

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

B. (No. 2)

v.

EPO

122nd Session

Judgment No. 3692

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr Y. N. E. B. against the European Patent Organisation (EPO) on 25 April 2013 and corrected on 4 July, the EPO's reply of 6 November 2013, the complainant's rejoinder of 20 January 2014 and the EPO's surrejoinder of 28 April 2014;

Considering Article II, paragraph 5, 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 who, at the material time, was working as a patent examiner, objects to three of his staff reports, submits that he was subjected to harassment and challenges the rejection of his request for an independent examination of several of his dissenting opinions on patent applications.

On 1 June 2006 the complainant received his staff report for the period 2004-2005 in which he received the assessment "good" for the quality of his work. With respect to his productivity, his reporting officer commented that the complainant's performance was at the "lower end of the good rating". At the end of the conciliation procedure requested by the complainant, the mediator who had been appointed noted in her

report of 3 July 2007 that while the parties had agreed to make three changes to the staff report, one of which consisted in modifying the reporting officer's comments on productivity to state that he considered that the complainant's productivity deserved the rating "good", in the end no overall agreement had been reached. On 16 May 2008 the Vice-President of Directorate-General 1 (DG1) decided to maintain the initial rating. On 26 August 2008 the complainant lodged a first internal appeal asking to have the three above-mentioned changes incorporated in his staff report and the rating he had been given for the quality of his work raised to "very good". He also requested 30,000 euros in compensation for moral injury.

On 14 May 2008 the complainant received his staff report for 2006-2007 in which his reporting officer indicated that, as far as his productivity was concerned, his performance was at the "lower end of the good rating". The conciliation procedure requested by the complainant proved unsuccessful, and the Vice-President of DG1 decided on 4 December 2008 to maintain the initial rating. On 9 March 2009 the complainant lodged a second internal appeal. He asked to have his productivity rating "raised" to at least a "normal good" and requested 10,000 euros in compensation for the injury suffered.

In a letter of 25 June 2009, a copy of which was sent to the President of the European Patent Office, the complainant explained that since 2004, when examining patent applications, he had striven to ascertain whether the inventions in question "involved an inventive step"^{*}, something which his colleagues never or rarely did. For this reason, his relations with many of his colleagues had deteriorated and the situation had "escalated into what [he] fe[el]t to be harassment". He accused his line manager, who was also his reporting officer, of handling the problem in an "unacceptable" manner and of denigrating his work, and he requested the holding of an inquiry into this "affair". On 5 October 2009 the President informed him that she had entrusted this investigation to a mediator. In his report of 19 August 2010 the latter concluded that the allegations of

^{*} Article 52(1) of the European Patent Convention is worded "European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application".

harassment were unfounded. However, he made various recommendations to the complainant, his line manager and the EPO. Having been informed on 15 October 2010 that, in accordance with the mediator's conclusion, his harassment complaint had been dismissed as unfounded, on 13 January 2011 the complainant lodged an internal appeal against this decision, claiming moral damages.

In the meantime, on 28 May 2010, the complainant had asked the President of the Office to arrange for an independent examination of several dissenting opinions which he had expressed on patent applications because they involved no inventive step. On 27 October 2010, having received no reply to this request, he lodged an internal appeal against the implied decision to dismiss it and requested compensation for moral injury.

On 14 July 2010 the complainant received his staff report for the period 2008-2009 in which his reporting officer observed, with regard to his productivity, that his performance was at the "lower end of the good rating". The countersigning officer merely added that he "agreed" with the reporting officer's assessment. In his comments, the complainant said that he disagreed with this report which, in his opinion, confirmed that his reporting officer was biased. As the complainant did not, however, request the opening of a conciliation procedure, the Vice-President of DG1 approved this report on 12 November 2010. On 9 February 2011 the complainant lodged a fifth internal appeal. He requested the cancellation of this report and the drawing up of a fresh report by "persons not suspected of bias". He also claimed moral damages.

After hearing the parties, the Internal Appeals Committee issued a single opinion on all five appeals on 3 December 2012. Regarding the appeal against the staff report for the 2004-2005 period, it unanimously recommended that the three changes agreed by the parties should be incorporated in the report. In addition, as the Vice-President of DG1 had not stated the reasons for his decision not to alter the reporting officer's comments on the assessment of the complainant's productivity, the majority of the Committee members recommended that he should be paid 500 euros in compensation for the injury suffered. The majority of the Committee members further recommended that the appeals against

the other two staff reports should be dismissed as unfounded. With regard to the appeal against the dismissal of the harassment complaint, the Committee recommended, also by a majority, that it should be dismissed as unfounded. However a majority recommended that the complainant should be paid 1,000 euros in compensation for the injury suffered on account of the loss of the guarantees offered by Circular No. 286 on the protection of the dignity of staff which, according to the majority, had been unlawfully suspended in 2007. Lastly, a majority of the Committee members recommended the dismissal of the appeal against the implied rejection of the request of 28 May 2010 as irreceivable *ratione materiae*, since it was not directed against a decision adversely affecting the complainant.

The complainant was informed by a letter of 30 January 2013, which constitutes the impugned decision, that the Vice-President of Directorate-General 4 (DG4) had decided to follow all of the majority and unanimous recommendations of the Internal Appeals Committee, apart from that concerning the award of 1,000 euros in compensation for the moral injury suffered as a result of the suspension of Circular No. 286.

In his complaint filed with the Tribunal, the complainant asks that the corrections which he requested in the internal proceedings be made to the three disputed staff reports. In respect of the five appeals, he requests the payment of 60,000 euros and an additional 1,000 euros per year from 1 January 2008 until the delivery of this judgment.

The EPO claims that the complaint is irreceivable *ratione materiae* insofar as it concerns the request of 28 May 2010. For the remainder, it submits that the complaint is devoid of merit.

CONSIDERATIONS

1. The complainant, a patent examiner at the EPO, lodged five internal appeals in succession. In the first two, he challenged his staff reports for the periods 2004-2005 and 2006-2007 respectively. The third appeal concerned the dismissal of a harassment complaint. The fourth was directed against the implied rejection of his request of 28 May 2010 for an independent examination of several dissenting opinions which

he had expressed on patent applications. Lastly, in his fifth appeal the complainant challenged his staff report for the 2008-2009 period.

2. The Internal Appeals Committee, which examined all the appeals together, issued its opinion on 3 December 2012 recommending that the first appeal should be allowed in part. As far as the other four were concerned, the majority of members recommended that they should be dismissed for the most part. In his decision of 30 January 2013, which the complainant impugns, the Vice-President of DG4 decided to accept most of the Internal Appeals Committee's recommendations.

3. On 25 April 2013 the complainant filed his complaint with the Tribunal. He asks that the corrections which he requested in the internal proceedings be made to the three disputed staff reports. He also requests, in respect of all five appeals, the payment of 60,000 euros and an additional 1,000 euros per year from 1 January 2008 until the delivery of this judgment.

4. The Tribunal first recalls that, according to Article 6(1)(b) of its Rules, a complainant's arguments of fact and law must appear in the complaint itself. They may not consist of a mere reference to other documents, as is the case here. This manner of proceeding is contrary to the Rules and makes it impossible for the Tribunal and the other party clearly to understand the complainant's pleas (see Judgment 3434, under 5).

5. On 28 May 2010 the complainant asked the President of the Office to arrange for an independent examination of several dissenting opinions which he had expressed on patent applications. As he received no reply to this request, on 27 October 2010 he lodged an internal appeal – his fourth – against the implied decision to reject it. In accordance with the recommendation of the Internal Appeals Committee, this appeal was dismissed as irreceivable on the grounds that it was not directed against a decision adversely affecting the complainant.

The EPO submits that the complaint is irreceivable for the same reason insofar as it concerns the request of 28 May 2010. Without there being any need to rule on this objection to receivability, the Tribunal notes that neither the Service Regulations for permanent employees of the European Patent Office nor any other normative text contain any provision granting the complainant the right to have his dissenting opinions on patent applications examined by an independent expert. This claim is therefore without merit and the Tribunal will reject it.

6. On the merits, the complainant enters several pleas with regard to his three staff reports for the periods 2004-2005, 2006-2007 and 2008-2009.

7. It is first necessary to examine his objection to his staff report for the 2006-2007 period. He contends that the comment of his reporting officer that “[his] performance [was] at the lower end of the good rating” detracted from the “good” rating he had obtained for his productivity.

8. As the Tribunal has consistently held, assessment of an employee’s merit during a specified period involves a value judgement; for this reason, the Tribunal must recognise the discretionary authority of the bodies responsible for conducting such an assessment. Of course, it must ascertain whether the ratings given to the employee have been determined in full conformity with the rules, but it cannot substitute its own opinion for assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene in this area only 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, or if it was taken in breach of a rule of form or procedure, or if there was abuse of authority (see, for example, Judgment 3006, under 7). This limitation on the Tribunal’s power of review naturally applies to both the rating given in a staff report and the comments accompanying that rating.

9. In this case, the Tribunal can only find that, although ultimately the complainant obtained the rating “good” for his productivity, the comment accompanying that rating detracted from it. In this respect the disputed staff report is open to the same criticism as the report censured by the Tribunal in Judgment 3268, concerning an almost identical case brought by another official of the EPO. This report is therefore unlawful for the same reasons as those set forth on considerations 11 and 12 of that judgment.

10. The Tribunal notes that the complainant’s reporting officer proceeded in the same way in the staff report for 2004-2005, since he inserted a comment detracting from the assessment “good” which he had given to the complainant for productivity.

11. It follows from the foregoing that the staff reports for the periods 2004-2005 and 2006-2007 are unlawful for the same reason. They must be set aside without there being any need to examine the complainant’s other pleas concerning them. It will be incumbent upon the EPO to draw up a new staff report for each of the periods in question, where the final paragraph containing the phrase “at the lower end of the rating good” will be deleted from each of the sections related to productivity and not replaced with equivalent terms. It will also be necessary, if this has not already been done, to incorporate in the staff report for 2004-2005 the changes agreed by the parties during the conciliation procedure.

12. In addition, the complainant submits that his staff report for 2008-2009 is “biased by the prejudice” of his reporting officer. In the proceedings before the Internal Appeals Committee he maintained that it was abnormal and unreasonable to have allowed his reporting officer and his countersigning officer to carry out the assessment, as previous events had shown that they could not guarantee an impartial assessment.

13. The Tribunal considers that the requisite guarantees of objectivity were not respected when the staff report for 2008-2009 was drawn up.

Although on 25 June 2009 the complainant had lodged a harassment complaint containing accusations against his line manager, who was also his reporting officer, and the case had been assigned to a mediator, he received his staff report for the 2008-2009 period on 14 July 2010. This situation cast doubts on the objectivity with which the complainant had been assessed. In accordance with Circular No. 246 entitled “General guidelines on reporting”, the superior authorised to countersign the report in question, who was responsible for ensuring that the complainant was assessed equitably, should therefore have carried out a genuine review of the assessment of the complainant’s merits.

14. Indeed, it is well settled by the Tribunal’s case law that if the rules of an international organisation require that an appraisal form must be signed not only by the direct supervisor of the staff member concerned but also by her or his second-level supervisor, this is designed to guarantee oversight, at least *prima facie*, of the objectivity of the report. The purpose of such a rule is to ensure that responsibilities are shared between these two authorities and that the staff member who is being appraised is shielded from a biased assessment by a supervisor, who should not be the only person issuing an opinion on the staff member’s skills and performance. It is therefore of the utmost importance that the competent second-level supervisor should take care to ascertain that the assessment submitted for her or his approval does not require modification (see Judgment 320, under 12, 13 and 17, or more recently Judgments 3171, under 22, and 3239, under 15). Of course, this check must be carried out with particular vigilance when the assessment occurs in a context where it is especially to be feared that the supervisor making it might lack objectivity and, *a fortiori*, when it takes place, as it did in the instant case, in a situation of overt antagonism (see Judgment 3171, under 23).

15. Far from satisfying these requirements, the countersigning officer merely added the word “agreed” to the disputed report. This clearly shows that he did not carry out a genuine review of the draft report submitted to him.

16. It follows from the foregoing considerations that the staff report for the 2008-2009 period must be cancelled. This means that it must be removed from the complainant's personal file and destroyed by the EPO.

In addition, the Tribunal notes that this report was tainted with the same flaw as those for the two preceding periods, because it stated that the complainant's productivity was "at the lower end of the good rating".

17. The complainant filed a harassment complaint on 25 June 2009. The case was referred to a mediator who issued his report on 19 August 2010 in which he concluded that there had been no "case of harassment", although he found that the complainant's line manager had displayed a "lack of [...] leadership" which, in his opinion, had a cause and effect relationship with the "spiralling conflict". The mediator considered that the complainant had not always behaved in a constructive manner and had thus largely contributed to the conflict.

The complainant filed his third internal appeal on learning on 15 October 2010 that, in accordance with the mediator's conclusion, his complaint of harassment had been dismissed as unfounded. He accused the mediator of failing to investigate the case properly in several respects and of issuing an incomplete report. The Internal Appeals Committee concluded that the mediator had not been negligent in any way when gathering evidence and conducting the inquiry and emphasised that he had heard the parties as well as two witnesses. It also noted that although the mediator had devoted one whole section of his report to the "problems of assessment", he had not considered himself competent to intervene in the proceedings concerning the complainant's staff reports that were then pending. The Committee also stated that the mediator had not exceeded his terms of reference by evaluating the parties' conduct and that he had been correct in finding that the responsibility for the worsening conflict had been shared. The Committee concluded that the decision to dismiss the harassment complaint was sound. However, it considered that the complainant had suffered injury owing to the loss of the guarantees offered by Circular No. 286 on the protection of the dignity of staff which, in its opinion, had been

unlawfully suspended in 2007. The majority of its members recommended that the complainant should be awarded damages in the amount of 1,000 euros. This recommendation was rejected by the Vice-President of DG4 on 30 January 2013.

18. In Judgment 2552, under 3, the Tribunal stated that when an accusation of harassment is made, an international organisation must investigate the matter thoroughly and accord full due process and protection to the person accused. The organisation's duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account (see Judgments 1376, under 19, 2642, under 8, and 3085, under 26).

Furthermore, the question as to whether harassment has occurred must be determined in the light of a thorough examination of all the objective circumstances surrounding the events complained of. An allegation of harassment must be borne out by specific acts, the burden of proof being on the person who pleads it, but there is no need to prove that the accused person acted with intent (see Judgments 2100, under 13, 2524, under 25, and 3233, under 6, and the case law cited therein).

19. The complainant has not provided any substantive, cogent evidence proving that his line manager's actions or statements belittled or humiliated him and that he therefore suffered harassment. The investigation conducted by the mediator did reveal the existence of considerable tension between the complainant and his line manager, which had impaired their professional relations and had ultimately created a strained working atmosphere. However, the facts established by the mediator, viewed in isolation or as a whole, do not lead the Tribunal to arrive at a different conclusion than that reached by him, as summarised in consideration 17, above.

Having examined the submissions in the file and the mediator's report, the Tribunal considers that the complainant's contention that the mediator failed to look into "certain fundamental issues" is groundless. The Tribunal considers that the mediator thoroughly investigated the events complained of in an effort to ascertain the nature of the conflict between the parties. He interviewed the complainant, his line manager and other witnesses. He carefully weighed up the evidence and came to the conclusion that the complainant had not been harassed. Both parties were able to supply all the clarification they wished during the proceedings.

It may be concluded from the above that the complaint is unfounded as far as the harassment complaint is concerned and that the related claim must be dismissed.

20. The complainant also complains that the mediator did not conduct his investigation "within the framework [...] of Circular [No.] 286". It is true that the Tribunal held in Judgment 3522 that this circular had been suspended unlawfully in 2007 but, as has just been stated, a procedure satisfying the requirements of the case law was followed in this case. The complainant may not therefore submit that he has suffered any injury on account of the suspension of the circular.

21. It follows from all the foregoing considerations that the decision of 30 January 2013 must be set aside insofar as it dismissed the appeals against the complainant's staff reports for the periods 2004-2005, 2006-2007 and 2008-2009.

22. Moreover, the unlawful nature of the disputed staff reports in question caused the complainant moral injury. The Tribunal considers it appropriate to award him 5,000 euros in compensation under this head.

23. On the other hand, all other claims must be dismissed for the reasons set forth in considerations 5 and 18 to 20, above.

DECISION

For the above reasons,

1. The decision of 30 January 2013 is set aside insofar as it dismissed the appeals against the complainant's staff reports for the periods 2004-2005, 2006-2007 and 2008-2009. These reports are also cancelled.
2. The EPO shall proceed as indicated under 11 and 16, above.
3. The EPO shall pay the complainant 5,000 euros in moral damages.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 May 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ