply the EPO contends that the claim for moral damages is irreceivable for failure to exhaust internal means of redress. It indicates that the complainant withdrew this claim during the internal appeal procedure.

On the merits, the Organisation indicates that decisions concerning staff reports are discretionary and subject to only limited review and that, in accordance with the Tribunal’s case law, the review should be even more limited as there is a conciliation procedure on staff reports. In its view, the limits of the director’s discretion have not been overstepped.

As to the quality of the complainant’s work, the defendant submits that he was given sufficient warning that he might get a marking “less than good” and, thus, was given the opportunity to overcome his shortcomings, which he did not. Moreover, it is not unusual for a grade A2 examiner to be appointed as chairman in examination procedures. It explains that the positive quality of individual pieces of the complainant’s work was outweighed by the processing backlog to such an extent that the rating “unsatisfactory” was deemed justified by his director. The majority members of the Internal Appeals Committee shared his view. It adds that the quality tests performed by the Directorate of Harmonisation and Quality were merely spot checks that could not be used to replace a staff report. Indeed, only the complainant’s director was in a position to observe and assess his work throughout the entire reporting period. It further asserts that the director’s comments in the staff report were coherent and objectively substantiated and did not involve any abuse of authority. In that respect, it explains that a work of good quality is distinguished not only by its content but also by its prompt delivery. The Organisation points out that several warnings were issued concerning the complainant’s poor productivity and that he was given sufficient time to increase it, as required by Circular No. 246. On the basis of the new

productivity data, the complainant's director reassessed whether the relevant marking had to be changed; he held that, although the complainant's performance had improved, at the material time no one had a weaker productivity than he did.

As to the complainant's aptitude, it states that the comment in the staff report that could have been regarded as inconsistent with the marking "good" has been deleted. Lastly, it asserts that the remarks concerning sick leave were reformulated in neutral terms.

D. In his rejoinder the complainant indicates that he received the second revised staff report – which is annexed to the Organisation's reply – only on 15 September 2008, i.e. after having filed his complaint with the Tribunal. He therefore asks the Tribunal not to take it into consideration and to refer instead to the revised staff report he received on 20 June 2008. He adds that the checks conducted by the Directorate of Harmonisation and Quality were of high quality and maintains that his director was biased against him and that his attitude was "bordering on" mobbing.

In addition, he submits that the EPO has not yet reimbursed his legal costs as ordered by the President. He also criticises the Internal Appeals Committee's recommendation that only half of the costs incurred in the course of the internal appeal procedure be reimbursed. Since his appeal was successful, at least in part, all his costs should be reimbursed.

E. In its surrejoinder the Organisation explains that, as the complainant's director had not implemented the President's decision in full in the staff report received by the complainant on 20 June 2008, a second revised version was sent to him on 12 August 2008. Hence the first revised version was superseded by the second one, in which comments and markings were consistent. Thus, the first revised version, on which the complainant's arguments are based, is no longer valid. The defendant further denies that the assessment made by the complainant's director showed bias towards him; in support of its view, it draws attention to the complainant's recent staff reports, according to which his performance is still unsatisfactory.

The defendant indicates that the complainant was informed by a letter of 15 April 2008 that half of his “reasonable” costs would be reimbursed, but that the invoice he had submitted was not acceptable. He was therefore requested to produce another invoice, which he has not yet done. On 16 July 2009 the Administration again requested the complainant to send such an invoice.

## CONSIDERATIONS

1. The complainant lodged an internal appeal challenging his 2000-2001 staff report. By a majority the Internal Appeals Committee recommended that the appeal be allowed in part, indicating various areas in which the report required amendment. A minority of the Committee recommended that the appeal be allowed and the report set aside in its entirety. The minority recommendation was based on its finding of prejudice on the part of the reporting officer. On 15 April 2008 the President of the Office adopted the majority recommendation.

2. The complainant asks the Tribunal to set aside that decision as well as his staff report for the period 2000-2001. Additionally, he asks for a new staff report to be issued with specific markings and seeks moral damages and costs.

3. In his internal appeal the complainant claimed in particular that he had been the victim of bullying on the part of his director, who was also his reporting officer. It took the form of “written threats, intimidation, groundless accusations [...] with a view to [his] public humiliation, betrayal of confidence and ultimately the complete breakdown of any rational communication with [his] then superior”. The majority of the Internal Appeals Committee rejected these claims as “unproven”, although it noted that the relationship between the complainant and his director had become increasingly strained. However, unlike the minority, it did not specifically consider whether the staff report had resulted from prejudice. Instead, it found that the inaccuracies it identified did not, individually, constitute an “abuse of

authority” and concluded that the “report [did] not reveal any flaws which would justify its complete retraction”. This approach involved an error of law. It was not sufficient to consider in relation to each inaccuracy whether it, standing alone, was an abuse of authority. Rather, it was necessary to consider whether, in the light of the evidence, including the various inaccuracies which it identified, the report as a whole was the result of prejudice on the part of the reporting officer.

4. There was considerable evidence before the Internal Appeals Committee of the attitude of the reporting officer towards the complainant, including that in October 2001 he raised his voice to the complainant “at [a] time where [he] admit[ted that he] was completely fed-up with the situation and [he] told him so”. Additionally, the reporting officer acknowledged that he had failed to take account of efforts, which resulted in regular improvements during the reporting period, and, also, made an error with respect to the complainant’s productivity in the latter part of the reporting period. These errors were not explained. In the absence of any explanation, these matters indicate an inability on the part of the reporting officer to bring a fair and open mind to the question of the complainant’s performance. That inability is confirmed by the fact that he reported the amount of the complainant’s sick leave to the Administration, even though it kept its own sick leave records, and admitted before the Committee that he “was frankly of the opinion that [the complainant] was abusing the sick leave provisions”. Moreover, and although it was subsequently ascertained by the reporting officer that the complainant was genuinely ill, he made no allowance for his illness in the staff report. In view of these matters, it is properly to be concluded that the reporting officer’s report was tainted with prejudice, as found by the minority of the Committee. It follows that the complainant’s revised 2000-2001 staff report must be set aside. That conclusion is not controverted by the EPO’s claim that bias should not be inferred because the complainant’s subsequent staff reports drawn up by different reporting officers also indicate that his service has not been

satisfactory. Those subsequent reports are irrelevant to the question of prejudice on the part of the reporting officer.

5. Although the complainant asks for specific “box markings” in his 2000-2001 staff report, this is not a matter for the Tribunal. The matter must be remitted to the EPO to prepare a new staff report for the relevant period. Given the finding of prejudice on the part of the reporting officer, the new report must be drawn up by another officer based on the relevant documentation.

6. The Organisation contends that the complainant’s claim for moral damages is irreceivable on the basis that he withdrew his claim for “damages for pain and suffering” during the internal appeal proceedings. That argument must be rejected. Moral damages are an available remedy in circumstances where error or delay has resulted in moral damage. The complainant was given a staff report which admittedly involved errors, and which should have been set aside in its entirety. Given this and the finding of prejudice, the complainant is entitled to moral damages in the sum of 7,000 euros. He is also entitled to costs in the sum of 1,000 euros for this complaint. The Tribunal makes no order for the costs of the internal appeal which have already been accepted by the President of the Office.

## DECISION

For the above reasons,

1. The impugned decision is set aside, as is the complainant’s revised staff report for the period 2000-2001.
2. The case is sent back to the EPO for a new staff report to be prepared in accordance with consideration 5 above.
3. The EPO shall pay the complainant 7,000 euros in moral damages and 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 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 8 July 2010.

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