

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

W.
v.
EPO

138th Session

Judgment No. 4894

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J.-L. C. W. against the European Patent Organisation (EPO) on 24 November 2015 and corrected on 7 March 2016, the EPO's reply of 23 June 2016, the complainant's rejoinder of 9 September 2016 and the EPO's surrejoinder of 16 December 2016;

Considering Articles II, paragraph 5, and VII 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 challenges his staff report for 2009.

At material times, the regulatory framework within the EPO for creating and reviewing staff reports was embodied in Circular No. 246, entitled "General Guidelines on Reporting". If a staff member was not in agreement with the content of her or his report, Section D facilitated a conciliation procedure between her or him and her or his reporting and countersigning officers, under the direction of a mediator appointed by the President of the European Patent Office, the EPO's secretariat. If no agreement was reached at the end of the mediation procedure, Section D(7) permitted the staff member to pursue the matter before the

Internal Appeals Committee in accordance with Articles 107 and 108 of the Service Regulations for permanent employees of the Office.

Circular No. 246 was replaced with effect from 1 January 2015 by Circular No. 366, entitled “General Guidelines on Performance Management”. At the same time as this circular took effect, the Administrative Council issued decision CA/D 10/14, which introduced a new career system for the EPO. It redesigned notably the classification of jobs and grades; the conditions of step advancement; the promotion procedure and the performance management system. Article 37 of decision CA/D 10/14 amended Article 109(3) of the Service Regulations for permanent employees of the Office to exclude appraisal reports from the review procedure as had been the previous position. Article 39 of decision CA/D 10/14 inserted Article 110a into the Service Regulations, under the heading “Objection procedure for appraisal reports”. Article 110a(1) stated that, in case of disagreement on an appraisal report, the parties to the dispute shall endeavour to settle it through conciliation. Article 110a(2) stated that an employee who is dissatisfied with her or his appraisal report at the outcome of the conciliation may challenge it by raising an objection with the Appraisals Committee. Article 110a(4) stated that the Appraisals Committee “shall review whether the appraisal report was arbitrary or discriminatory”. Article 110a(5) stated that the competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee. Article 38 of decision CA/D 10/14 amended Article 110(2) of the Service Regulations to exclude appraisal reports from the internal appeal procedure before the Internal Appeals Committee.

The complainant joined the Office in 1988 at grade B1. With effect from 1 December 2006, he was promoted to grade B5. Under the new career system introduced by decision CA/D 10/14, he currently holds grade G09.

In the course of the reporting period 2008-2009, the complainant was transferred from his post of Manager of the Knowledge Management Team of Unit 211 to the post of Supervisor/Head of Section, Manager of Unit 4353, following a departmental reorganisation. Consequently,

two separate staff reports were drafted for the said reporting period: the first one covering the period from 1 January 2008 to 31 December 2008 and the second one covering the period from 1 January 2009 to 31 December 2009.

On 1 April 2010, the complainant's reporting officer signed the second staff report. The complainant's quality, aptitude and management ability were rated as "very good", whereas his productivity and attitude to work and dealings with others were rated as "good", and so was the overall rating. The countersigning officer agreed with the markings and signed the report on 6 April.

The complainant, who considered that the markings and the corresponding written comments were not consistent, requested an amendment of his staff report. More specifically, he asked the removal of a sentence under the section of attitude to work and dealings with others and the subsequent amendment under the corresponding box marking from "good" to "very good". The same amendment was requested for the box marking under the section of overall rating.

On 21 April 2010, the reporting officer indicated that he would not remove the written comments nor modify the markings in the report. The countersigning officer agreed with him on the following day. On 26 April, the complainant requested a conciliation procedure in compliance with Section D of Circular No. 246.

A conciliation meeting took place on 14 February 2011, during which the parties were unable to resolve their disagreement. The mediator drew up a report on 29 March 2011 and sent it to the Vice-President of Directorate-General 4 (DG4), who confirmed the final staff report on 26 July 2011. The complainant signed it on 5 September 2011.

Meanwhile, on 1 September 2011, the complainant had lodged an internal appeal requesting, among other things, that his staff report for 2009 be quashed, that he be granted the marking "very good" for his productivity, attitude to work and dealings with others and for the overall rating, and that the corresponding amendments be made in the written comments. He further sought the award of moral and material damages and costs.

In its opinion of 1 December 2014, the Internal Appeals Committee unanimously concluded that the internal appeal was founded on the merits. It recommended that the staff report be referred back to the Administration to review the box markings for attitude to work and dealings with others, productivity and overall rating and to adjust, where necessary, the corresponding comments. Should the complainant not be satisfied with the new report, the Internal Appeals Committee indicated that he could request a new conciliation procedure and then directly file a complaint before the Tribunal. Concerning the complainant's request for material damages, it recommended that, as no concrete injury could be determined, the new staff report be sent to the Promotion Board in order to examine a retroactive promotion for the complainant. It also recommended awarding the latter 2,500 euros for the loss of possible career perspectives, and 1,000 euros for the length of the procedure. Finally, it recommended dismissing the claim for costs.

By a letter dated 11 September 2015, the complainant was informed that he would be awarded 3,500 euros pursuant to the Internal Appeals Committee's recommendations. The Vice-President of DG4, acting by delegation of power from the President of the Office, explained to him that a new career system had been adopted as from 1 January 2015 by decision CA/D 10/14 and that, consequently, the conditions of career advancement had been changed. The Vice-President concluded that there would be no review of the staff report. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the amendment of the markings and comments in the staff report or, subsidiarily, the review of the report in accordance with the Internal Appeals Committee's recommendations. He also seeks the award of "any real damage" flowing from the staff report in terms of promotion and career prospect. In this regard, he asserts that he would be satisfied with an order to submit the revised staff report to a Promotion Board composed in accordance with and governed by the provisions in force in 2009. He further requests compensation for moral damages and the award of "[s]pecial damages if the [EPO] were to delay the proceedings before the Tribunal by asking for extensions of

the deadlines”. Finally, he seeks costs for the internal proceedings and the present proceedings and other relief which the Tribunal may find reasonable in law and equity in addition to, or in lieu of, the relief claimed above.

The EPO notes that the complainant’s request for an order to submit the revised staff report to a Promotion Board is irreceivable as it is raised for the first time before the Tribunal. Moreover, the Organisation argues that decisions regarding promotion constitute distinct subject matters which must be challenged distinctively. It requests the Tribunal to dismiss the complaint as partly irreceivable and unfounded in its entirety.

CONSIDERATIONS

1. The complainant became a member of the staff of the EPO in February 1988. The detailed factual background is already set out earlier in this judgment. Suffice it to note that this grievance had its genesis in two staff appraisal reports prepared for the calendar years 2008 and 2009. The report for 2009, as initially prepared by the reporting officer, evaluated the complainant’s productivity, attitude to work and dealings with others and the overall rating as “good”. The complainant was not satisfied with these evaluations and persisted both internally, including before the Internal Appeals Committee, and before the Tribunal with a contention that each should have been evaluated as “very good”.

2. It is desirable, at the outset, to discuss the interaction between the approach, conclusions and recommendations of the Internal Appeals Committee and the impugned decision, namely the decision of the Vice-President of Directorate-General 4 (DG4) of 11 September 2015. The opinion of the Internal Appeals Committee was signed by only three members, seemingly on the basis that two had resigned at the time the opinion was signed and formally published. However, it is tolerably clear that all five members of the Committee participated in the deliberations on the appeal in June 2014 and the subsequent preparation

of the opinion. The resignations took place only shortly before the opinion was signed by the three remaining members. While the fact that the opinion was signed only by three members was noted by the Vice-President of DG4 in his decision of 11 September 2015, he does not say the substance of the opinion could be ignored. Indeed, he expressly adopted one of the recommendations in the opinion, namely, to pay the complainant 2,500 euros in moral damages for the loss of possible career perspectives, claimed by the complainant in the internal appeal as moral damages for the Vice-President's failure to discharge his duty of care. He was also awarded 1,000 euros for the length of the procedure.

3. In its opinion of 1 December 2014, the Internal Appeals Committee firstly considered its role and secondly the merits of the complainant's internal appeal. As to its role, it firstly noted, correctly, the limited role of the Tribunal in reviewing staff reports which are discretionary in nature. However, and importantly (a matter not understood by all internal appeals bodies), it said that an internal appeal body can "determine whether the decision under appeal is the correct decision or whether, on the facts, some other decision should have been made" citing Judgment 3161, consideration 6.

4. The Internal Appeals Committee undertook a detailed and seemingly balanced, coherent and persuasive analysis of the evaluations that had been made in the staff report and the methodology adopted. After having done so, it expressed the view that the whole staff report "ha[d] to be considered as fundamentally flawed". It went on to address in some detail what the gradings probably should be (again seemingly involving a balanced, coherent and persuasive analysis), expressed in terms of "giv[ing] the following hints". The Internal Appeals Committee made several recommendations. They included that "[t]he staff report should be referred back to the [A]dministration to review the box markings for the aspects of attitude, productivity and overall rating and to adjust, where necessary, the corresponding comments". The Committee also recommended that, after that, "the new staff report should be sent to the Promotion Boards in order to examine a retroactive

promotion of the [complainant]”. The Internal Appeals Committee said that “no concrete material damage [could] be determined”.

5. The Vice-President of DG4, in his decision of 11 September 2015, rejected the recommendation to review the complainant’s 2009 staff report, saying that “[a]s a consequence of the entry into force of the career reform, the conditions of career advancement have changed. In view of the entry into force of the new career system, it has been decided that there will be no further review of your staff report for 2009.” This is certainly no answer, or at least a complete and entirely intelligible answer, to the recommendation of the Internal Appeals Committee that there be a new staff report prepared because the original report was “fundamentally flawed”. Even if the introduction of a new career system rendered it unnecessary to prepare a new staff report (which must be doubted), no explanation is given as to why. In substance, the Vice-President of DG4 has failed to motivate the impugned decision of 11 September 2015, which departed from the recommendation of the Internal Appeals Committee. He is legally obliged to do so (see, for example, Judgments 4772, consideration 12, 4762, consideration 8, and 4598, consideration 12). For this reason alone, the impugned decision should be set aside, as the complainant seeks.

6. It is now convenient to consider the additional relief sought by the complainant. This includes that the text in his staff report for 2009 be amended by order of the Tribunal. But it has long been acknowledged that a request such as this would involve an impermissible determination by the Tribunal of what the appraisal should be (see, recently, Judgment 4786, consideration 1). The Tribunal noted in Judgment 4786 that it can, if the report was the product of one of the legal flaws listed in Judgment 4564, consideration 3, set aside the contested staff report at the same time as the impugned decision and remit the matter to the Organisation for review. However, this would be review of a report concerning the appraisal of the complainant some considerable time ago. There should be no such remittal though the complainant may gain some comfort from the conclusions of the

Internal Appeals Committee (together with the observations of the Tribunal in this judgment), whose opinion should be included in his personal file, if it is not already. It is also assumed that the present judgment will be included in his personal file.

7. The complainant seeks, it seems, material damages for the adverse effects of the original staff report on his promotion and career prospects. None could be identified by the Internal Appeals Committee and, even having regard to the further pleas of the complainant on this topic in these proceedings, no sound basis is established for awarding such damages. The moral damages he received were adequate. As the complainant has succeeded in substantial part, he is entitled to costs for the proceedings before the Tribunal which are assessed in the sum of 1,500 euros. His claim for the costs of the internal appeal is rejected as no exceptional circumstances are evident (see Judgment 4157, considerations 13 and 14).

8. Since the preceding reasons for judgment were prepared and well after the pleas of the parties were finalised, the EPO informed the Tribunal, by email dated 19 April 2024, that, as a matter of fact, the complainant has died. In that correspondence, the Organisation did not make a submission that the complainant's death had an effect on these proceedings or suggest that an opportunity be provided to make such submission. Nor has such a submission been made by the complainant's wife or his former lawyer. Accordingly, the Tribunal has decided to render judgment in these proceedings in the ordinary course. It will presumably be a matter for domestic legal processes to determine to whom the money payable to the complainant under this judgment, is ultimately paid as part of the distribution of his estate.

DECISION

For the above reasons,

1. The impugned decision of the Vice-President of DG4 of 11 September 2015 is set aside.
2. The EPO shall pay the complainant 1,500 euros in costs.
3. It shall also insert in the complainant's personal file the Internal Appeals Committee's opinion as stated in consideration 6 of this judgment.
4. All other claims are dismissed.

In witness of this judgment, adopted on 23 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER