115th Session **Judgment No. 3198**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. N. M. against the European Patent Organisation (EPO) on 2 March 2010 and corrected on 24 March, the Organisation's reply of 19 July, the complainant's rejoinder of 22 September and the EPO's surrejoinder of 22 December 2010;

Considering Articles II, paragraph 5, and VII 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 is a Spanish national, born in 1965, who joined the European Patent Office – the EPO's secretariat – in 1996 as an examiner at grade A2. He works at the Office's Berlin sub-office and currently holds grade A3.

Pursuant to Article 47 of the Service Regulations for permanent employees of the European Patent Office, the complainant receives a staff report at least once every two years in which his ability, efficiency and conduct are assessed. Circular No. 246 sets out

"General Guidelines on Reporting", which detail the procedure to be followed by reporting officers in drawing up a staff report, as well as the conciliation procedure to which staff members may resort in the event that a dispute arises in connection with a staff report. At the material time, Section A, paragraph 6, of the Guidelines relevantly provided:

> "Discussion between staff member and Reporting Officer at the start of each year, together with regular review and feedback, is an important aspect of management and staff guidance. In particular each staff member should be informed about what is at least required from him to justify a 'good' marking.
>
> A staff member will be notified as early as possible, with confirmation in writing, if he is in danger of receiving an overall marking or a marking for any aspect under review less than 'good' in order to give him a chance to improve before the end of the reporting period […]."

On 20 July 2006, after having met with the complainant to discuss his performance, the complainant's reporting officer sent him an e-mail confirming that his productivity during the period January-June 2006 had been insufficient and that this could lead to a marking of "less than good" at the end of the reporting period. He pointed out that in 2005, with a productivity factor of 0.7, the complainant's marking had already been "at the lower part of good", and that his productivity for 2006 was currently well below that level. To enable the complainant to improve his performance, the reporting officer suggested that, for the next three months approximately, he should check his work with a colleague on a regular basis in order to gain advice as to how he might work more efficiently. Both he and his colleague would be credited with sufficient time for that purpose in the electronic workflow monitoring system. The reporting officer also confirmed that he would provide the complainant with the productivity data he had requested concerning other examiners working in his technical field. This e-mail was copied to the Personnel Directorate with a request that it be placed in the complainant's personal file.

In a letter of 7 August, likewise copied to the Personnel Directorate, the complainant contested the reporting officer's

assessment, which he considered to be unsubstantiated, particularly because the data concerning other examiners had not yet been obtained. Moreover, it appeared to the complainant that the reporting officer had not complied with the Code of Practice of 12 July 2002 concerning the assessment of examiners' productivity, because he had not taken into account the fact that, during the period at issue, the complainant had performed numerous additional duties which did not count towards his productivity factor. The complainant concluded that the reporting officer's warning was null and void and he requested that the e-mail of 20 July be removed from his personal file.

The reporting officer then provided the complainant with the requested productivity data relating to other examiners and invited him to discuss his concerns with him at a second meeting. However, the outcome of that meeting was that the reporting officer reiterated his warning concerning the complainant's productivity in a letter dated 4 September 2006, stating that unless the complainant achieved a productivity factor of 0.8 by the end of the reporting period, he ran the risk of obtaining a marking of "less than good". On 20 September the complainant was informed by the Personnel Directorate that this letter would be placed in his personal file, but not the e-mail of 20 July containing the first warning.

By a letter of 17 October 2006 the complainant submitted an internal appeal to the President of the Office seeking the withdrawal of the warnings concerning his productivity. He claimed material damages on the basis that the presence of an unjustified warning in his personal file could adversely affect his career progression. He also claimed moral damages on the grounds that the warnings had caused him significant stress and that some of the proposed measures to improve his performance were tantamount to compelling him to carry out his work as an examiner in breach of the provisions of the European Patent Convention. He also claimed costs. On 23 October he was informed that, after an initial review of the case, the President considered that his appeal could not be allowed, and that it had therefore been referred to the Internal Appeals Committee for an opinion.

The Office argued before the Committee that the complainant's appeal was irreceivable, because it was directed against a decision which had not adversely affected him, the purpose of the warning being to help him improve his performance. It also submitted that the appeal was premature, since the final decision on his performance had not been taken until June 2008, when he had received his staff report for the period at issue. This line of argument was rejected by the Committee, which unanimously held in its opinion of 12 October 2009 that the appeal was receivable because the complainant's interests might be harmed if the warning placed in his personal file were erroneous. Furthermore, in view of the requirement under the General Guidelines on Reporting that a marking less than "good" be preceded by a written warning, once such a warning had been issued, the complainant was adversely affected by it to the extent there was no longer any guarantee that his marking would be at least "good". The members of the Committee disagreed on the merits of the appeal. The majority held that the complainant had not established any flaw in the reporting officer's assessment, nor any breach of the applicable procedures or misuse of authority, and that the appeal should therefore be dismissed as unfounded. The minority, however, concluded that the reporting officer had failed to comply with the above-mentioned Code of Practice and that the target productivity factor of 0.8 was not only excessively high in light of the available statistics but also unrealistic in view of the time frame. The minority recommended that the warning be removed from the complainant's personal file and that he be awarded moral damages and costs.

By a letter of 10 December 2009 the Director of Regulations and Change Management informed the complainant that the President had decided to dismiss his appeal as irreceivable on the grounds that neither the issuing of a warning under Section A, paragraph 6, of the General Guidelines on Reporting nor the placing of such a warning in a staff member's personal file constituted an act adversely affecting the staff member, within the meaning of Article 107(1) of the Service Regulations, against which an appeal would lie. The President also considered that the appeal was premature, since the complainant had

filed it without having first availed himself of the conciliation procedure. Regarding the merits of the appeal, the President had decided to follow the majority opinion of the Internal Appeals Committee and to reject the appeal as unfounded in its entirety. That is the impugned decision.

B. The complainant submits that any warning letter placed in a staff member's personal file must comply with the applicable regulations and must be correct in substance, because it will be relevant to decisions on promotion and on selection processes and may therefore have negative consequences for the staff member concerned. In his view, the warning letter of 4 September 2006 was flawed in both respects.

According to the complainant, that warning was based solely on his productivity factor which, at 0.59, was said to be far below the target of 0.8 as well as the average of 0.98 achieved by examiners working in the same technical field in Munich and The Hague. He had already drawn the reporting officer's attention to the fact that his case deviated from the norm, particularly with respect to the range of duties that he performed, and in these circumstances the reporting officer ought to have followed the Code of Practice in assessing his productivity; yet none of the points that he raised was addressed by the reporting officer in his written warning. Moreover, the comparison with examiners in Munich and The Hague was incorrect, because the group of eight examiners on which it was based was too small to constitute a representative sample. The complainant infers from the above that the Code of Practice was not applied at all in his case.

He also contends that, even if it is assumed that the reporting officer did not have to apply the Code of Practice, his assessment of the complainant's productivity did not support the conclusion that he was at risk of obtaining a marking of "less than good" for productivity. Indeed, in light of the available statistical data, the probability of obtaining such a marking was no greater than 12 per cent at the time when the warning was issued. Furthermore, the reporting officer ignored the fact that his productivity was then

following an upward trend, which made it all the less likely that a rating "less than good" would ensue. As for the target productivity factor of 0.8 which he was expected to achieve in order to avoid a rating less than "good", the complainant submits that this figure was far too high, since it corresponded to a marking close to "very good". Noting that the initial warning of 20 July had referred to a productivity rating of 0.7, he points out that this target was arbitrarily raised to 0.8 in the second warning without the slightest justification.

According to the complainant, the proposed measures to help him improve his performance could not have led to increased productivity before the end of the reporting period. Indeed, they could even be viewed as counterproductive insofar as the time spent on them would delay the performance of other tasks without having any positive impact on his productivity rating.

The complainant states that the warning of 4 September caused him considerable stress, particularly because his attempts to explain why his case warranted the application of the Code of Practice were simply ignored. He regrets that the Office has wrongly interpreted the improvement in his productivity that occurred during the second part of the reporting period as a positive effect of the warning.

The complainant asks the Tribunal to order the removal of the warning of 4 September 2006 from his personal file *ex tunc* or, failing that, *ex nunc*. He claims damages in an amount equal to his basic salary for the period July to December 2006, plus 500 euros per month from January 2007 "up to present". He also claims costs.

C. In its reply the EPO submits that the complaint is irreceivable *ratione materiae*, because a notification under Section A, paragraph 6, of the General Guidelines on Reporting does not constitute an act adversely affecting the complainant within the meaning of Article 107(1) of the Service Regulations. Furthermore, at the time when he filed his appeal, no final decision had been taken on his performance in the reporting period at issue, and the appeal was therefore premature. In any case, he had not exhausted the internal remedies available to him, since he had not availed himself of the

conciliation procedure provided for in Section D of the General Guidelines on Reporting. In the Organisation's view, as the internal appeal was irreceivable, so too is the present complaint.

On the merits, the EPO recalls that, according to the Tribunal's case law, decisions concerning staff reports involve the exercise of discretion and are therefore subject to only limited review by the Tribunal. It emphasises that in this case the reporting officer had a duty under the General Guidelines on Reporting to issue the disputed warning. According to the Organisation, the reporting officer did apply the Code of Practice, since he took into account the specificities of the complainant's case. However, he did not consider that the complainant's case deviated from the norm, because he was performing the same tasks as his colleagues. Regarding the comparison that was made with other examiners working in the same technical field, the EPO points out that this matter lay within the discretion of the reporting officer and that, in any case, there was no flaw in the choice of a sample group.

The Organisation denies that the measures proposed to improve the complainant's productivity were counterproductive and points out that, even if they were, the warning itself would not be invalid on that account. It argues that even if the measures in question had not achieved their goal immediately in 2006, they would nevertheless have had a positive effect on his staff report for the 2006-2007 period.

The EPO concludes that the inclusion of the disputed warning in the complainant's personal file was entirely justified and that his claim to have it removed *ex tunc* should therefore be rejected. Moreover, it states that the warning has already been deleted from his personal file, so that his claim to have it removed *ex nunc* is moot. It considers that the complainant's claim for damages must be rejected, given that he has not proved that the impugned decision was unlawful or indeed that it caused him any injury, and that his claim for costs should likewise be rejected, since, in its view, his complaint is unfounded.

D. In his rejoinder the complainant states that the arguments raised by the defendant do not lead him to alter the reasoning set out in his

complaint. In his view his complaint is receivable. On the merits he considers that, as the Organisation alone has access to all the relevant productivity data, it bears the burden of proving that the Code of Practice was applied, and in this case it has failed to do so. He contends that he is entitled to moral damages because the inclusion of the warning in his personal file caused him to sustain severe psychological pressure, anxiety and physical stress in both his professional and personal life.

E. In its surrejoinder the EPO maintains its position in full.

CONSIDERATIONS

1. The complainant challenges the decision of 10 December 2009 and, ultimately, the "written warning" contained in the letter to him from the reporting officer, dated 4 September 2006. The first relief which he claims is an order from the Tribunal to remove this warning *ex tunc* from his personal file, so that any hint of its existence is deleted as if it never existed. In the alternative, he seeks an order removing the warning from his personal file *ex nunc*. In the third place, the complainant claims damages, including moral damages, and the reimbursement of his costs in these proceedings.

2. Setting out the contents of the e-mail of 20 July 2006 – which contained the initial warning – in detail would provide a perspective of its tone and intent. It stated as follows:

> "Dear E.,
>
> as discussed in our interview today, I would like to confirm in written form following points:
>
> - there is no question as to [whether] you work hard, however the results of this work, i.e. 21 searches and 6 examinations for 97 days of core time in jan-june 2006 are not sufficient and could lead to a box marking less than good in productivity by [the] end of the reporting period. Indeed, an extrapolation, considering the expected core time for this year, very similar to the one used last year, would lead to about 42 searches and 12 examinations, well below the 51 searches and 20 examinations of 2005,

> which were already, as stated in your staff report [for] 2004-2005, at the lower part of good with a productivity factor of 0.7.
>
> - you asked for comparative data and I will, as soon as I reach him, contact [Mr H.] to get data from the GO1N21 examiners,
>
> - you consider a one month exchange with an examiner of the field in [Münich] or [The Hague] as difficult for private reasons right now,
>
> - in order to support you to improve your efficiency, such that the time you invest in your work produces more focused results, we agree, also with Stephan, that you would for an approximate period of about three months check each action with him, at the time where you think your strategy is established, in order to get hints as to what could be done more efficiently. The purpose is to improve your efficiency. For each consultation, the order of magnitude should be a few to some minutes. I provide each of you with a budget of 5 days of B330 peer-to-peer budget in [the electronic workflow monitoring system] to support this investment.
>
> I wish you every success in improving your efficiency and never hesitate to ask me for help if you see the need for it."

3. In effect, the reporting officer suggested measures for the improvement of the complainant's productivity and offered assistance. The reporting officer sent a copy of this e-mail, and, later, a copy of his letter dated 4 September 2006, which confirmed it, to the Personnel Directorate, with a request that they should be added to the complainant's personal file. It is noteworthy that Article 32, paragraph 1, of the Service Regulations, which is under the heading "Personal file", states as follows:

> "The personal file of a permanent employee shall contain:
>
> a) all documents relating to his administrative position and all reports relating to his ability, efficiency and conduct;
>
> b) any comments by him on such documents and reports."

Part 2 of Circular No. 262 setting out guidelines on personal files for EPO employees also provides that a written warning associated with staff reports is to be contained in Section D of a staff member's personal file.

4. In short, the complainant contends that the decision to issue the warning was illegal because of the reporting officer's defective application of the relevant guidelines for productivity assessment, in

particular the Code of Practice. He also contends that the calculations which the reporting officer used to determine that he risked receiving an assessment of "less than good" were faulty and did not follow the applicable rules. Further, he complains that his comments regarding his productivity were either disregarded or inadequately acknowledged, and that the warning damaged his image and caused him unbearable stress at work and in his family environment. He insists that through all of this he suffered from fear and serious concerns over his professional future, and that the injury thus caused entitles him to damages and costs.

5. It is clear that the disputed warning was given in the context and during the course of a staff assessment report. Section A, paragraph 1, of the General Guidelines on Reporting contained in Circular No. 246 and Article 47(1) of the Service Regulations inform the procedures for this. Paragraph 2 of Section A of the General Guidelines states that the general aim of the reporting system is to ensure that the performance and abilities of a staff member are fairly and objectively evaluated so that the staff member would have a chance to move to more responsible work and secure access to a higher grade. Paragraph 3 of Section A states, inter alia, that in jobs where productivity is measured, relevant information must always be given. Section A then goes on to set out the procedure for assessment and signatures.

6. Section B of the Guidelines speaks specifically of filling in the standard form for assessment. Section C provides for the procedures that relate to the process by which the signatures and comments of the reporting officer, the countersigning officer and the staff member who is being assessed are obtained. It also provides for these processes where there is a disputed case and the requirement that the President of the Office or the Vice-President would eventually sign in the event that the report is no longer disputed. According to paragraph 3 of Part XI of Section C where the dispute continues, Section D of the Guidelines is applicable. Section D provides for a conciliation procedure. Paragraph 1 of that Section permits the

President to appoint a mediator for cases still in dispute and for which the conciliation procedure has been requested by a staff member. The procedure is then outlined.

7. The EPO's first objection is on the threshold issue of receivability. It submits that the complaint is irreceivable in the first place, because the complainant was not adversely affected by the inclusion of the warning in his personal file. In the second place, it submits that the complaint is not receivable because it was not brought against a final decision and because the complainant had not exhausted the internal remedies available to him before he filed his complaint with the Tribunal. The defendant further submits that the complainant's claim to have the warning removed from his personal file *ex nunc* is moot, because the warning is no longer in his file.

8. It will be recalled that while the Internal Appeals Committee unanimously found that the appeal was receivable, the President of the Office decided that it was not. His reasons for this decision are summarised above, under A.

9. According to the EPO, a notification issued under Circular No. 246, Section A(6), second paragraph, does not constitute an act adversely affecting the complainant in the sense of Article 107(1) of the Service Regulations.

10. Section A, paragraph 6, of the General Guidelines on Reporting relevantly provides:

> "A staff member will be notified as early as possible, with confirmation in writing, if he is in danger of receiving an overall marking or a marking for any aspect under review less than 'good' in order to give him a chance to improve before the end of the reporting period; the person reported upon and the Reporting Officer concerned are working together towards that end. All the relevant written notifications, their receipt acknowledged by the staff member, will be copied to the relevant Countersigning Officer."

11. It is common ground that it was in accordance with this provision that the reporting officer sent the complainant what was,

in effect, a "written notification", on 20 July 2006. The e-mail notification of that date is, of itself, not significant in these present proceedings because the Personnel Directorate had informed the complainant, by letter dated 26 September 2006, that the e-mail had not been and would not be added to his personal file. However, the letter of 4 September 2006 informed the complainant that the said letter would be added to his personal file. A subsequent letter to the complainant from the Personnel Directorate, dated 25 September 2006, informed him as follows:

> "This is to inform you that I intend to add the original letter of the attached copy (Notification in accordance with the Guidelines on Reporting, Circ. No. 246 (A.6) – Written Warning-) dated September 4, 2006 to your personal file."

12. The defendant insists that the notification had no adverse effect on the complainant and was only intended to give him a chance to improve his productivity before the end of the reporting exercise, i.e. 31 December 2007. The contents and tone of the e-mail of 20 July 2006, as confirmed in the letter of 4 September 2006, bear this out.

13. The case law is clear that a complaint will be irreceivable if a complainant is not adversely affected by the impugned decision. Accordingly, in the context of staff assessment reports, the Tribunal stated as follows in Judgment 1674, under consideration 6(a):

> "a complaint is irreceivable when the decision at issue is not one that adversely affects the complainant. A decision is an act by an officer of an organisation which has a legal effect on the staff member's status: see Judgment 532 […]. The complainant suffers no injury from having to wait for a later decision which he may impugn, [...]. Similarly, an internal appeal, followed by a complaint, is not receivable when the organisation's rules prescribe some formality to be completed first (see Judgment 468 […] concerning 'something which is only one step in a complex procedure and of which only the final outcome is subject to appeal')."

14. The Organisation indicated, in writing, on a number of occasions that the warning was not intended to be used for disciplinary purposes. The complainant suffered no injury, detriment

or adverse effects as a result of the warning. The complaint is therefore irreceivable on this ground.

15. It is trite law that a complaint will not be receivable unless it is directed against a final decision or an implicit final decision. The complainant's staff report for 2006-2007 confirms that for that two-year period he received an overall rating of "good". It also indicates that the complainant signed the completed report on 2 June 2008, thus finalising the reporting process. The EPO therefore submits that when the complainant lodged his internal appeal on 17 October 2006, no final decision had yet been taken on the complainant's marking for the relevant reporting period. This submission is correct.

16. The warning entered in the complainant's personal file was a provisional measure taken during the course of the 2006 to 2007 reporting period. The final decision was made with the completion of the complainant's staff report, which he signed on 2 June 2008. The complaint is therefore also irreceivable on this ground.

17. The EPO also submits that at the time when the complainant brought his internal appeal in the EPO, and, subsequently, his complaint to the Tribunal, he had not exhausted the internal remedies that were open to him. This, according to the Organisation, is because the specific means provided by the Service Regulations to reach a solution in the event of a dispute over a staff report, namely a conciliation procedure under Section D of the General Guidelines on Reporting, were still open to him but he did not pursue them. The EPO therefore argues that the internal appeal was irreceivable, as the President decided, and that the complaint is accordingly irreceivable as well.

18. The need to exhaust the internal processes of an organisation is a requirement for receivability under Article VII, paragraph 1, of the Tribunal's Statute. The complainant did not embark upon the conciliation procedure provided for in Section D of the Guidelines. The case law of the Tribunal is quite clear on this. Accordingly, in

Judgment 1144, under 7, the Tribunal stated that its review of a decision on a staff report:

> "will be more limited because at the EPO there is a procedure for conciliation on staff reports and the Service Regulations allow the staff member to appeal to a joint committee made up of people who are closely familiar with the running of the Office."

19. The complainant insists that the Organisation is aware that no conciliation procedure is provided for any ongoing action unless it is finally reflected in the staff report. This, he states, would mean that an employee has no recourse where a written warning involves an abuse or distortion of facts.

20. The complainant should first have exhausted the internal processes of the EPO before he filed his complaint. Since he did not, his complaint is irreceivable on this ground as well.

21. The defendant asks the Tribunal to note that the e-mail of 20 July 2006 was never included in the complainant's personal file and that the warning, by way of the letter of 4 September 2006, has been withdrawn from his file. The EPO exhibited an e-mail from the Head of the Human Resources Section in The Hague, dated 18 June 2010, as evidence of this. In response, the complainant states that he requested the deletion of the warning *ex nunc* as early as December 2006 or by February 2008 at the latest, at the end of the period at which the productivity figures "imposed under threat had to be achieved". It seems obvious that the complainant is of the view that he filed his complaint before the letter of 4 September 2006 was withdrawn from his personal file, and that he is concerned that the removal does not enable him to obtain an order to remove it *ex tunc*.

22. The critical consideration, however, is that a cause of action no longer exists when the action that is complained of is withdrawn. Thus, the Tribunal stated as follows in Judgment 1394, under 4, in which the EPO was the defendant:

> "At the date of filing […] the decision [the complainant] is impugning did indisputably cause [him] injury and he was free to challenge it as he saw

> fit. Yet, though his claim to quashing did then serve some purpose it no longer does so since at his own instance the decision has been withdrawn. There is of course no question of quashing a decision that no longer exists and therefore has no effect in law. So the claim to the quashing of the decision must fail."

23. Since the warning has been withdrawn from the complainant's personal file, there is now no cause of action which calls for adjudication by the Tribunal.

24. The complainant further contends that the inclusion of the warning in his personal file was arbitrary and illegal. He submits that he is entitled to an award of damages because the inclusion of the warning caused him to sustain severe psychological pressure, anxiety, and physical stress in his professional and personal life, and also caused him to lose confidence in his superiors.

25. However, as earlier indicated, the complaint must be dismissed on grounds that it is irreceivable. Moreover, there is now no cause of action. According to the case law of the Tribunal, no damages will be ordered where a decision does not hamper a career and the matter which was complained of has been withdrawn (see Judgment 1380, under 11).

26. Additionally, the warning was a mere declaration of intent that if the complainant's productivity did not improve by the end of the reporting period he could receive a productivity mark of "less than good". It thus caused no injury to the complainant and does not attract damages.

The complainant is not therefore entitled to an award of damages. Neither is he entitled to an award of costs since the complaint is to be dismissed and there is an absence of any circumstances which would entitle him to costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 May 2013, Ms Dolores M. Hansen, Presiding Judge of the Tribunal for this case, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Dolores M. Hansen
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet