NINETY-EIGHTH SESSION

Judgment No. 2400

The Administrative Tribunal,

Considering the complaint filed by Mrs M. S.-R. against the European Patent Organisation (EPO) on 14 July 2003 and corrected on 1 October, the EPO's reply of 19 December 2003, the complainant's rejoinder of 25 March 2004, and the Organisation's surrejoinder of 1 June 2004;

Considering Article II, paragraph 5, 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, a Spanish national, was born in 1957. She entered the service of the European Patent Office – the EPO's secretariat – in 1987 as an examiner at grade A2. On 1 September 1991 she was promoted to A3. Her employment ceased with effect from 1 March 2003 because of permanent total invalidity.

In her 1996-97 staff report the complainant obtained the rating "very good" under "Productivity". Under the headings "Quality", "Aptitude", "Attitude to work" and "Overall rating" she obtained the rating "good". In her staff report for the period from 1.1.98 to 30.6.99 she received the rating "good" under "Productivity" and the other headings given above. From 1 July 1999 the directorate she was working in was divided into two, and she was transferred to the newly created one.

The complainant entered comments on her 1998-99 report on 15 May 2000. On the basis of her comments certain corrections were made, but no rating was changed. At the complainant's request, a conciliation procedure ensued. In a note dated 12 December 2000 the reporting and countersigning officers proposed certain amendments, including changing the productivity figure from 74.9 to 87.7. The complainant set out her views in a note of 16 January 2001. A conciliation report was issued by the mediator in April 2001. As indicated therein the parties failed to reach agreement, and on 7 May the President of the Office signed the complainant's staff report as it stood. The complainant signed it on 28 June 2001 adding the remark: "This report contains incorrect production data. The correct production data are to be found in the herewith annexed document, signed by both reporting officers [on] 12.12.00."

By a letter of 31 July 2001 the complainant lodged an internal appeal, claiming that the staff report contained factual errors. She lodged another appeal on 31 July protesting, inter alia, against a particular assessment under "Attitude to work" in part III of the report, which was drafted in French. The contested sentence read: "*Sa tenue est toujours en très bonne adéquation avec ses fonctions.*" While recognising that the word "*tenue*" could have other meanings, she assumed that it referred to her clothes. She took it to mean that her "clothes were always appropriate for the job she had to do", and considered the remark to be sexist and discriminatory. In both appeals she claimed moral damages.

The two appeals were joined. The Appeals Committee issued its report on 10 February 2003. It recommended that the figures forming the basis for the productivity evaluation in the disputed staff report should be those proposed in the note of 12 December 2000 drafted by the reporting and countersigning officers. It recommended making other changes on the basis of that note as well as a later one of 24 August 2001. The President of the Office decided to follow the Committee's recommendations. His decision was notified to the complainant by the Principal Director of Personnel on 16 April 2003. That is the impugned decision.

The staff report was corrected accordingly and sent to the complainant on 13 June 2003. In that final version, under "Attitude to work", the words "*Son comportement*" replaced "*Sa tenue*". The disputed sentence thus now referred more to the complainant's conduct than to her clothes.

B. The complainant chiefly argues that the original version of her 1998-99 report contained factual errors which instead of being corrected were allowed to persist. Incorrect figures were given for production and the number of

hours worked, which affected the overall productivity figure. Also, although the overall reporting period went to 30 June 1999, the end date for the assessment period stopped short at 31 May and production for June was not included. Even though the reporting officer, countersigning officer and the mediator were aware of the errors, no steps were taken to correct them. The complainant argues that those officials were prejudiced against her and abused their authority, and the Organisation failed in its duty of care towards her. The maintenance of the errors in the report caused her undue stress and led to a serious deterioration in her health.

As it now stands, the staff report fails to take account of essential facts. Not only is it based on incorrect production and productivity data, but it also fails to mention certain of her achievements during the reporting period in question. According to her calculations, the rating "very good" for productivity given in her 1996-97 report should be maintained.

She alleges other flaws in the reporting procedure, claiming in particular that she had no prior interview with her reporting officer. She also submits that the Office failed to send her a copy of the final report on the conciliation proceedings.

The complainant objects to a comment attributed to the mediator, recorded by the Office in its position paper of 29 January 2002 on her internal appeal. The mediator had accused her of not wanting "to introduce the corrections in the report, in order to be able to argue later that the report contain[ed] factual errors". The complainant denies that there is any truth in that statement, adding that from the date she first received her 1998-99 staff report she tried to have the errors corrected.

She objects to the sentence under "Attitude to work" in her staff report, both in its original and amended form. When it contained the word "*tenue*" she assumed it referred to her clothing; she considers that to be discriminatory justifying payment of damages. Now that "*tenue*" has been amended to "*comportement*" she assumes it refers to the adequacy of her behaviour in relation to her job. Given that the nature of her duties required her to work alone she strongly objects to the amendment, arguing that it can only lead to further misunderstanding.

She seeks the quashing of the impugned decision; the removal from her personal file of the statement attributed to the mediator recorded in the Office's position paper; the removal from her 1998-99 staff report of the sentence: "*Son comportement est toujours en très bonne adéquation avec ses fonctions*", and 3,000 euros in moral damages; the drawing up of an "objective" staff report for 1998-99 which takes "proper account of both the correct factual data and all [her] achievements", and another 3,000 euros in moral damages; and costs.

C. In its reply the Organisation submits that the complaint is devoid of merit. The complainant, it claims, has no reason for filing a complaint with the Tribunal, as all the factual errors she refers to were corrected in the final version of the 1998-99 staff report sent to her on 13 June 2003. The productivity figures now correspond to those set out in the note of 12 December 2000, which she herself confirmed were correct by her handwritten remark of 28 June 2001 on the initial copy of the report. Likewise, the dates for the reporting period and the assessment period for productivity now correspond. The corrected figures produce a better result for productivity but do not justify changing the box rating from "good" to "very good". Even on the basis of other changes that were made there is no justification for raising the other box markings to "very good". All important facts were taken into consideration, and in its final version the report constitutes an objective assessment. None of the errors the complainant points to was made deliberately and there is no basis for her allegation that the reporting officers abused their authority. Nor has she substantiated her claim that the contested report led to the deterioration in her health.

The EPO rebuts her allegations that there were procedural violations in the reporting procedure. A prior interview between the reporting officer and the complainant took place on 11 April 2000, but was curtailed by the complainant. Her contention that the final version of the conciliation report was not sent to her is unfounded. She received a copy of the draft conciliation report, and the final copy remained the same. Similarly, she was not sent a copy of the staff report as sent to the President, because she had been informed that no changes were being made.

The Organisation submits that it cannot accede to her claim for the removal of the comment made by the mediator. The sentence can no longer be removed from the position paper issued by the Office during the internal appeal. Such position papers, it continues, are not placed in personal files and, in any event, the sentence in question had no impact on the President's decision. It therefore considers her claim to be unfounded for lack of substance.

As for her request to have a sentence removed from her staff report, it points out that a similarly worded comment containing the word "*tenue*" appeared in her previous staff report, without her contesting it. Nor did she raise any objection when she endorsed her report on 28 June 2001. Had she done so, the matter could have been clarified at the time. As explained by the countersigning officer the word "*tenue*" referred to her behaviour, not her clothes. Wide discretionary powers are accorded to the reporting officer allowing him to decide on the pertinence of such a comment in the report, and the sentence as it stands is favourable to her.

D. In her rejoinder the complainant disagrees that her complaint is bereft of a purpose, particularly as the moral damages claimed in her internal appeal have not been granted. The errors were maintained in her staff report from the date of the conciliation proceedings on 30 November 2000 until the final version was sent to her on 13 June 2003, which meant that for more than 30 months she did not have a "proper" staff report. The delay had an irreversible effect on her career prospects. She maintains her plea of abuse of authority, as the errors, even if not deliberately introduced into the report, were deliberately maintained in it during that time. She withdraws her claim for the removal of the statement attributed to the mediator.

E. In its surrejoinder the Organisation maintains its position. It denies that the delay in inserting the correct figures had any adverse effect on the complainant's career.

CONSIDERATIONS

1. In her initial brief to the Tribunal the complainant seeks the removal from her personal file of a comment which is attributed to the mediator and appeared in the position paper produced by the European Patent Office on 29 January 2002 in the context of her internal appeal; the removal from her staff report for 1998-99 of a particular remark under the heading "Attitude to work"; and the establishment of an objective staff report for the same period which will take "proper account of both the correct factual data and all [her] achievements in [her] work". She also asks for the quashing of the President of the Office's decision of 16 April 2003, by which he accepted the unanimous recommendation of the Appeals Committee, and partially amended her 1998-99 staff report.

2. The complainant withdrew her claim for the removal of the comment attributed to the mediator after the Organisation had pointed out that the contested comment could no longer be removed from the Office's position paper. There is therefore no need to address this matter.

3. As for the second and third of the above-mentioned claims, it is necessary to establish the guiding principles regarding performance evaluations as laid down in the Tribunal's case law. The Tribunal has continuously found that a reporting officer has wide discretion unless there is "an obvious mistake of fact or failure to show the sort of objectivity that ought to govern reporting" (see Judgment 1136, under 6). As the Tribunal has often said, performance reports serve no purpose unless the supervisor has full freedom in commenting on performance, and the Tribunal will review a decision only where there has been blatant abuse of authority or breach of a formal or procedural rule (see, for example, Judgment 880, under 4). It has also been said that the Tribunal may not replace with its own the executive head's assessment of a staff member's conduct, work and qualifications. All it may do regarding a discretionary decision is see whether the decision was taken without authority, or if it was tainted with a procedural or formal defect, or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see Judgments 525 and 824). Consequently, only in exceptional circumstances will the Tribunal have comments struck out of a performance report, because the exercise of discretion demands broad freedom of speech (see Judgment 820, under 3). In the same vein are Judgments 232, 516, 973, 1048, 1221 and 1301. In the present case, the Tribunal has found no evidence of any flaw that would justify the quashing of the impugned decision.

4. The complainant's second claim has arisen from her original staff report for 1998-99. The assessments made in the report were positive – none were objectionable. The overall rating, however, was "good" – in the middle of a scale that ranks five positions: "outstanding", "very good", "good", "less than good", and "unsatisfactory". She objected to a word in an assessment under the heading "Attitude to work"; the word was then replaced by another and she also objects to the new phrasing.

There was conciliation, there was due process. Throughout the complainant's pleadings, it is clear that she is loath to accept the box rating marked "good" and that she expresses dissatisfaction with the word "*tenue*" or

"*comportement*" as one possible way to have the "good" changed to "very good", but that did not happen.

The Appeals Committee pointed out that, in its view, the initial word "*tenue*" used in the report was not objectionable, but suggested that it should be changed to "*comportement*", at the discretion of the reporting officer. The unanimous recommendation of the Committee was endorsed by the President of the Office and the complainant was notified of his decision on 16 April 2003. That is the decision the complainant impugns.

5. The complainant maintains in her rejoinder that, despite the fact that the Office corrected the errors made concerning her productivity figures, her report is substantially the same and fails to take account of essential facts. In a note annexed to its surrejoinder the Organisation acknowledges that the complainant's absence from the office for several months in the first part of 1999 naturally influenced her productivity for that period. It transpires from the case file that her productivity had been declining in her later years at the EPO and that there were other disturbing signs in her relationship with the Organisation: e.g. she refers in her rejoinder to "lack of respect" from the reporting officer.

6. Although the Tribunal has not had, and has not ordered, access to the complainant's personal files, it transpires from the file before the Tribunal that the complainant was deemed by the Invalidity Committee to be permanently and totally unfit for work.

7. The Tribunal finds that the comments and evaluations with which the complainant disagrees are not such as to justify the establishment of a new staff report as requested by her. Nor are the contested comments that the complainant wants deleted disparaging either about her work or herself. Her sensitivity to those comments is to be respected as a personal matter, as the words at issue could be interpreted in different ways upon translation, but there is no cause for redress before the Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Flerida Ruth P. Romero

Agustín Gordillo

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.