O'C. (No. 2)

v.

EPO

129th Session **Judgment No. 4267**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr D. F. O'C. against the European Patent Organisation (EPO) on 21 June 2014 and the EPO's reply of 14 October 2014, the complainant having chosen not to file a rejoinder;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges his staff report for 2008-2009.

In his staff report for 2008-2009 the complainant obtained the rating "very good" for quality, "good" for productivity, "very good" for aptitude, "good" for attitude, and "good" for the overall rating. The complainant objected to the fact that his overall rating was lower than in his previous two reports. During this reporting period he had suffered from a medical condition which, he believed, had not been properly taken into account. Towards the end of the reporting period, he had been able to use voice-recognition software and an improvement in productivity had been observed.

Following an unsuccessful conciliation procedure, the Vice-President of Directorate-General 1 (VP1) decided to modify the report by raising the attitude rating to "very good", but the other ratings remained unchanged and the complainant therefore lodged an internal appeal. The Internal Appeals Committee (IAC) unanimously held that the report should be annulled because the reporting officer had not taken into account the complainant's medical condition. A majority of its members also considered that the overall rating "good" was not consistent with the other four ratings following the amendment of the attitude rating by VP1.

In a decision of 25 March 2014, the Vice-President of Directorate-General 4 (VP4), acting on behalf of the President of the European Patent Office, the EPO's secretariat, agreed that the report was flawed in that the complainant's medical condition had not been taken into account and he decided that the complainant's productivity and overall ratings would be reassessed. To that end, as suggested by the IAC, the complainant was asked to submit medical evidence to the Occupational Health Service (OHS), which would "seek to provide a recommendation on the steps which would most likely have been taken" had it been consulted at the time. The contested staff report would then be revised in light of OHS's recommendation. VP4 also accepted the IAC's recommendation that the complainant be awarded 1,000 euros in damages for procedural delays and for the failure to take into account his medical condition.

The complainant submitted medical evidence as requested, but OHS considered that the information provided was not sufficient to enable it to draw any conclusions as to his working capacity during the relevant period. His staff report was finalised with the same ratings, but the following comment was added: "Throughout the present reporting period, [the complainant] reported that he suffered from pain in his neck/shoulders which would adversely affect his performance. However, this medical condition was not reported to [OHS], and its effects on his performance could therefore not be assessed in any objective manner."

The complainant impugns the decision of 25 March 2014. He asks the Tribunal to set aside what he describes as "the decision of the EPO to request a retroactive medical evaluation rather than substituting an overall 'very good' box marking for the existing 'good'"; to set aside the EPO's decision not to follow the opinion of the IAC majority concerning his overall rating; to order the EPO to grant him a "very good" overall rating; to ensure that the "principle of prohibition of *reformatio in peius*" is respected; to order the EPO to submit any new report to the Promotion Board with a view to reviewing the date of his promotion; and to award him 3,500 euros in moral damages.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant was employed, at relevant times, by the EPO. He challenges his staff report for the period 2008-2009. Ultimately, the complainant's overall rating was "good" rather than, as he suggests is appropriate, "very good". In the first iteration of the report the complainant had been rated "very good" for quality, "good" for productivity, "very good" for aptitude, "good" for attitude and "good" for the overall rating. The complainant was dissatisfied with these ratings and, in due course, VP1 re-rated attitude to "very good" but did not alter the other ratings. Following an internal appeal, the IAC recommended in its opinion of 20 December 2013 that the report should be annulled. That was because the reporting officer had not taken into account the complainant's medical problems during the reporting period.

2. The IAC observed in its opinion that one way of dealing with the medical issues (noting the complainant had not consulted OHS) was for medical evidence available for the relevant time to be presented to OHS for it to evaluate what it might have recommended at the time. By letter dated 25 March 2014 VP4 indicated that reference would be made to medical issues in the space provided for "supplementary remarks". He also indicated that the rating for productivity and the overall rating would be reassessed in light of the medical issues. He suggested that

the complainant provide medical evidence as suggested by the IAC for the staff report to be revised. Consistent with the IAC's recommendation as adopted by VP4, medical evidence was submitted by the complainant to OHS, though it concluded what had been submitted was inadequate to draw any conclusions about his working capacity during the relevant period.

3. In his brief (there is no rejoinder), the complainant seeks the following relief:

(i) that the decision by the EPO to request the retroactive medical evaluation rather than substituting an overall "very good" rating for the existing "good" be quashed;

(ii) that the decision by the EPO not to follow the majority opinion of the IAC regarding the award of a "good" overall rating based on three out of four partial "very goods" and one "good" be quashed;

(iii) that a "very good" overall rating be awarded;

(iv) that the principle of prohibition of *reformatio in peius* be respected;

(v) that any new report be presented to the Promotion Board to see if promotion to A4 might have been possible earlier than September 2013; and

(vi) that moral damages of 3,500 euros be awarded.

4. The Tribunal recalls that it is well established in the Tribunal's case law that assessment of merit is an exercise that involves a value judgement, signifying that persons may quite reasonably hold different views on the matter in issue. Moreover, because of the nature of a value judgement, the grounds on which a decision involving a judgement of that kind may be reviewed are limited to those applicable to discretionary decisions. Thus, the Tribunal will only interfere if the decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, if it was taken in breach of a rule of form or procedure, or if there was an abuse of authority (see, for example, Judgments 3006,

consideration 7, and 3062, consideration 3, a case likewise concerning a staff report). Accordingly the role of the Tribunal in challenges to the assessment of the performance of staff of international organisations is a limited one and does not involve reassessment of performance by the Tribunal (see, for example, Judgments 3228, consideration 3, and 3692, consideration 8).

5. The arguments in support of the relief identified in (i) of consideration 3 are mostly an invitation to the Tribunal to engage in the very process deprecated in the cases referred to in the preceding consideration. The only point made with remotely any legal foundation is that any attempt to comply with the request that he furnish OHS with medical evidence "would lack any probative value whatsoever". But in fact he did. Moreover it does not follow that because the material he did provide was inadequate, other material could not have been provided which was adequate.

6. The only argument in the brief legally available in support of the relief identified in (ii) of consideration 3 is that VP4 did not motivate his decision to depart from the view of the IAC majority. He was not obliged to follow that view nor legally obliged to assess the overall performance at a particular level. He provided an adequate explanation of the approach ultimately adopted in his letter of 25 March 2014.

7. The relief identified in (iii) of consideration 3 would involve an assessment the Tribunal should not make.

8. The argument in support of the relief identified in (iv) of consideration 3 assumes that the complainant had, by the appeal process, been put in a worse position. He was not.

9. Having regard to the preceding discussion the relief identified in (v) is irrelevant even if available. No grounds have been established for the awarding of moral damages.

10. The complainant has failed to establish any reviewable error on the part of VP4 in reaching the conclusions and decision he did in his letter of 25 March 2014 and accordingly the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 October 2019, Ms Dolores M. Hansen, 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 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ