

119th Session

Judgment No. 3433

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr G. P. P. against the European Patent Organisation (EPO) on 12 April 2011 and corrected on 28 June, the EPO's reply of 5 October, the complainant's rejoinder of 23 November 2011, the EPO's surrejoinder dated 6 March 2012 and the EPO's further submissions of 22 May 2013, forwarded to the complainant on 23 May 2013;

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

Having examined the written submissions;

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

A. On 29 June 2007 the complainant met with his reporting officer to discuss his staff report for the period 2006-2007. On the same day, the reporting officer notified the complainant in writing, in accordance with Section A(6) of the General Guidelines on Reporting contained in Circular No. 246, that he was at risk of receiving markings of "less than good" for his productivity, attitude and overall rating in his forthcoming staff report. The reporting officer specified his expectations, gave the complainant various instructions and encouraged him to remedy the situation by the end of the reporting period. He also arranged to have weekly meetings with the complainant to discuss his work. On 27 September 2007 the complainant lodged an internal appeal challenging the issuance of the warning letter and requesting its withdrawal. He also claimed damages. On 22 November 2007 he was

informed that his request could not be granted and that the appeal had been referred to the Internal Appeals Committee (hereinafter IAC).

After having met with the complainant on 7 December 2007 to discuss his performance, on 17 December, the reporting officer issued a second written notification of poor performance, almost identical in content to that of 29 June. The same measures as those suggested in the first warning letter were to be continued and, in addition, the complainant would work under the direct supervision of an experienced examiner in his technical field. On 14 March 2008 the complainant lodged another internal appeal, challenging the issuance of the second notification and requesting its withdrawal, as well as claiming damages. On 9 May 2008 he was informed that his request could not be granted and that the appeal had been referred to the IAC.

In a single opinion of 12 November 2010, the majority of the IAC members recommended that the complainant's first appeal (RI/157/07) be dismissed as unfounded. Concerning his second appeal (RI/51/08), a majority concluded that the second warning letter was unlawful and recommended that it be withdrawn from the complainant's personal file, but that his claim for moral damages be rejected.

By a letter dated 12 January 2011 the complainant was informed that the President of the EPO had decided to reject his appeals as irreceivable, on the ground that a notification under Section A(6) of the General Guidelines on Reporting did not constitute an act adversely affecting him in the sense of Article 107(1) of the Service Regulations for Permanent Employees of the European Patent Office. Regarding the merits, the President endorsed the majority opinion of the IAC as regards the complainant's first appeal and the minority opinion as regards his second appeal. The appeals were thus rejected as unfounded in their entirety. Nevertheless, the President decided that the second warning letter would exceptionally be removed from the complainant's personal file. That is the impugned decision.

The complainant lodged a further internal appeal on 5 April 2011 challenging his staff report for 2006-2007, in particular the assessment of his productivity as "less than good". He also initiated separate

harassment proceedings against his supervisors, alleging that they had harassed him when dealing with his performance evaluation.

B. The complainant states that his main arguments are contained in his submissions before the IAC and in the IAC minority opinions. He contends that the warning letters were unjustified, and adopted in breach of the applicable rules and guidelines. In his view, they amounted to disciplinary measures, as their purpose was not to support him in achieving a higher productivity, but to intimidate him. Had the EPO intended to support him, it would have granted the measure proposed by him and which was granted in 2008, namely further technical training by experienced examiners in the new fields to which he was assigned. He asserts that his performance was, at the time of the warnings, within the range of the expected values and argues that the impugned decision is based on unsubstantiated facts and is not supported by adequate reasons. Moreover, the length of the appeal procedure has prejudiced his performance, his career, as well as his health.

The complainant asks the Tribunal to set aside the impugned decision and the decision to issue the two warning letters. He asks that the Tribunal order that the first warning letter be withdrawn from his personal file. He seeks damages and costs, and asks for oral proceedings under Article 12, paragraph 1, of the Rules of the Tribunal.

C. In its reply the EPO submits that the complaint is irreceivable, as the warning letters at stake do not constitute acts adversely affecting the complainant within the meaning of Article 107(1) of the Service Regulations. These letters were intended to give him a chance to improve his performance before the end of the reporting exercise. Subsidiarily, it submits that the complaint does not entirely comply with Article 6(1)(b) of the Rules of the Tribunal, as the complainant merely states that his main arguments are “illustrated” in his submissions before the IAC.

On the merits, the EPO states that the two letters were issued in full compliance with Section A(6) of Circular No. 246, as well as the

requirements found in the Tribunal's case law. There was no question of imposing a disciplinary measure under Article 93 of the Service Regulations. The reporting officer exercised his supervisory authority in good faith, and the complainant has not established any error of fact or law, or any bias or prejudice on the part of the reporting officer. On the contrary, the reporting officer properly assessed his productivity, taking into account the specificities of the complainant's case. Moreover, it is in the complainant's interest that the reporting officer should explain clearly and in detail what is expected of him to avoid an assessment of "less than good". In this case, the expectations were neither unjustified nor disproportionate. It denies his allegations of lack of support. By issuing the first letter, the reporting officer gave the complainant the opportunity to improve his performance six months before the end of the reporting period 2006-2007. The second letter, on the other hand, clearly mentioned that its purpose was "to give [the complainant] the opportunity to rectify the situation in the next reporting period". Indeed, it has since been removed from his personal file, which demonstrates that it served its purpose, as the complainant received the marking "good" in productivity for the 2008-2009 reporting period.

D. In his rejoinder the complainant presses his pleas. He maintains that both warning letters plainly fell within the definition of disciplinary measures under Article 93 of the Service Regulations, and he asserts that the measures of support proposed by the EPO were not in fact implemented consistently. He reiterates his request for oral proceedings, arguing that this is the only way for him properly to address the arguments raised by the EPO in its reply.

E. In its surrejoinder the EPO maintains its position in full. It points out that the complainant has produced no evidence to support his allegation that the measures of support were not implemented consistently.

F. In its further submissions the EPO informs the Tribunal that, following an investigation, the Ombudsman concluded that there was

no evidence that the complainant's supervisors had harassed him. However, she considered that certain organisational practices were not always respectful of the complainant's needs and she made various recommendations, which the President decided to endorse. Thus, by a letter of 16 November 2012, the complainant was informed that the warning letter of 29 June 2007 would be withdrawn from his personal file and that the marking for productivity in his 2006-2007 staff report would be raised from "less than good" to "good". The EPO therefore submits that, insofar as the complainant seeks the withdrawal of the first warning letter from his personal file, he no longer has a cause of action.

CONSIDERATIONS

1. The complainant was notified by a letter dated 29 June 2007, in accordance with Circular No. 246, Section A(6), that he was at risk of receiving a marking of "less than good" under the headings "productivity", "attitude" and "overall rating" in his 2006-2007 staff report. The complainant contested that warning in a letter to the President dated 27 September 2007, requesting: the withdrawal of the warning which, he alleged, was unjustified and not in compliance with the Service Regulations; that the EPO should ensure that no trace of the warning remained in any documentation and that it would not affect his work and career in the Organisation; and compensation for material and moral damages in the amount of 3,000 euros per week since the issue date of the warning letter until the effective date of its withdrawal. The complainant was informed by a letter dated 22 November 2007 that his appeal had been forwarded to the IAC for an opinion (appeal RI/157/07). The complainant received a second warning in a letter dated 17 December 2007 which stated that he was at risk of receiving a marking of "less than good" for his "productivity" and "overall rating" and that the warning was meant to give the complainant "the opportunity to rectify the situation in the next reporting period". The complainant contested this warning in an appeal to the President dated 14 March 2008 and was informed in a

letter dated 9 May 2008 that it had been forwarded to the IAC for an opinion (appeal RI/51/08).

2. The IAC addressed both appeals (RI/157/07 and RI/51/08) in a single opinion dated 12 November 2010. The IAC unanimously considered both appeals to be receivable, but provided divergent opinions on the merits. With regard to RI/157/07, a three-member majority recommended that the appeal should be entirely rejected as unfounded; a one-member minority recommended withdrawing the warning letter but rejecting the claim for damages; and a one-member minority recommended withdrawing the warning letter and an award of 3,000 euros in moral damages, including 1,000 euros for the delay in the internal appeal proceedings. With regard to RI/51/08, a three-member majority recommended withdrawing the warning letter; a four-member majority recommended rejecting the claim for damages; a two-member minority opinion recommended rejecting the appeal as wholly unfounded; and a one-member minority recommended an award of 3,000 euros in moral damages, including 1,000 euros for the delay in the internal appeal proceedings.

3. The Vice-President of Directorate General 4 (VP4), by delegated authority from the President, decided to reject both appeals as irreceivable and unfounded in their entirety. VP4 found them to be irreceivable because “a warning letter under Section A(6) of Circular No. 246 does not constitute an act adversely affecting [the complainant] in the sense of Art. 107(1) [of the Service Regulations]” and therefore “cannot be challenged by means of an internal appeal”, and also because they were “premature”, considering the complainant filed the appeals prior to the finalisation of his staff report and the exhaustion of the conciliation procedure for disputes arising from staff reports. On the merits VP4 endorsed the majority opinion in RI/157/07 and the minority opinion in RI/51/08 which recommended that the appeals be rejected in their entirety, for the reasons put forward by the Organisation during the internal appeal proceedings. The complainant’s claim for damages was also rejected, but VP4 decided exceptionally to withdraw the second written warning from

the complainant's file, stating that the "warning [had] served its purpose". The complainant was notified of this decision in a letter dated 12 January 2011 from the Director of Regulations and Change Management. That is the impugned decision.

4. Following an investigation into the complainant's allegations of harassment, the complainant was notified by letter dated 16 November 2012 that the warning letter of 29 June 2007 would be withdrawn from his file and that the marking for "productivity" in his staff report for 2006-2007 would be changed to "good" based on the recommendations of the Ombudsman. The Ombudsman found that there was no harassment.

5. The complainant has applied for oral proceedings and asks the Tribunal to quash "the decision of issuing the two warning letters"; to quash "the decision of VP4 to consider both warning letters as founded and legitimated"; to order the removal of both letters from his personal file; and to award compensation for damages and costs.

6. The complainant challenges the decision contained in the letter of 12 January 2011, and ultimately, the two written warnings. Considering that the two warning letters have been withdrawn, the complainant's claim to have those letters removed from his personal file is moot.

7. The Tribunal considers that the two warnings are not final decisions adversely affecting the complainant; they must be considered as acts, or steps, of an administrative procedure which could lead to a final decision.

8. The complainant insists that the warning letters were a disciplinary measure provided for under Article 93(2)(a) of the Service Regulations, which refers to a "written warning", and that consequently, the two warnings have to be considered as final decisions. The Tribunal notes that the headings of the two letters refer expressly to "Notification of poor performance and opportunity to improve, under Section A,

point 6 of the General Guidelines on Reporting, Communiqué No. 87”, and their content is consistent with the provisions of the General Guidelines on Reporting, which form part of the EPO’s system of staff member performance evaluation. Thus, the Tribunal is of the opinion that written warnings are administrative acts forming part of the procedure which concludes in the drafting of a staff report. Their aim is to help the staff member reach the required marking by notifying the staff member of the potential for a marking of less than “good” while giving them time to correct it. Therefore, the Tribunal finds that the warnings do not constitute the disciplinary measure provided for under Article 93(2)(a) of the Service Regulations.

9. Consequently, the Tribunal is of the opinion that the complainant impugns decisions which do not correspond to “final decisions” in accordance with Article VII, paragraph 1, of the Tribunal’s Statute. “Ordinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as a part of a challenge to the final decision but they, themselves, cannot be the subject of a complaint to the Tribunal.” (See Judgment 2366, under 16.) Consequently, the complaint is irreceivable in accordance with Article VII, paragraph 1, of the Tribunal’s Statute. The claims for damages allegedly stemming from the decision to issue the warning letters (until the date of their removal) must be rejected and the complaint must be dismissed in its entirety. In these circumstances the request for oral proceedings is denied.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2014,
Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M.

Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I,
Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ