112th Session **Judgment No. 3062**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr A. P. against the European Patent Organisation (EPO) on 1 August 2009 and the EPO's reply of 23 November 2009, the complainant having declined to file a rejoinder;

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 is a French national born in 1975. He joined the European Patent Office, the EPO's secretariat, in February 2000 as an examiner at grade A1 in The Hague (Netherlands). On 1 February 2002 he was promoted to grade A2, and on 1 February 2003 he was assigned to Directorate 2.4.24 within the Vehicles and General Technology Joint Cluster, in Munich (Germany).

In July 2004 the Principal Director of the Vehicles and General Technology Joint Cluster, Mr F., was temporarily assigned to the Controlling Office. As from 1 September 2004, Mr M., who was then Director of Directorate 2.4.24, was asked to perform the duties of the

Principal Director on an ad interim basis. He combined these duties with his own duties until 1 October 2005, when he was appointed to the Principal Director post vacated by Mr F. and hence ceased to be Director of Directorate 2.4.24.

As a result of the dual role assumed for several months by Mr M., a problem arose in Directorate 2.4.24 with regard to staff reports, which would ordinarily have been signed by him as reporting officer and by his supervisor, the Principal Director, as countersigning officer. In the event, it was decided that Mr M. should act as both reporting and countersigning officer for the 2004-2005 reporting period. Mr M. informed the staff of Directorate 2.4.24 of this decision in an e-mail of 30 March 2006, adding that if any staff member felt that his or her performance had changed dramatically during the last three months of 2005 when he had no longer been their Director, they could request a separate report for that period.

The complainant's staff report for the period 1 January 2004 to 31 December 2005 was thus signed by Mr M. in March 2006 as reporting officer and in April as countersigning officer. When the complainant signed it on 12 May he appended a letter objecting to the fact that the reporting officer and the countersigning officer were the same person. He also disagreed with some of the comments made concerning his productivity and the quality of his work and asked that they be removed or modified. On 20 June Mr M. indicated on the report that he had considered the complainant's objections but found no reasons for modifying his comments. The complainant signed the report again on 21 June, but since he was not satisfied with certain markings and comments he applied for a conciliation procedure. That same day he lodged a first internal appeal, challenging the decision to designate Mr M. as both reporting and countersigning officer. As the conciliation procedure proved unsuccessful, on 16 October 2006 the mediator transmitted the file to the competent Vice-President, who decided not to amend the staff report.

By a letter of 27 March 2007 addressed to the President of the Office, the complainant initiated a second internal appeal contesting his staff report for the period 2004-2005 and alleging that he had been

harassed and treated in an arbitrary manner. He objected to the fact that the reporting officer and the countersigning officer were the same person, and contended that the comments made concerning his productivity and the quality of his work did not reflect his actual performance. He therefore asked that his staff report be annulled and that a new report be prepared by the reporting officer and an independent countersigning officer. He also asked that his performance be rated "very good" in all its aspects and that he be granted damages in the amount of 2,000 euros as well as costs.

In its opinion of 17 March 2009 the Internal Appeals Committee, to which both appeals had been referred, held that the first one was inadmissible, as the challenged decision did not, in itself, have any direct legal effect on the complainant. With respect to the second appeal, it considered that the staff report was procedurally flawed given that the same person had acted as reporting and countersigning officer, whereas the General Guidelines on Reporting provide that these functions are separate so as to ensure an effective and independent review. The Committee found no evidence of harassment or arbitrary treatment. However, it held that, with respect to productivity, the complainant was in the middle range of "good" rather than at the lower end and that his productivity might have been affected by his health problems. It also noted that the comments concerning the quality of his work were self-contradictory and needed to be formulated more clearly by the reporting officer. The Committee recommended that the contested staff report be annulled and replaced with two new reports. For the first of these reports, covering the period from January 2004 to September 2005, Mr M. would remain as reporting officer but another person would act as countersigning officer. For the second, Mr M. would countersign but another director from the same Joint Cluster would act as reporting officer. If, however, this arrangement proved to be impossible or impracticable, an agreement was to be reached with the complainant regarding a different solution, possibly involving a single report for the entire two-year period. The Committee further specified that the new report or reports should not be any worse than the annulled report

and should contain a reference to the complainant's health problems. Lastly, it recommended that the complainant be awarded 500 euros for the delay in the internal appeal proceedings, together with costs.

By a letter of 15 May 2009 the Director of Regulations and Change Management informed the complainant that the President had decided to endorse the Committee's recommendations in part. She rejected the first appeal as inadmissible but allowed the second one in part. She decided to annul the 2004-2005 staff report and asked that, for the period from January 2004 to September 2005, a new report be established by Mr M. as reporting officer and countersigned by another officer, and that, for the period from October to December 2005, another report be drawn up by a new reporting officer and countersigned by Mr M. However, as the competent reporting officer for the latter period had retired and no one had yet been appointed to replace him, the President suggested that a single staff report be prepared for the entire period under review, if the complainant agreed. She added that the comment "just barely good" for his productivity would be replaced by "in the lower half of good" and that the contested comment on the quality of his work would be deleted. The President further decided to award him 500 euros in moral damages and to reimburse his reasonable costs upon submission of bills. Lastly, she had decided not to endorse the Committee's recommendation to refer to his health condition in the report, considering that it had been duly taken into account by deducting all days of absence for the calculation of the productivity factor. The complainant impugns the decision contained in the letter of 15 May 2009.

On 20 May the complainant asked the Director of Regulations and Change Management to provide him with explanations as to the modifications to be incorporated in his staff report. In his view, the President's decision concerning his productivity was not in line with the Internal Appeals Committee's recommendation. The Director replied on 26 May that the new comment was in line with the Committee's recommendation, stressing that the latter had made no specific recommendation as to the wording of the new comment,

except that it should not be *in peius*. On 18 June 2009 the Director asked the complainant whether he would accept to have only one staff report for the period 2004-2005, indicating that, if he agreed, the new comment about his productivity would be changed to "in the middle of good". He also pointed out that if two reports were drawn up, the report covering the last three months of 2005 would in all likelihood show a less favourable rating for productivity than the original report, because his productivity had dropped during that period. The complainant's representative rejected the proposal on 21 October 2009.

B. The complainant alleges abuse of authority insofar as there is no evidence that the impugned decision of 15 May 2009 was taken by the President; he contends that the decision was taken by the Director of Regulations and Change Management.

He submits that the EPO, in deciding to replace the comment "just barely good" by "in the lower half of good" with respect to his productivity, did not follow the Internal Appeals Committee's recommendation, and that no reason was given in the impugned decision for doing so. He points out that, according to the Committee, his productivity was "in the middle of good". He also alleges that the impugned decision was taken without the reporting officer having reassessed his productivity, as recommended by the Internal Appeals Committee. The complainant adds that to date no reporting officer has been appointed.

The complainant asks the Tribunal to set aside the impugned decision insofar as it replaced the comment "just barely good" in his staff report by "in the lower half of good". He requests that the comment be replaced by a "superior good" or, subsidiarily, a "solid good". He also claims moral damages and costs.

C. In its reply the EPO denies any abuse of authority and provides an internal note showing that the President explicitly agreed to the impugned decision drafted by the Director of Regulations and Change

Management. It adds that the President had the complete file at her disposal when she received the draft, and that she had the information and the time needed to examine the case and take a reasoned decision.

According to the Organisation, the President's decision to replace the comment "just barely good" by "in the lower half of good" is consistent with the Internal Appeals Committee's recommendation that the comment made in the new report should not be worse than the one made in the report that was set aside, as well as its finding that the complainant's productivity factor was "in the middle rather than at the lower end of 'good'". The EPO asserts that the impugned decision is duly reasoned and points out that, in accordance with the Tribunal's case law, when the executive head of an organisation accepts the recommendations of an internal appeal body, he or she is under no obligation to give further reasons than those given by the appeal body itself. It adds that the Committee did not recommend that a new assessment of the complainant's performance be carried out, but recommended that a new staff report be drawn up for 2004-2005 with different persons acting as reporting and countersigning officers. It points out that the Committee held that Mr M. was the legitimate reporting officer for the period from 1 January 2004 to September 2005 and the legitimate countersigning officer for the period from October to December 2005.

In addition, the defendant contends that, since it acted lawfully, no grave moral prejudice was caused by its action. Hence, there is no ground for awarding moral damages to the complainant. Lastly, it submits that the complainant's claim for costs should be rejected because the complaint is unsubstantiated.

CONSIDERATIONS

1. In a letter dated 15 May 2009 the Director of Regulations and Change Management informed the complainant of the decision of the President of the Office to set aside the contested staff report for the period from 1 January 2004 to 31 December 2005, as recommended by the Internal Appeals Committee. Due to administrative difficulties, the

President suggested that, if he agreed, a single staff report would be issued for the whole period, rather than two separate reports. The President also decided that the contested comments on the quality of his work would be deleted and those concerning his productivity would be modified. In an e-mail dated 20 May 2009 the complainant asked the Director of Regulations and Change Management to provide him with some clarifications as to the President's decision which was said to have been made in accordance with the Committee's recommendation. He noted that the President's decision to replace the comment "just barely good" by "in the lower half of good" in the section headed "Productivity" in this staff report was not consistent with the Committee's finding that "with a PF [productivity factor] averaging 0.73 over the years 2004 and 2005 the [complainant was] in the middle rather than at the lower end of 'good'". The Director replied, by a letter dated 26 May 2009, that the Internal Appeals Committee "did not make any concrete recommendations as to the [contested] comment but left it clearly in the reporting officer's discretion to modify the specific aspect accordingly" and noted that the new comment placed the complainant's productivity "in the lower half of 'good', i.e. in a broader range which begins at the middle of 'good' and simply excludes the upper half of it". It was considered that this comment constituted "a considerable improvement" in his staff report compared to the previous wording. Furthermore, the Director pointed out that the new comment did not violate the principle of prohibition of *reformatio in peius*.

2. The complainant asks the Tribunal to quash the decision of 15 May 2009 insofar as it replaced the comment "just barely good" in his staff report by "in the lower half of good". He requests that the comment be replaced by a "superior good" or, subsidiarily, a "solid good". He also requests moral damages and costs.

3. 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 Judgment 3006, under 7).

In the present case, the Tribunal notes that the President decided to follow the Internal Appeals Committee's recommendation with respect to the comment on productivity; however, the new comment was not in line with that recommendation. As mentioned above, the Committee found that the complainant's productivity was "in the middle rather than at the lower end of 'good'", which is not the same as stating (as the Organisation did) that the complainant's productivity was "in the lower half of good". The Tribunal is of the opinion that the appropriate equivalent of being "in the middle […] of good" is a comment of "solid good". It follows that the impugned decision, being contradictory in that respect, is flawed, and that the complaint is therefore well founded.

4. In light of the above considerations, the decision of 15 May 2009, as clarified in the letter of 26 May 2009, must be set aside insofar as it relates to the comments on productivity in the staff report for the period 2004-2005. As such, the complainant is entitled to moral damages in the amount of 2,000 euros and costs in the amount of 750 euros.

DECISION

For the above reasons,

1. The decision of 15 May 2009 is quashed insofar as it relates to the comments on productivity in the staff report for the period 2004-2005.

2. The case is referred back to the EPO for consideration of the complainant's rights in accordance with 3 and 4 above.

3. The EPO shall pay the complainant moral damages in the amount of 2,000 euros.

4. It shall pay him costs in the amount of 750 euros.

5. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2011, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Seydou Ba
Mary G. Gaudron
Giuseppe Barbagallo
Catherine Comtet