

115th Session

Judgment No. 3228

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr O. S. against the European Patent Organisation (EPO) on 24 April 2010 and corrected on 11 October 2010, the EPO's reply of 28 February 2011, the complainant's rejoinder of 14 July and the Organisation's surrejoinder of 27 October 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 14 of its Rules;

Having examined the written submissions;

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

A. Facts relevant to this case are to be found in Judgments 3227 and 3229, also delivered this day. Suffice it to recall that the complainant is a German national, born in 1965, who joined the European Patent Office, the EPO's secretariat, in 1991 as an examiner at its Headquarters in Munich, and is now serving at the Office's branch in The Hague, where he currently holds grade A2.

On 8 June 2005 the complainant received a staff report covering the period from 1 February 2004 to 30 April 2005, in which the quality of his work and his aptitude were rated "less than good", while

his productivity and his attitude to work and dealings with others were rated “unsatisfactory”. His overall rating was likewise “unsatisfactory”. The rating scale shown on the staff report form contains five possible ratings: outstanding, very good, good, less than good, and unsatisfactory. In his comments on the staff report the complainant indicated that he disagreed with all of the ratings given to him. He argued that the reporting officer had disregarded the General guidelines on Reporting set out in Circular No. 246 and that each rating should be raised by one level, except the rating for attitude to work and dealings with others, which should be raised from “unsatisfactory” to “good”. Not having obtained satisfaction, he requested a conciliation procedure under Section D of the above-mentioned guidelines. This procedure resulted in a partial agreement to amend the list of the complainant’s duties shown in the staff report and to modify the comments relating to quality, productivity and to the overall rating. However, none of the ratings was changed. The amended staff report was signed by the reporting officer on 7 March 2006 and by the complainant on 31 March 2006. As disagreement persisted however, the complainant requested, in accordance with Circular No. 246, Section D, paragraph 6, a decision of the Vice-President of Directorate-General 1. On 20 June 2006 the Vice-President approved the amended report as it stood. The complainant received the report on 11 August and signed it on 8 September.

By a letter dated 10 November 2006 the complainant lodged an internal appeal challenging his staff report, alleging that Circular No. 246 had been breached, that the report was flawed owing to procedural errors and that the reporting officer had misused his discretionary power by ignoring the complainant’s personal circumstances. He requested that all his ratings be raised by one level, except the rating for attitude to work and dealings with others, which he requested be raised from “unsatisfactory” to “good”. On 26 November 2009 the Internal Appeals Committee issued its opinion, in which the majority recommended that the comments concerning the complainant’s attitude to work and dealings with others be amended but that the remainder of his claims be dismissed as unfounded. The

minority, however, concluded that the staff report was tainted with procedural flaws, because the reporting officer had not followed the Code of Practice entitled “Production and productivity of Examiners in DGs 1 and 2”, issued on 12 July 2002 to assist managers in evaluating the productivity of examiners. As a result, important facts had been overlooked. It also considered that the reasons given to support the various ratings were inadequate. The minority recommended that the report be cancelled in its entirety and that the complainant be awarded costs.

By a letter dated 25 January 2010 the complainant was informed of the decision taken by the President of the Office to follow the majority’s recommendation and to refer his staff report back to the reporting officer to review the comments made under the section “Attitude to work and dealings with others” and, if appropriate, to modify the rating attributed for “attitude to work and dealings with others” and the overall rating accordingly. The President considered that the minority had not established any mistake of fact or lack of objectivity, nor had it established any breach of the applicable regulations. He also noted that the majority had stated that the reporting officer had duly considered the complainant’s individual circumstances. That is the impugned decision.

On 19 April 2010 the complainant acknowledged receipt of the amended staff report and indicated that he disagreed with it for the reasons set out in his internal appeal. The reporting officer had modified the comments concerning the complainant’s attitude to work and dealings with others, but he did not consider that this warranted changing the overall assessment, which remained “unsatisfactory”. On 24 April the complainant filed the present complaint, challenging the President’s decision of 25 January 2010.

B. The complainant contends that the disputed staff report breaches Circular No. 246. In particular, according to Circular No. 246, each aspect must be evaluated independently from the other aspects considered in the report, and the comments made under each section must not contradict the corresponding rating. The complainant submits

that the comments that the quality of his work is satisfactory and that it addresses essential aspects cannot be reconciled with a rating of “less than good”, and that it constitutes evidence of the reporting officer’s bias and bad faith. He draws the Tribunal’s attention to the positive results he received during random quality control checks carried out by the Directorate Harmonisation and Quality and to the fact that he was designated as Chairman in examination procedures during the reporting period, a function which, he asserts, is normally assigned by “uncontested administrative practice” only to examiners of grade A3 or higher. In his view, this confirms that he should have been given a rating no lower than “good” for the quality of his work.

As regards the section of the report on “Productivity”, the complainant argues that the minority of the Internal Appeals Committee were correct in finding that the reporting officer had failed to apply the Code of Practice. Indeed, the minority concluded that even a productivity factor of 0.11 could lead to a “less than good” rating rather than an “unsatisfactory” rating, as the productivity factor alone is not a reliable basis for assessing productivity. He adds that the case law cited by the majority on this point is not relevant to his case.

The complainant asserts that the assessment of his aptitude was contradictory and influenced by the assessment of his productivity, in breach of Circular No. 246. Indeed, he received a rating of “less than good” even though the reporting officer acknowledged in the corresponding comment that he possessed a good level of technical and legal knowledge. Lastly, concerning the comments under the section “attitude and dealings with others”, he considers them to be “personal, offensive and speculative” and to lack objectivity. In his view, the reporting officer has not followed the recommendations of the majority opinion, since he has not reviewed the rating given under this section, or indeed the overall rating, which further demonstrates his bad faith and bias.

The complainant asks the Tribunal to set aside the impugned decision and to annul his staff report for the period from 1 February 2004 to 30 April 2005. He requests its replacement with a new and amended staff report with ratings of “good” for quality, aptitude,

attitude and dealings with others, and “less than good” for productivity and for the overall rating. He also requests that “all subjective negative personal and disparaging remarks” be removed from the report. He claims moral damages, in an amount to be determined by the Tribunal, for injury to his dignity, as well as costs in the amount of 4,000 euros.

C. In its reply the EPO indicates that it has treated the complaint as being directed not only against the impugned decision but also against the outcome of the review exercise, because a new conciliation procedure and another internal appeal would not make sense in the circumstances. On the merits, it recalls that a performance appraisal is discretionary in nature and, therefore, is subject to only limited review. Citing the Tribunal’s case law, it stresses that reporting officers must enjoy freedom of expression and that the Tribunal’s role is not to replace the reporting officer’s assessment with its own.

The defendant argues that the complainant’s reference to positive results from random checks of his files by the Directorate Harmonisation and Quality amongst others, do not preclude a rating of “less than good” for the quality of his work, when put into perspective with his serious backlog and deficient prioritisation of work. It also denies that the reporting officer acted in bad faith and considers this allegation to be completely unfounded.

Regarding the complainant’s productivity, the Organisation points out that, contrary to the minority opinion, the correct test is not whether, in light of the circumstances, another reporting officer could have come to a different assessment, but whether, given the complainant’s productivity factor of 0.11, the reporting officer was within his discretionary power when he rated his productivity as “unsatisfactory”. In the EPO’s view, the reporting officer was fully within his discretion when he rated a productivity that is 10 per cent of what is considered normal as “unsatisfactory”. Moreover, as can be seen from the complainant’s amended staff report, his Director and reporting officer, Mr J., took into account any factor that might have negatively influenced his performance, such as the fact that he was

frequently on sick leave during the reporting period, and he offered him support to overcome the difficulties he encountered. The defendant argues that the Tribunal's case law cited in the majority opinion is relevant to the present case in terms of the legal principles established, even if some of the judgments in question were delivered at a time when a different method was used to assess productivity.

As regards the complainant's aptitude, the EPO denies that there is a contradiction between the reporting officer's comments and the rating attributed. It points out that the reporting officer used the conditional tense to convey the idea that the complainant, given his long experience, ought to possess a certain knowledge and thus aptitude to perform his duties, but that this is not the case. The rating "less than good" is therefore consistent with this assessment. Further, the Organisation asserts that by assessing the complainant's aptitude in light of other sections of the report, namely quality and productivity, the reporting officer did not breach the General guidelines on Reporting. Indeed, it cannot be denied that there is a link between quality, productivity and aptitude, since the first two elements are constitutive of the third.

Lastly, the defendant rejects the contention that the reformulated comments in the final version of the report are "personal, offensive and speculative". It argues that these comments are covered by the great freedom of expression which reporting officers must enjoy, and it points out that they are necessarily personal.

D. In his rejoinder the complainant presses his pleas. He adds that the reporting officer failed to implement correctly the President's decision by replacing his comments under the section "Attitude and dealings with others" with equally damaging and false statements. The complainant denies the EPO's assertion that the reporting officer offered him support, and he requests the Tribunal to obtain the testimony of a former colleague in order to confirm the positive aspects of his work. He also argues that the Internal Appeals Committee ought to have recommended that he be awarded costs, as it considered that his appeal should be allowed at least in part.

E. In its surrejoinder the EPO maintains its position in full. It points out that the witness cited by the complainant has already been heard in the internal appeal proceedings, and it asks the Tribunal to order that the complainant bear his costs.

CONSIDERATIONS

1. By a letter dated 25 January 2010 the complainant was informed that the President of the Office had decided to endorse the Internal Appeals Committee's majority opinion regarding his appeal against his staff report for the period from 1 February 2004 to 30 April 2005. Therefore his staff report would be referred back to his reporting officer in order to review the comments concerning the complainant's attitude to work and dealings with others and, if appropriate, to modify the rating attributed for attitude to work and dealings with others and the overall rating accordingly. The complainant received an amended staff report on 19 April 2010, in which the comments under attitude to work and dealings with others were modified, although the ratings remained the same. In his third complaint, he impugns the President's decision to endorse the majority opinion, as well as the amended staff report.

2. Amongst his claims, which are set out under B above, the complainant initially asked the Tribunal to be granted a three-month extension to provide the translations of the German documents appended to his complaint, as required by the Rules of the Tribunal. The Tribunal notes that this claim has been satisfied as the complainant has already been granted the necessary extension in accordance with Article 14 of the Rules.

3. According to the Tribunal's case law, issues raised by staff reports "are discretionary and the Tribunal will set aside or amend a report only if there is a formal or procedural flaw, a mistake of fact or law, or neglect of some material fact, or misuse of authority, or an obviously wrong inference from the evidence. Those criteria are the more stringent because the EPO has a procedure for conciliation on

staff reports and the Service Regulations entitle officials to appeal to a joint body whose members are directly familiar with the workings of the Office.” (See Judgment 1688, under 5, and also Judgments 806, under 15, and 1144, under 7.) It is clear from the case law that the Tribunal will not interfere with the discretionary assessment of the decision-maker unless there is a reviewable error.

4. With regard to “quality”, the complainant invokes in particular a violation of Circular No. 246 as this aspect of performance was not evaluated in isolation but instead was combined with his productivity. The Tribunal is of the opinion that quality can also encompass efficiency. In that sense it was open to the Office to evaluate the complainant’s quality of work also according to his ability to meet deadlines. Therefore, the rating of “less than good” does not violate Circular No. 246.

5. As to the “unsatisfactory” rating for his “productivity”, the complainant relies on the method of analysis undertaken by the minority of the Internal Appeals Committee. As the reporting officer took into account the complainant’s sick leave, as well as the breakdown of assignments, there is no reviewable error concerning the application of applicable regulations.

6. Contrary to the complainant’s assertion, the comments concerning “aptitude” do not contradict the rating “less than good”. Essentially, the comments state that, considering the complainant’s seniority and experience, he should have a certain level of technical and legal knowledge but as he is unable to apply it to his work, the reporting officer considers that the complainant’s aptitude therefore cannot be evaluated higher than the rating “less than good”.

7. With regard to attitude to work and dealings with others, the complainant calls into question whether the reporting officer adhered to the President’s instructions to follow the Internal Appeals Committee’s majority opinion. He asserts that instead of following the Committee’s opinion the reporting officer merely reworded the

comments without changing their substance. The original comments under “attitude and dealings with others” stated: “The complainant is polite and friendly. He is usually on good terms with his colleagues and his manager. On the other hand, because of the recurring organisational problem mentioned above, he gives the outside world a poor impression of the Office. In addition, his very low productivity, which is known to many colleagues, gives a very bad example and could have a damaging effect on their motivation.” The amended version reads as follows: “The complainant is polite and friendly. He is usually on good terms with his colleagues and his manager. The delays incurred by the complainant contribute, to an above average extent, to the accumulation of arrears, which in turn expose the Office to negative comments from outside. In addition, his slow productivity is known to many colleagues and gives a bad example.”¹ The Internal Appeals Committee considered that the complainant could not be accused in the comments of projecting a negative image of the Office to the outside world, nor could he be accused of having a demotivating influence on his colleagues, as this was not his intention either and there was no proof that such negative consequences flowed from his unsatisfactory performance. The Committee also underlined that the reporting officer chose to express his comment in the conditional tense, so that it cannot as a matter of fact be even established if this detrimental impact could actually be determined at all. Therefore, it recommended deleting the second and third sentences of this comment or that they be “replaced by another wording”.

8. The Tribunal notes that the majority opinion focuses on the idea that the complainant could not be accused of projecting a negative image of the Office to the outside world as the comments cannot include unprovable ideas such as speculating whether or not the complainant had a “demotivating influence on his colleagues”. That opinion is followed by the advice to cut out the last two sentences completely, or to reword them. As the opinion specifies that the sentences can be “replaced by another wording” and not that they

¹ Registry’s translation from a French original.

must be completely rewritten to express another meaning, the Tribunal interprets that to mean that as long as the initial two objections are met (that the comment must not reflect the idea that the complainant is directly to blame for the projection of a negative image of the Office to the outside world, nor the idea that he has a demotivating influence on his colleagues), the reporting officer has remained true to the recommendations of the Committee. Considering this, the reworded comment is in keeping with the majority opinion of the Internal Appeals Committee. Furthermore, as the first four ratings and associated comments stand, there is no reason for the “overall rating” to be changed. The Tribunal finds that no element has been presented to prove that the reporting officer drafted the report with bias or bad faith.

9. As the final staff report stands in its entirety, there are no grounds for awarding moral damages. Given that the previous staff report was considered unlawful in part by the Internal Appeals Committee, as endorsed by the President of the Office, the Tribunal awards costs in the amount of 800 euros for the complainant’s internal appeal.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 800 euros in costs for the internal appeal.
2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet