

110th Session

Judgment No. 2995

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr T. P. C. M. against the European Patent Organisation (EPO) on 2 April 2008 and corrected on 1 July and 8 August 2008, the EPO's reply of 27 February 2009, the complainant's rejoinder of 31 October 2009, corrected on 13 January 2010, and the Organisation's surrejoinder of 26 April 2010;

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

Considering Articles 10, paragraph 3, and 14 of the Rules 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. The complainant is a German national born in 1964. He joined the European Patent Office – the EPO's secretariat – as an examiner in 1991. Mr S. was his director and reporting officer from January 1998 to December 2001 and Mr H. from January 2002 to April 2007.

On 22 January 2003 his staff report covering the period 2000-2001 was signed by Mr S. and countersigned by Mr F., his Principal Director at the time. He received the overall rating “less than good”, and the individual ratings “less than good” for quality, “good” for productivity and aptitude, and “unsatisfactory” for attitude to work and dealings with others. In connection with the latter rating, reference was made in the report to his work on two patent examination files. Having made several unsuccessful requests to inspect those files, on 19 February 2003 he wrote to the President of the Office requesting that the two files or, alternatively, all relevant documents be placed at his disposal. He asked that his letter be treated as an internal appeal in the event that his requests were not granted. He was subsequently informed that his appeal had been referred to the Internal Appeals Committee under the reference RI/5/03.

In April 2003 the complainant provided his comments on the 2000-2001 staff report. He characterised it as “unlawful” and explained why he disagreed with the ratings he had received. Mr S. and Mr F. then provided their final comments, maintaining the initial ratings. The matter was submitted to the conciliation procedure provided for in the General Guidelines on Reporting set out in Circular No. 246, but the disagreement between the parties persisted. The mediator’s report was transmitted to the Vice-President of Directorate-General 2, who on 3 February 2004 decided to approve the staff report. The complainant wrote to the President on 9 May 2004 requesting that the reporting procedure for the period 2000-2001 be declared unlawful, that a new procedure be carried out with the participation of a different reporting officer, that the 2000-2001 staff report be amended with the individual and overall ratings being raised to “good” and that he be awarded moral damages and costs. He again asked that his letter be considered as an internal appeal in the event of a negative response. He was soon thereafter informed that this appeal had also been referred to the Internal Appeals Committee, which had registered it as RI/23/04.

After having examined the complainant’s first and second appeals jointly, the Internal Appeals Committee concluded in its opinion of 20 February 2006 that the 2000-2001 reporting procedure had been

procedurally flawed insofar as the complainant's right to a hearing had been infringed and he had not been given a timely warning in respect of his "less than good" rating for quality. It thus recommended that the reporting procedure be repeated, that a new staff report be drawn up with the rating for quality being raised to "good", and that up to half of the complainant's costs not exceeding the usual scope be reimbursed. It otherwise recommended that the appeals be dismissed. By a letter of 21 April 2006 the complainant was informed that the President had decided to endorse the Committee's recommendations. An amended staff report for the period 2000-2001 was drawn up in accordance with the President's decision and it was signed by Mr S., and by Mr B. as countersigning officer, on 5 and 6 December 2006 respectively. The complainant provided his comments on the amended staff report on 13 March 2007. He expressed his disagreement and requested that it be withdrawn. Mr B. made his final comments on 18 December 2007, noting that the staff report remained without change, and the Vice-President of Directorate-General 1 endorsed it on 22 February 2008.

Prior to that, on 12 April 2006, the complainant had lodged a complaint of harassment identifying Mr H. as the respondent. The Ombudsman assigned to investigate the complaint, in accordance with Circular No. 286, submitted his report on 15 February 2007 in which he concluded that the complainant had been the victim of an exceptionally severe harassment campaign by Mr H. since 2002 – in particular through the latter's attempts to present him as mentally ill. He also pointed to clear indications that the complainant had been subjected to harassment by Mr S. as early as the 2000-2001 reporting period. He thus recommended that the complainant be afforded "comprehensive reparation", inter alia by being transferred and placed under a different director, having his 2002-2003 and 2004-2005 staff reports revised by an impartial reporting officer and being awarded financial compensation and legal costs. The Ombudsman also considered that the 2000-2001 staff report drawn up by Mr S. should be considered as part of the harassment campaign. By a letter

of 23 March 2007 the complainant was informed that the President had decided to allow his complaint; he would thus be transferred, his staff reports for the 2002-2003 and 2004-2005 periods would be reviewed and he would be awarded 5,000 euros in compensation. The complainant was transferred with effect from 1 April 2007.

By an e-mail of 12 June 2007 he requested the implementation of the Ombudsman's recommendations, including the award of "comprehensive reparation". He asked that his letter be considered as an internal appeal in the event that the President failed to grant his request. On 13 July he lodged a further internal appeal challenging the manner in which the Ombudsman's recommendations had been dealt with by the EPO. These appeals were registered as RI/72/07 and RI/115/07 respectively. On 7 August he was advised that the Office had taken appropriate steps to implement the Ombudsman's recommendations and that it had decided to award him an additional 15,000 euros in compensation so as to close the procedure under Circular No. 286. In his review of the complainant's staff reports dated 22 August 2007, Mr M., the Head of the President's Office, concluded that the complainant's ratings should be raised to "good" for the periods 2004-2005 and 2006-2007 but not for the period 2002-2003. The President decided not to endorse this conclusion and by a letter of 18 October informed the complainant that his staff report ratings for all of the above periods would be raised to "good".

On 30 November 2007 the complainant requested that the Ombudsman's recommendation for "comprehensive reparation" be implemented, that his 2000-2001 staff report be revised in line with the latter's finding and that he be awarded an appropriate amount in moral damages and costs. He was informed by letter of 20 December 2007 that his requests could not be granted as the procedure under Circular No. 286 had already been closed. He would however be reimbursed reasonable and appropriate legal costs subject to the receipt of invoices. He was also advised that, as his requests in connection with the 2000-2001 staff report had already been the subject of internal appeal proceedings, the Tribunal remained the sole legal remedy. The complainant's staff reports covering the period from 2002 to 2007 were signed on 21 and 22 January 2008 by Mr M., acting as reporting

officer, and Ms M., as countersigning officer, respectively. Although the complainant received the rating “good” under each heading, it was expressly stated in the 2002-2003 report that his performance had been unsatisfactory and in the 2004-2005 and 2006-2007 reports that his ratings were not based on his performance and aptitude but solely on the outcome of the procedure under Circular No. 286.

The complainant signed the amended staff report on 29 January 2008, indicating that he wished to have it referred for conciliation under the General Guidelines on Reporting. He was informed by a letter of 8 February that further conciliation was not possible.

On 22 February 2008 the complainant’s counsel wrote to the President, reiterating the requests of 30 November 2007 and asking that his letter be treated as an internal appeal. Counsel was notified on 4 March that the President had decided not to grant those requests and to refer the matter to the Internal Appeals Committee, which registered it under RI/3/08. The complainant filed the present complaint on 2 April 2008, impugning the President’s decision of 20 December 2007. He requested on 8 August 2008 conciliation under the General Guidelines on Reporting in respect of his staff reports covering the period from 2002 to 2007 and his request was granted on 25 August.

B. The complainant contends that his amended 2000-2001 staff report signed on 5 December 2006 is tainted with procedural and substantive flaws.

He argues in particular that the EPO not only failed to implement properly the President’s decision taken after the close of internal appeals RI/5/03 and RI/23/04, but also the Ombudsman’s recommendations following the investigation into his complaint of harassment. Consequently, both the amended 2000-2001 staff report as well as those covering the period from 2002 to 2007 are clearly inconsistent, unbalanced and in breach of the provisions of the General Guidelines on Reporting.

The complainant strongly criticises the Organisation for the delay in providing him with both the original and the amended 2000-2001

staff reports and for its refusal to pay him adequate compensation in moral damages and costs, notwithstanding the Ombudsman's unequivocal finding that he had already been subjected to harassment during the 2000-2001 reporting period when Mr S. was his director and reporting officer. In addition, he submits that he suffered a loss of rights, including the right to be heard, because the Internal Appeals Committee never issued an opinion on the content of the original 2000-2001 staff report, and also because the amended 2000-2001 staff report was never referred to the conciliation procedure under the General Guidelines on Reporting or to the Internal Appeals Committee.

The complainant asks the Tribunal to order that the amended 2000-2001 staff report signed on 5 December 2006 be declared void, that it be withdrawn, and that a new staff report for the same period be issued with all ratings being raised to "good"; that all requests made by him in connection with internal appeals RI/5/03 and RI/23/04 be granted and that the Ombudsman be heard as a witness; and that some of the statements in the President's letter of 20 December 2007 be declared void. Lastly, he seeks moral damages in the amount of 50,000 euros and costs.

C. In its reply the EPO submits that the complaint is receivable only to the extent that it concerns the claims raised in connection with the complainant's 2000-2001 staff report. All other claims, including those linked to the procedure under Circular No. 286 and the complainant's staff reports for the period from 2002 to 2007, are irreceivable for failure to exhaust the internal means of redress.

On the merits, the Organisation argues that the complaint is ill-founded, emphasising the discretionary nature of decisions on performance and conduct. It rejects the allegation that the complainant's right to be heard was denied, noting that he had ample opportunity to state his opinion at four individual meetings where his

performance was discussed and during the conciliation procedure. The Internal Appeals Committee considered his case and, in line with its recommendation, his 2000-2001 staff report was amended with the rating for quality being raised to “good”. Thus, the internal means of redress were exhausted and there was no basis for referring the matter a second time to the Internal Appeals Committee.

The EPO submits that in light of the complainant’s behaviour towards his colleagues and other staff, the reporting officer was fully justified in maintaining the rating “unsatisfactory” for his attitude to work and dealings with others. Similarly, in view of the available evidence, he was right to confirm the overall rating “less than good”. In effect, the amended 2000-2001 report was tainted with neither a mistake of fact nor abuse of authority. As for the complainant’s criticism of the Administration’s delay in forwarding him the 2000-2001 staff report, the Organisation argues that it was the complainant who failed to respect the prescribed deadlines and who may thus be said to have deliberately delayed the procedure.

The EPO states that it fully complied with the Ombudsman’s recommendations. The complainant’s staff reports for the period from 2002 to 2007 were reviewed in a transparent, objective and impartial manner and he was awarded the rating “good” under each heading. The defendant nevertheless emphasises that the Ombudsman was not qualified to make recommendations regarding the complainant’s performance and neither was he authorised to draw conclusions regarding Mr S. – Mr H. was the sole respondent identified in the complainant’s complaint under Circular No. 286 and Mr S. was never accused or found guilty of harassment. It invites the Tribunal to disregard the Ombudsman’s findings with regard to the 2000-2001 staff report on the grounds that the latter exceeded his authority.

D. In his rejoinder the complainant asserts that his claims before the Tribunal arise in connection with his 2000-2001 staff report and are therefore receivable. He recalls that the Ombudsman made the unequivocal finding that he was harassed by Mr S. and that the

2000-2001 staff report constituted part of the harassment campaign, and he reiterates the view that the EPO did not properly implement the President's decision or the Ombudsman's recommendations in respect of the said report. He argues that the Ombudsman acted fully within the powers afforded to him under Circular No. 286.

In addition to the claims made in his complaint, the complainant requests that the comments in his 2000-2001 staff report be revised so as to be consistent with the ratings and that the amount claimed in his complaint be awarded to him in moral damages for the harassment he suffered by Mr S. He also requests that the EPO be ordered to provide the Tribunal with a complete copy of the Ombudsman's report.

E. In its surrejoinder the Organisation argues that the Ombudsman's report has no bearing on the complaint because it refers to events which unfolded after the 2000-2001 reporting period. It thus invites the Tribunal to dismiss the complainant's request for a complete copy. It notes that by a decision of 19 November 2009 the complainant received 20,000 euros in legal costs, thus bringing the total amount paid to him by the defendant to 40,000 euros. It otherwise maintains its position in full.

CONSIDERATIONS

1. This complaint is concerned with the complainant's amended staff report for the period 2000-2001. The draft of the original staff report was signed by the complainant's then director, Mr S., and countersigned by his Principal Director, Mr F., on 22 January 2003 with the following markings:

Quality	less than good
Productivity	good
Aptitude	good
Attitude to work and dealings with others	unsatisfactory
Overall rating	less than good

The section of the report concerned with “dealings with others” referred to two patent examination files on which the complainant had worked. The complainant unsuccessfully sought access to those and other files and was informed that one of the files referred to in the report had been destroyed. The question of his right to see those files was the subject of an internal appeal.

2. The complainant submitted his comments on the draft of the original staff report on 2 April 2003. Mr S. and Mr F. added their final comments on 19 August 2003. The markings were not changed. The complainant then requested a conciliation procedure but that proved unproductive. On 3 February 2004 the Vice-President of Directorate-General 2 approved the report on behalf of the President. The complainant then lodged an internal appeal, which was joined with his appeal concerning his request for access to various files. By the time the appeals were heard, the internal sections of both files mentioned in the original staff report had been destroyed. The Internal Appeals Committee issued its opinion on 20 February 2006. It was of the view that the complainant’s right to a hearing had been denied by reason of the failure to make available those files referred to in the staff report and recommended that “the reporting procedure be carried out anew”. It also found that there had been insufficient warning of the “less than good” rating for quality and commented that “[s]hould the mark for ‘quality’ be upgraded, the reporting officers will have to deliberate as to whether the overall rating of ‘less than good’ can be sustained”. In the event, the Committee did not consider the complainant’s arguments with respect to the markings in the report.

3. The President accepted the recommendations of the Internal Appeals Committee and, on 21 April 2006, the complainant was also informed that his rating for quality would be raised to “good”. An amended staff report was signed by Mr S. and countersigned by Mr B. respectively on 5 and 6 December 2006, and forwarded to the complainant in January 2007. Apart from the mark for quality, the

other markings, including the overall marking of “less than good”, remained unchanged. The complainant submitted his comments on the amended staff report on 13 March 2007.

4. In the meantime, in April 2006, the complainant had lodged a complaint of harassment against Mr H. who had become his director in January 2002. This complaint was referred to the Ombudsman who found in his report, dated 15 February 2007, that the complainant had been the victim of sustained harassment by Mr H. since 2002. According to the report, the harassment took the form of pretending or falsely claiming that the complainant was mentally ill. In his report the Ombudsman noted that in 2003 Mr S. and Mr F., who had respectively signed and countersigned the complainant’s original staff report but neither of whom had been the subject of the complaint of harassment, had shared the “defective opinions” of Mr H. regarding the complainant’s mental health and, for that reason, he referred to one aspect of the amended 2000-2001 staff report stating:

“Although [the complainant] achieved a ‘good’ quality it is claimed that he did not admit mistakes and that [his] cooperation had been ‘difficult’ to such an extent that the aspect ‘behaviour’ had to be assessed as ‘unsatisfactory’.”

The Ombudsman added:

“Having analysed the documents relating to the original and the amended ‘2000/2001 staff report’, including, where available, the parties’ documents relating to sections VIII and IX, the Ombudsman considers that there are clear indications that Mr [S.] triggered the start of the harassment during the 2000/2001 period, even if the intensity of his actions is not comparable to that of the harassment by Mr [H.]”

In his report, the Ombudsman also found that “[t]he event triggering the harassment may have started during the time for which [the complainant] worked for Mr [S.]”.

5. Between April and October 2007 various steps were taken by the Administration in consequence of the Ombudsman’s report, including a review of the complainant’s staff reports for the period 2002-2007. Mr M., Head of the President’s Office, conducted

that review and, also, reviewed the amended 2000-2001 staff report. He concluded that he would make no changes with respect to that report and the 2002-2003 staff report. Mr M. also reached two conclusions adverse to the complainant with respect to the reporting period 2008-2009. The President informed the complainant on 18 October 2007 that she did not accept Mr M.'s conclusions with respect to the 2002-2003 staff report and the 2008-2009 reporting period. On 30 November 2007 the complainant pointed out that he had still not received his staff report for the period 2000-2001. On 18 December 2007 the countersigning officer, Mr B., made his final comments on the amended 2000-2001 staff report and informed the complainant that it remained unchanged. By a letter signed on 20 December 2007 and received by the complainant on 3 January 2008, the President informed him that if he was not satisfied with the assessment he would have to file a complaint with this Tribunal. Contrary to what is claimed by the EPO, the complainant returned the amended staff report on 29 January 2008 with a statement indicating that he wished to have it referred for conciliation but he was informed on 8 February that further conciliation was not possible. His complaint was filed with the Tribunal on 2 April 2008.

6. Before turning to the substance of the complaint, it is convenient to note a number of preliminary matters. The first concerns the argument of the EPO that it was not appropriate for the amended 2000-2001 staff report to be the subject of an internal appeal. In this regard, the EPO refers to Judgment 1109, consideration 6, where the Tribunal said:

“in only two cases may an internal body be asked to think again. One is where something unforeseeable and of decisive moment occurs after it has reported, and the other is where there comes to light some fact or evidence, again of cardinal importance, that it did not know of or could not have known of before it reported.”

Reliance on that statement is misplaced. An internal appeal with respect to the amended 2000-2001 staff report would not have required the Internal Appeals Committee to rethink its earlier findings

and recommendations. Rather, it would have required it to consider the new appraisal made in consequence of its recommendations. Further and as already pointed out, the Committee had no occasion to consider the substance of the complainant's claims with respect to the original markings. The result is that none of the markings has ever been the subject of review by the Committee. The complainant has, thus, been wrongly denied the opportunity to pursue internal remedies with respect to his amended 2000-2001 staff report. That being so, the Tribunal is competent to hear the present complaint but it must do so without the benefit of findings by the competent internal appeals body.

7. The second preliminary matter concerns procedural requests by the complainant. He seeks an order requiring the EPO to provide a translation of the Ombudsman's report and, also, an oral hearing so that the Ombudsman can give evidence of "events since [15 February 2007]". Only some aspects of the Ombudsman's report are relevant to the present complaint and, thus, there is no need for the Tribunal to have a translation of the entire report. Moreover, the complainant has not established that the events since 15 February 2007 of which the Ombudsman might give evidence have any relevance to the issues surrounding the amended 2000-2001 staff report. Accordingly, these procedural requests are rejected.

8. The substantive relief that the complainant now seeks is set out in his rejoinder. He seeks a declaration that the amended 2000-2001 staff report is void and an order that it be withdrawn, or that the markings all be raised to "good". Additionally, he asks the Tribunal to grant "any admissible request [...] in the [...] internal appeals [...] relating to the original staff report 2000-2001" and seeks moral damages for "the scandalous continuation of any serious violations of [his] human rights [...] relat[ing] to the staff report of Mr [S.] for the period 2000-2001". So far as concerns the first of these additional requests and the claims arising out of the original 2000-2001 staff report or the subsequent appeals relating to it, the

Tribunal finds that they are now time-barred and irreceivable. To the extent that the second of these claims is an attempt to raise either a claim of harassment against Mr S. independently of the amended 2000-2001 staff report or a claim for further relief in consequence of the Ombudsman's report, the complainant has not exhausted internal remedies and those claims are not receivable. The complainant also seeks a declaration that certain statements in the President's letter of 20 December 2008 are void. The Tribunal is empowered to consider decisions, not statements in correspondence. Thus, it will concern itself solely with the question whether the amended 2000-2001 staff report can stand in its present form.

9. The General Guidelines on Reporting laid down in Circular No. 246 set out the procedure to be followed in relation to staff reports. Communiqué No. 87 of December 2001 on certain aspects of the 2000-2001 reporting exercise requires that the reporting officers "know exactly what the people they report on actually do and are in a position to make a comparative assessment of the merits of a group of staff". It also requires that a staff report "be consistent in itself, which means that the overall rating must accurately reflect the individual markings, without necessarily being the arithmetic mean". The General Guidelines on Reporting, in the version applicable for present purposes, provide in Section A, paragraph 2, that the aim of the reporting system is "to ensure that [...] performance and abilities [...] are fairly and objectively evaluated". Section B, paragraph 2, requires the Personnel Department to inform the staff member concerned of the names of his or her reporting and countersigning officers towards the end of the reporting period. Section B, paragraph 5, provides:

"A prior interview will take place, unless the staff member expressly wishes to dispense with it. The date of this interview will be fixed by mutual agreement between the staff member and his Reporting Officer and must be entered on the form in the space provided on page 1."

Once the reporting officer has completed the draft report, it is to be passed to the countersigning officer who is to sign the report, adding any comments he or she wishes to make. Section C, Parts VI and VII,

paragraph 1, provides that the countersigning officer, in consultation with the reporting officer, “is responsible for ensuring consistency within each report”.

10. After the reporting and countersigning officers sign the draft report, it is to be given to the staff member concerned who has one month to comment on it. The Guidelines provide in Section C, Part IX, paragraph 1, as follows:

“On receiving the staff member’s comments, the Reporting and Countersigning Officers should respond, if need be after a further discussion with the person reported upon, within one month.”

Section C, Part X, paragraph 2, provides that if, after being shown the final comments of the reporting and countersigning officers, the staff member still disagrees with the report, he or she should state plainly within one month, whether he or she wishes to proceed to a mediator for conciliation. According to Section D, if the conciliation procedure does not result in agreement, the mediator is to transmit the different points of view to the appropriate Vice-President who is to take a final decision on the staff report. If still dissatisfied, the staff member may then proceed to the Internal Appeals Committee.

11. It is to be remembered that the President accepted the recommendations of the Internal Appeals Committee following the appeal with respect to the original 2000-2001 staff report that “the reporting procedure be carried out anew”. It is apparent that that was not done. Rather, it appears that the original staff report was amended to take account of the findings of the Committee and the President’s decision that the marking for quality should be upgraded to “good”. Within this context, a number of matters should be noted. The first is that the countersigning officer for the original 2000-2001 staff report was Mr F., the complainant’s then Principal Director. Before the original staff report was signed, the complainant had four meetings with Mr S. and Mr F. However, the countersigning officer for the amended staff report was Mr B. There is no evidence that the complainant was informed that Mr B. was to be the countersigning

officer for the amended staff report. The complainant contends, and there is no evidence to the contrary, that he does not know Mr B. and that Mr B. does not know him. Given that through no fault of the complainant, the Tribunal does not have the benefit of findings by the Internal Appeals Committee, the Tribunal must proceed on the basis that it is not established that, in accordance with Communiqué No. 87 of December 2001, Mr B. “knew exactly” what the complainant actually did in 2000-2001.

12. As earlier indicated, the complainant met on four occasions with Mr S. and Mr F. prior to their signing the original staff report. There was no meeting prior to the signing of the amended staff report. Indeed, the amended staff report states that the prior meeting was on 15 January 2003 and that the other persons present were Mr F. and Mr G., exactly as recorded in the original staff report. Moreover, there was no meeting between the complainant and the reporting and countersigning officers following the complainant’s submission of his comments on the amended 2000-2001 staff report. The General Guidelines on Reporting require a meeting only “if need be”. However, because it is not established that Mr B. knew exactly what the complainant did and, also, because he had not participated in the earlier meetings, it would have been preferable if he, at least, had met with the complainant before issuing his final comment on 18 December 2007, saying no more than that “[t]he report remains without change”.

13. Although the rating for quality in the amended staff report was raised to “good”, the comments were to much the same effect as in the original staff report, as were the comments under all other headings, save for that relating to “dealings with others”. In that section of the staff report, the substance remained the same but with concrete references to files and documents that were wrongly said to be annexed to the report. In the event, the Personnel Department provided the complainant with documents by reference to which the complainant made his comments. In this section of the amended staff

report, as in the original staff report, it was said that the complainant only accepted the position of third parties after lengthy discussions and that this was detrimental to the productivity of all concerned. In his comments on the amended staff report, the complainant stated:

“As a matter of fact there was not a considerable number of cases where I was outvoted, there was not a considerable number of cases where I drafted a minority vote, in line with my in fact ‘good’ quality. Instead in [seven specified] cases (see the evidence in the Annex) the division decided that my opinion was right. There was no vote in other cases, because a mutual agreement with a single other member was found.”

The EPO seeks to establish that the complainant had difficulties with his colleagues by referring to the minutes of a meeting held with Mr S. and Mr F. on 18 December 2000. However, it provides no evidence to counter the complainant’s statement that there was not a considerable number of cases in which he differed with the opinions of his colleagues. Moreover, the complainant was not given the opportunity to establish that as a fact by way of meeting with Mr B. either before the latter made his final comments or, later, in conciliation or appeal proceedings. In these circumstances, the Tribunal can only proceed on the basis that, if there were cases in which the complainant did not accept the views of others, that may well have been appropriate in a number of cases. Once that conclusion is reached, it follows that the Tribunal cannot be satisfied that the comments and marking with respect to “dealings with others” or those relating to “overall rating”, which are substantially based on those concerning “dealings with others”, represent an objective assessment of the complainant’s performance.

14. The amended staff report for 2000-2001 involved procedural errors resulting from the failure to carry out the procedure “anew”. Overall, that failure had the result that the complainant was not given an opportunity to be heard personally by Mr B. and, more significantly, that he was denied the opportunity to put his case in conciliation proceedings and before the Internal Appeals Committee with the result that the Tribunal cannot be satisfied that the amended staff report represents an objective assessment. It follows that the report must be set aside.

15. However, it is necessary to mention two other matters that are the subject of the complainant's arguments. The first concerns Mr S. The complainant argues that the amended staff report evidences and was the result of harassment by Mr S. The EPO correctly points out that Mr S. was not the subject of a complaint of harassment and was not given the opportunity to be heard by the Ombudsman. Accordingly, it is argued that the Tribunal should not rely on any of the Ombudsman's findings relating to him. The Tribunal accepts that argument. However, the defendant does not deny that in 2003, the year in which Mr S. completed the original 2000-2001 staff report, he shared the incorrect view that the complainant was mentally ill. As the remarks in the amended staff report are, in substance, the same as in the original staff report, this is further reason for doubting that the amended staff report represents an objective assessment of the complainant's performance during that period. As already explained, the Tribunal is concerned only with the amended staff report for 2000-2001. That report was prepared in late 2006 and there is no basis for concluding that Mr S. was at that stage involved in harassment of the complainant.

16. The second matter that should be noted concerns the review conducted by Mr M. In its reply the EPO states:

“Since the staff reports for 2002 to 2007 needed to be reconsidered objectively and impartially [...] the head of the President's Office [Mr M.] and the Principal Director Legal Services were regarded as best placed to undertake the necessary investigations and issue new reports.”

It is not clear on what basis Mr M. reviewed the amended 2000-2001 staff report but he did so. Moreover, the amended staff report was held in abeyance while he did so and Mr B.'s final comments were only issued after Mr M. concluded that he would make no changes to the report. Much of what was said in Mr M.'s review was irrelevant to and, sometimes, inconsistent with an objective evaluation of the

complainant's performance in 2000-2001. As the complainant has been denied the right to conciliation and internal appeal procedures, it is not possible to determine whether Mr B. took Mr M.'s review into consideration when he issued his final comments stating that the staff report remained unchanged. If he did so, that was a serious procedural flaw. But the involvement of Mr. M. is not a matter entitling the complainant to relief in the present case, which is concerned solely with the amended 2000-2001 staff report.

17. The complainant's amended staff report for 2000-2001 must be withdrawn. In view of the time that has now elapsed, the Tribunal will not order that a fresh report be prepared. However, it will order that the withdrawal be without prejudice to the complainant's future rights. The complainant is entitled to moral damages in the amount of 10,000 euros for the procedural irregularities involved in the amended staff report, particularly the denial of the right to conciliation procedures and to pursue an internal appeal. He is also entitled to costs in the amount of 3,000 euros.

DECISION

For the above reasons,

1. So far as concerns the complainant's 2000-2001 amended staff report, the decision of the President of the Office dated 20 December 2007 is set aside.
2. The EPO shall withdraw the complainant's amended 2000-2001 staff report without prejudice to any future right that may depend on satisfactory performance during the relevant reporting period.
3. The EPO shall pay the complainant moral damages in the amount of 10,000 euros.
4. It shall also pay him costs in the amount of 3,000 euros.
5. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet