

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L. G.

v.

EPO

134th Session

Judgment No. 4564

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. L. G. against the European Patent Organisation (EPO) on 16 June 2014 and corrected on 2 October 2014, the EPO's reply of 20 January 2015, the complainant's rejoinder of 6 March, the EPO's surrejoinder of 29 May, the complainant's additional submissions of 13 July, corrected on 23 July, and the EPO's final comments thereon of 4 November 2015;

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 the 2008-2009 exercise.

At the material time, the complainant was a permanent employee of the European Patent Office (hereinafter "the Office"), the EPO's secretariat, and held the post of examiner at grade A4. After two prior interviews with his reporting officer in March 2010 – as provided for by Circular No. 246, entitled "General guidelines on Reporting" – he received his staff report for the period from 1 January 2008 to 31 December 2009 signed by the reporting officer and the countersigning officer. In that report, he was rated as "good" for quality, "very good" for productivity,

“good” for aptitude, “very good” for attitude and “good” for the overall rating. As he considered that the report did not accurately reflect his performance, he signed it on 3 May 2010 but, in an annex dated the same day, contested the ratings awarded and asked for the ratings for quality, aptitude and attitude and the overall rating to be raised.

Despite these objections, the final report was approved in June 2010 without any changes. On 6 July 2010 the complainant requested that a conciliation procedure be initiated under Section D of the aforementioned Circular No. 246. At the end of the conciliation meeting on 21 December 2010, the mediator concluded that no agreement had been reached and invited the competent authority to take a final decision on the staff report in question. On 27 June 2011 the competent Vice-President signed the report, which remained as it had been drawn up in 2010.

On 22 September 2011 the complainant lodged an internal appeal against that decision and again requested that the ratings awarded be changed, as well as an award of compensation “to be determined” for the injury that he considered he had suffered. In its opinion of 19 December 2013 the Internal Appeals Committee unanimously recommended that the staff report be quashed. The majority recommended that a new report, free of any flaws, be drawn up and that, if appropriate, the possibility of promoting the complainant retroactively be examined. The minority recommended that certain ratings be raised and that the complainant’s case be submitted retroactively to the Promotions Board. In a letter of 17 March 2014 the complainant was informed of the President’s decision to allow his appeal in part and to amend his staff report for it to be submitted to the Promotions Board for consideration. That is the impugned decision.

Following that decision, a new staff report for the 2008-2009 exercise was drawn up by the reporting officer on 16 May 2014. The countersigning officer and the complainant signed it on 11 and 25 June 2014 respectively.

In the meantime, on 16 June 2014 the complainant filed his complaint with the Tribunal, requesting that the ratings contained in his staff report be altered. He asks to be rated as “very good” for quality,

“outstanding” for aptitude and attitude and “very good” for the overall rating.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant asks the Tribunal to order that his staff report for 2008-2009 be amended in such a way that his evaluation in respect of the criteria “quality”, “aptitude” and “attitude” is respectively raised to “very good” (instead of “good”), “outstanding” (instead of “good”) and “outstanding” (instead of “very good”) and that he is awarded the overall rating “very good” (instead of “good”).

Although the complaint does not contain an explicit claim to that effect, the complainant must thus be regarded as seeking the setting aside of the President’s decision of 17 March 2014 on the internal appeal that he had brought against that staff report, insofar as that decision, in allowing the appeal only in part, did not grant the various requests for ratings to be amended.

Furthermore, although in his complaint filed on 16 June 2014 the complainant challenges his initial staff report, which has since been replaced pursuant to the decision of 17 March 2014 by an amended report that he signed on 25 June 2014, in the circumstances of the case it must be considered that the complaint has not become moot on that account; the complainant’s submissions must simply be reinterpreted as being directed against that new report. Indeed, the drawing up of the amended staff report merely gave direct effect to the impugned decision and, although its content does differ from that of the initial report in terms of particular comments and the list of the complainant’s duties, the disputed ratings associated with the assessment of the complainant’s merits have all been maintained.

2. At the outset the Tribunal observes that, in requesting that the Tribunal should itself determine the new ratings to be awarded under the various headings of the staff report concerned, the complainant plainly misunderstands the nature of the review with which the Tribunal

is tasked. It is not for the Tribunal, whose role is not to supplant the administrative authorities of an international organisation, to conduct an assessment of an employee's merits instead of the competent reporting officer or the various supervisors and appeals bodies which may be called upon to revise that assessment. Consequently, as it is framed, the request for the staff report concerned to be amended can only be dismissed (see, to that effect, Judgment 4258, considerations 2 and 3, and the case law cited therein).

The Tribunal may only set aside that staff report at the same time as the impugned decision and remit to the EPO the task of reviewing the assessment concerned in light of the grounds of its judgment, if it considers it necessary to make such an order within the limits of the restricted power of review which the Tribunal may exercise in this area, the scope of which will be reiterated below.

3. As the Tribunal has repeatedly 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 the assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene only if the staff report was drawn up without authority or in breach of a rule of form or procedure, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, or if there was abuse of authority. Regarding the rating of EPO employees, those criteria are the more stringent because the Office has a procedure for conciliation on staff reports and the Service Regulations entitle officials to appeal to a joint body whose members are directly familiar with the workings of the Office (see, for example, Judgments 1688, consideration 5, 3062, consideration 3, 3228, consideration 3, 3268, consideration 9, 3692, consideration 8, and 4258, consideration 2).

4. In support of his complaint, the complainant mainly submits that the ratings awarded to him for the 2008-2009 exercise marked a sharp and, in his view, inexplicable decline in comparison with those in his four previous staff reports – in which he had indeed been awarded the rating “very good” in respect of the criteria “quality” and “aptitude” and, above all, in respect of the overall rating. According to him, this deterioration in his evaluation was also paradoxical because 2008-2009 was precisely the period in which he devoted himself most intensively to his work and achieved the highest level of performance in his entire career, particularly since he had at that point just mastered the new method for processing patent applications, known as “BEST” (Bringing Examination and Search Together), which combined the examination of patent applications with the search for prior art. He thus submits that the increase in his professional competence and the particular efforts that he had made were insufficiently taken into account in the assessment of his merits with regard to the criteria “quality”, “aptitude” and “attitude” and, by implication, in the determination of his overall rating. Lastly, he states that he was not warned of the decline in his evaluation before he was sent his draft staff report, with the result that its content came as a “huge surprise” and he was not given an opportunity, in particular, to attempt to improve his performance in good time.

5. The Tribunal understands the feeling of deep disappointment that the evaluation in question caused the complainant, especially as it had the tangible effect of denying him any chance of promotion to grade A4(2), which he had hoped to reach before the end of his career.

However, his submissions, summarised above, cannot be accepted for the following reasons.

6. The Tribunal firstly observes that a staff report, the purpose of which is to assess an employee’s merits over a given period and which is drawn up according to the rules governing the evaluation exercise for the period in question, is an entirely separate document from previous staff reports. Consequently, a staff member cannot reasonably expect that favourable ratings that may previously have been awarded

to her or him will automatically be maintained (see, for example, abovementioned Judgment 1688, consideration 6).

It is true that there must be a legitimate reason for any change in rating and that, in the present case, the evidence does not show that the standard of the complainant's performance during 2008-2009 deteriorated in absolute terms compared with previous years.

However, it is important to take into account an essential feature of the reporting system applicable in this case, which is that, as the President's Communiqué No. 2 of 22 December 2009 on the 2008-2009 staff reporting exercise stated, "[the] system is a relative one, i.e. staff are marked in relation to their peers and not against an absolute yardstick". The communiqué added that "[a]round 30% of all staff w[ould] receive an overall [rating] 'very good' or 'excellent' for their performance in 2008-2009" and that "this quota [would be] respected in [all] areas". As the complainant's reporting officer explained during the conciliation procedure – and as the Organisation reiterates in its submissions, without being effectively contradicted by the complainant –, the general level of competence of employees in the directorate to which the complainant belonged increased significantly in 2008-2009.

In view of the relative nature of the evaluation system, the corresponding implementation of quotas for awarding higher ratings and the substantial improvement in the performance of other employees in the directorate concerned, the fact that the complainant's rating fell by comparison with previous evaluation periods, without this being attributable to an inherent deterioration in his performance, does not establish the existence of a flaw warranting review by the Tribunal.

7. In the light of the comments made in the various sections of the staff report in question, the Tribunal further observes that the impact of the complainant's "migration to BEST" on his working conditions, the nature of his duties and his performance was duly taken into account in the determination of each of the ratings criticised by the complainant (and also in setting the rating awarded to him in respect of the criterion of "productivity", which on that account was expressly raised by the

reporting officer in relation to the rating that would have been justified by a measurement of his output in absolute figures).

8. It follows from considerations 6 and 7 above that the authors of the contested staff report cannot be said to have drawn clearly mistaken conclusions from the facts or failed to take account of a material fact – bearing in mind that, under the aforementioned case law, it is not for the Tribunal to further review the assessment of the complainant’s merits made by the authorities of the Office.

9. Concerning the plea that the complainant was not informed in advance of the reduction in his rating in comparison to previous evaluations, the Tribunal notes that Circular No. 246 setting out “[g]eneral guidelines on [r]eporting”, which was in force at the time, did not require an employee to be formally notified in advance of a proposed rating unless “he [was] in danger of receiving an overall marking or a marking for any aspect under review less than ‘good’”. The situation of the complainant, who did not receive any rating lower than “good”, was not covered by this requirement. In other cases, the circular only drew attention to the importance of “regular review and feedback” between the staff member and reporting officer throughout the reporting period. That requirement was met in the present case, since the disputed staff report mentions that six discussions between the complainant and his reporting officer were held during the reporting period and it is apparent from the conciliation report of 21 December 2010 that from late 2008, the reporting officer had made comments to the complainant during these discussions that showed that he had some reservations about the standard of the complainant’s performance.

The plea alleging the existence of a procedural flaw liable to have affected the lawfulness of the evaluation in question must therefore be dismissed.

10. When filing its surrejoinder, the EPO submitted documents containing unfavourable comments by the reporting officer regarding some of the complainant’s work, of which he had been notified in August 2009. The complainant states in his further submissions that

those comments “give an impression of [his] unwarranted persecution by the [r]eporting officer”. However, the Tribunal considers that, although some of the criticisms contained in those documents would certainly have benefited from being expressed in less incisive terms, they do not establish the existence of unfavourable prejudice on the part of the reporting officer against the complainant that would render the evaluation unlawful.

11. Lastly, the complainant complains, again in respect of the documents appended to the surrejoinder, that the Organisation produced them at a stage in the proceedings when it was no longer possible for him to respond to them. However, while it is certainly regrettable that the Organisation acted in this manner when it would clearly have been possible for it to submit those documents when it filed its reply, the adversarial nature of the proceedings before the Tribunal was nonetheless respected, since the complainant was specifically authorised to present additional submissions in order to be able to make his observations thereon.

12. It follows from the foregoing that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ