

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**É. (No. 5)**

**v.**

**EPO**

**138th Session**

**Judgment No. 4896**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr S. P. É. against the European Patent Organisation (EPO) on 18 March 2020, the EPO's reply of 18 September 2020, the complainant's rejoinder of 11 January 2021 and the EPO's surrejoinder of 13 April 2021;

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 appraisal report for 2018.

The regulatory framework within the EPO for creating and reviewing staff reports was amended with effect from 1 January 2015. Before that date, the framework was embodied in Circular No. 246, entitled "General Guidelines on Reporting", and, on and from that date, the framework was embodied in Circular No. 366, entitled "General Guidelines on Performance Management". This coincided with the introduction of a new career system in the EPO by Administrative Council decision CA/D 10/14 of 11 December 2014, effective 1 January 2015.

By Communiqué 8/2017 of 22 December 2017, the President of the Office informed members of staff that new “Guidelines on Performance Development”, issued on 20 December 2017, would come into force on 1 January 2018, replacing Circular No. 366. The President stipulated that the new Guidelines would apply to objective-setting for 2018.

A document entitled “Guidance to performance assessment 2018” was subsequently issued through a Communiqué from the Vice-President of Directorate-General 1 of 19 February 2019.

The complainant joined the European Patent Office, the EPO’s secretariat, in 2000 as a patent examiner.

At an objective-setting meeting held on 26 February 2018, the complainant’s production objectives for 2018 were set as 56 “products”. At intermediate review meetings held on 19 June and 16 July 2018, it was pointed out to the complainant that his productivity was falling well below those objectives.

In the complainant’s appraisal report, drawn up at the end of the reporting period, his reporting officer found that he had not met his production objectives, having delivered only 27 products in 173 days, and that his productivity was far below that of his colleagues. The reporting officer concluded that the complainant’s competencies were “very limited in terms of delivering results and clearly insufficient” and that, “[o]verall, his performance [was] far below the level of an examiner in his grade and completely unacceptable”. That assessment was confirmed by the countersigning officer, who stated in the complainant’s appraisal report that his performance for 2018 was “extremely disappointing”.

The complainant requested a conciliation meeting, which ended without agreement. He then submitted an objection to his appraisal report.

In its opinion, delivered on 22 November 2019, the Appraisals Committee found that the disputed appraisal report was neither discriminatory nor arbitrary, and therefore recommended that the complainant’s objection be rejected. By a letter of 11 December 2019,

the Vice-President of Directorate-General 4 informed the complainant of her decision to follow that recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and his appraisal report for 2018. He asks for the report to be replaced by a “neutral report” or, subsidiarily, that the EPO be ordered to nominate a “neutral person” to draw up a new appraisal report “in which the inaccuracies from 2018 will not prejudice [him]”. Lastly, he seeks compensation for the moral injury which he considers he has suffered and claims 1,500 euros in costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable or, subsidiarily, as entirely unfounded.

#### CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 11 December 2019 by which the Vice-President of the European Patent Office, Directorate-General 4, rejected the objection he had raised with regard to his appraisal report for 2018.

2. The EPO challenges the receivability of the complaint on the grounds that it was filed late.

The Tribunal must find that the objection to receivability is well founded.

3. According to Article VII, paragraph 2, of the Statute of the Tribunal, “[t]o be receivable, a complaint must [...] have been filed within ninety days after the complainant was notified of the decision impugned”.

The Tribunal has consistently held that the period of time set forth by the Statute begins to run on the day following the date of notification of the impugned decision, but where the ninetieth day falls on a public holiday, the period is extended until the next business day (see, for example, Judgments 3801, consideration 3, 3708, consideration 3, 3630, consideration 3, or 2250, consideration 8).

4. In the present case, the evidence shows that the complainant was notified of the impugned decision on 18 December 2019. The ninety-day period – which, in this case, included 29 February 2020, it being a leap year – therefore expired on Tuesday 17 March 2020. Since 17 March was not a public holiday, the complaint filed by the complainant on 18 March 2020 was out of time.

5. In that regard, it must be pointed out that the complainant, who annexed to his rejoinder a breakdown showing how the period in question had been calculated, making the complaint appear receivable based on the above premise, incorrectly submits that the first day to be included in that period was 20 December 2019.

The period provided for in Article VII, paragraph 2, of the Statute begins to run, as already stated, on the day following the date of notification of the impugned decision, meaning that its point of commencement is taken as the beginning of that day. The first day to be counted is therefore the day immediately following the day of notification – namely, in the present case, 19 December 2019 – and not the day after that (see, in particular, Judgments 4441, considerations 1 and 3, 4272, considerations 2 and 4, 3973, considerations 2 and 4, 3801, considerations 2 and 4, 3708, considerations 2 and 4, or 3630, considerations 2 and 4).

In support of his proposed calculation method, the complainant refers to Judgment 2863, in which the Tribunal indicated that the period during which a decision notified on 11 March 2008 was open to challenge expired on 10 June 2008, and not on 9 June as the usual calculation method outlined above would suggest. But the finding to that effect, contained in consideration 3 of that judgment, was clearly the result of a material error – which was in any event irrelevant since the complaint in that case was time-barred, no matter which of the two dates was used – and this non-standard solution cannot, therefore, be considered to serve as a precedent.

6. As the Tribunal has repeatedly stated, time limits are an objective matter of fact and it should not rule on the lawfulness of a decision which has become final, because any other conclusion, even if founded on considerations of equity, would impair the necessary stability of the parties' legal relations, which is the very justification for a time bar (see, for example, Judgments 4374, consideration 7, 4160, consideration 9, 3828, consideration 7, 3406, consideration 12, or 3002, consideration 13).

7. It follows from the foregoing that the complaint must be dismissed in its entirety as irreceivable because it is time-barred.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

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

*(Signed)*

PATRICK FRYDMAN    JACQUES JAUMOTTE    CLÉMENT GASCON

MIRKA DREGER