

F. (No. 3)

v.

EPO

141st Session

Judgment No. 5176

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr G. P. F. against the European Patent Organisation (EPO) on 24 January 2020 and corrected on 20 April 2020, the EPO's reply of 16 December 2020, the complainant's rejoinder of 22 December 2020 and the EPO's surrejoinder of 6 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 performance evaluation report (PER) for 2018.

The complainant joined the European Patent Office, the EPO's secretariat, in 1992. At the material time, he worked as a technically qualified member of the Boards of Appeal.

As part of a structural reform of the Boards of Appeal, Communiqué 2/17, setting out new guidelines for the evaluation of the performance of members and chairmen of the Boards of Appeal, entered into force on 1 January 2018.

On 21 March 2018, the chairman of the Board of Appeal to which the complainant was assigned (Board of Appeal 3.5.02) notified him of his objectives for 2018, which were, amongst other things, to “[s]tart working on 5 to 7 new cases as rapporteur per quarter during the evaluation period”. The complainant signed the objectives on the same day adding a handwritten remark in which he indicated “that 6 or 7 new cases per quarter [was] prima facie not achievable”. The objective setting forms part 1 of the PER.

In his written opinion dated 26 February 2019, which forms part 2 of the PER, the chairman of the Board of Appeal 3.5.02 evaluated the complainant’s overall performance for 2018 as “very good” (corresponding to “Grade 1”). In section 1 of his opinion, which dealt with the assessment of achievement of objectives, he noted that the number of new cases started in the first half of the year was below the objectives set, namely because of “the heavy workload associated with an extremely complex five-member case started during this period”, but that the number of new cases started in the second half of the year was in line with those objectives. In section 2 of his opinion, the chairman gave the complainant the rating “surpasses the requirements” in six of the nine competencies assessed. Concerning more specifically the competency “Organisational skills and ability to deal with the workload”, the complainant was assessed as “fulfils the requirements”.

On 19 July 2019, the President of the Boards of Appeal finalised the complainant’s PER, in which he evaluated the complainant’s overall performance as “satisfactory” (corresponding to “Grade 2”). The evaluation made by the President forms part 3 of the PER. In section 2 of the PER, under the competency “c) Organisational skills and ability to deal with the workload”, he stated that he concurred with the opinion provided by the chairman of the Board of Appeal 3.5.02. He added that “[t]he explanation of the chairman [as] to why the set objectives were not met allow[ed] the conclusion that the requirements for [that] competence [...] [were] fulfilled” but that “the overall contribution to the [B]oard [of Appeal 3.5.02] in terms of settled cases – 13, of which one extremely complicated – remain[ed] comparatively low, taking into

account that [the complainant was] an experienced member of the [B]oards”.

On 31 July 2019, the complainant lodged an objection to his PER pursuant to Article 110a(7) of the Service Regulations for permanent employees of the European Patent Office, which was sent to the Appraisals Committee. In his objection, he argued that the President of the Boards of Appeal gave too much weight to the competency “Organisational skills and ability to deal with the workload”, whereas the guidelines for performance evaluation recognized quality over quantity. He also took the view that the criterion “settled cases” which was used by the President to assess that competency was not a criterion for measuring a member’s “contribution to the performance and functioning of the [B]oard”, nor was it an objective given to him for the reporting period. He claimed that the overall performance rating awarded to him be changed from “satisfactory” to “very good”.

Having requested additional information from the President of the Boards of Appeal, the Appraisals Committee delivered its opinion on 6 November 2019. Its conclusion was that the PER was arbitrary. The Committee considered that, in his assessment of the complainant’s performance, the President of the Boards of Appeal gave decisive importance on the sole quantity-related aspect of the competency “Organisational skills and ability to deal with the workload”, thus ignoring the qualitative criteria.

On 19 December 2019, the President of the Boards of Appeal took a final decision on the objection lodged by the complainant. In his decision, he stated that he did not share the Appraisals Committee’s finding that the PER was arbitrary and indicated that the objection was rejected. This is the impugned decision.

The complainant asks the Tribunal to set aside Communiqué 2/17 and the impugned decision. He further requests that the overall “Grade 2” in part 3 of his PER be declared arbitrary and that the President of the Boards of Appeal be ordered to amend said part 3 by awarding him an overall “Grade 1”. He also seeks compensation of no less than 10,000 euros for the moral injury which he considers he has suffered.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable to the extent that the complainant is seeking the setting aside of Communiqué 2/17 and as entirely unfounded for the remainder.

CONSIDERATIONS

1. The complainant impugns the 19 December 2019 decision whereby the President of the Boards of Appeal, departing from the Appraisals Committee's opinion delivered on 6 November 2019, confirmed his previous 19 July 2019 decision concerning the complainant's performance evaluation for 2018, whereby he assessed the complainant's overall performance as "satisfactory" rather than "very good," awarding him the overall "Grade 2" rather than the overall "Grade 1". The complainant also asks the Tribunal to set aside Communiqué 2/17 containing the new guidelines for the evaluation of the performance of members and chairmen of the Boards of Appeal as a general decision underlying the impugned individual decision.

2. With regard to Communiqué 2/17, the complainant alleges that it is flawed for lack of statutory consultation of the General Consultative Committee (GCC), in breach of Article 38(2) of the Service Regulations. He contends that the Presidium of the Boards of Appeal cannot usurp the consultative role of the GCC. As already stated by the Tribunal in a similar case (see Judgment 4795, considerations 3 and 4), the claim that Communiqué 2/17 be set aside is irreceivable, and the plea alleging that the individual decision is flawed for lack of consultation of the GCC in the process leading to the adoption of Communiqué 2/17, is unfounded. The reasoning to deal with the claim on the setting aside of Communiqué 2/17 can be found in that judgment.

3. The complainant challenges the impugned decision alleging that, in the assessment of his performance for 2018, with regard to the competency "Organisational skills and ability to deal with the workload", the President of the Boards of Appeal relied upon an arbitrary quantity-related criterion – that is the number of settled cases – that was never stipulated in the new guidelines for the evaluation of the performance

of members and chairmen of the Boards of Appeal, nor set as an objective prior to the reporting period. More specifically, the complainant submits that he concurs with the Appraisals Committee's conclusion that his PER was arbitrary and that the President of the Boards of Appeal gave decisive importance to the sole quantity-related aspect of the competency "Organisational skills and ability to deal with the workload", thereby disregarding the qualitative criteria.

4. At the outset, the Tribunal recalls its established case law concerning the assessment of an employee's performance during a specified period. Such assessment involves a value judgement and, for this reason, the Tribunal must recognize 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 an abuse of authority (see, for example, Judgments 4795, consideration 9, 4564, consideration 3, 4267, consideration 4, 3692, consideration 8, 3228, consideration 3, and 3062, consideration 3).

5. It is appropriate to recall the PER criteria enclosed in the Annex of Communiqué 2/17, which read in the relevant part as follows:

"The criteria for the evaluation of the performance of members and chairmen of the Boards of Appeal are expressed in the form of observable competencies [...] The focus of the performance evaluation shall lie on quality.

1. Objectives

a) Set objectives

Objectives shall be specific, measurable, achievable, and time-bound. Objectives may be qualitative or quantitative, and shall relate to one of the competencies listed below.

With regard to quantitative objectives, ranges rather than specific numbers shall be applied, taking individual circumstances (e.g. complexity of cases, additional tasks, etc.) into account.

b) Assessment of achievement

[...] The level of achievement of quantitative objectives shall be taken into account in evaluating the competency ‘organisational skills and ability to deal with the workload’.

2. Competencies

Nine out of ten evaluated competencies relate to qualitative performance aspects.

Only one competency, namely ‘organisational skills and ability to deal with the workload’, relates to quantitative performance aspects.

[...]

c) Organisational skills and ability to deal with the workload

Demonstrates strong organisational skills, in particular with regard to case management, in accordance with his or her role as a technically qualified member, legally qualified member or chairman. Plans ahead and sets appropriate priorities. Demonstrates the ability to manage the workload effectively, taking account of its volume and complexity. Takes the organisational requirements of the whole board into account.

[...]

4. Overall grade

The overall performance grade shall depend on how the individual competencies have been evaluated.

Grade 1

The board member’s/chairman’s overall performance is very good. He or she performs at the required level for all competencies, and above it for some of them.

He or she adapts quickly to change, and contributes greatly to the performance and functioning of the board.

[...]

Grade 2

The board member’s/chairman’s overall performance is satisfactory. He or she performs at the required level for all or most competencies. He or she adapts to change within an acceptable timeframe and contributes significantly to the performance and functioning of the board.

[...]”

In essence, these guidelines unequivocally treat quality as paramount in the assessment of performance. Specifically:

- Communiqué 2/17 explicitly states that the focus of the performance evaluation lies on quality rather than quantity;
- while objectives may encompass both qualitative and quantitative aspects, quantitative objectives are to be applied within ranges rather than specific numbers, with due consideration given to individual circumstances such as the complexity of cases and additional tasks;
- significantly, nine out of ten evaluated competencies pertain to qualitative performance aspects; and
- only a singular competency, namely “organisational skills and ability to deal with the workload”, relates directly to quantitative performance.

6. In 2018, the year under review, the complainant served as a technically qualified member of the Board of Appeal 3.5.02, a capacity he had held for over eleven years since 2007.

Pursuant to Article 6(4) of Communiqué 2/17, the complainant’s objectives for 2018 were set by the chairman of his Board of Appeal, in consultation with him, and signed by him on 21 March 2018. The 2018 objectives were the following:

“Start working on 5 to 7 new cases as rapporteur per quarter during the evaluation period.

Be ready to act as chairman in 1 to 2 cases during the evaluation period.

Take on the role of tutor for one of the two members joining [B]oard 3.5.02 during the evaluation period, introducing him/her to other colleagues and to the working methods and electronic tools of the Boards of Appeal. Assist him/her in solving issues relating to his/her newcomer status.”

In part 2 of the PER for 2018, containing the “Written opinion by the Board chairman”, the chairman of the Board of Appeal 3.5.02 delivered his opinion on 26 February 2019. Regarding the achievement of the objectives, the chairman observed that the number of cases initiated in the first half of the year – namely seven – fell below the set objectives but crucially attributed this to “the heavy workload associated

with an extremely complex five-member case started during this period”. Conversely, the number of cases initiated in the second half of the year – namely ten – was in line with the set objectives. The chairman expressed the opinion that the complainant be awarded the overall “Grade 1”, based on the fact that, in 2018, he had performed at “above the required level” (corresponding to the rating “surpasses the requirements”) for six competencies and “at the required level” (corresponding to the rating “fulfils the requirements”) for three competencies.

In part 3 of the PER for 2018, containing the “Performance evaluation report by the President [of the] Boards of Appeal”, the President concurred with the chairman’s opinion in the ranking of all the complainant’s competencies, including the “c) Organisational skills and ability to deal with the workload”, for which the rating from both the chairman and the President was “fulfils the requirements”. However, regarding this competency, the President added the following:

“The explanation of the chairman [as] to why the set objectives were not met allows the conclusion that the requirements for competence c) is fulfilled. Bearing in mind also that explanation, the overall contribution to the board in terms of settled cases – 13, of which one extremely complicated – remains comparatively low, taking into account that [the complainant] is an experienced member of the [B]oards [of Appeal].”

In section 4 of part 3 of the PER, departing from the opinion of the chairman, the President assigned the complainant an overall “Grade 2”, rather than “Grade 1”, stating that:

“[The complainant] is a capable technical member. Not only does he possess at the highest level both the required technical and legal analysis and understanding, but also a well-developed set of organisational skills and ability to deal with the workload.

His contribution to the performance of the [B]oard is improving and he should strive for further developing his organisational skills and ability to deal with the workload.

He works very collaboratively in a constructive manner which is appreciated by his colleagues. It needs to be noted that [the complainant] performs additional tasks for which he deserves special recognition.

I have taken note of the comments provided by [the complainant] [...]
Overall, I consider [the complainant] to be an experienced and competent member who makes a significant, but not yet great contribution to the performance and the functioning of the [B]oard.”

7. The Tribunal notes that, according to Communiqué 2/17 and the criteria for PERs appended therein, an overall “Grade 2” is awarded when a Board member performs “at the required level for all or most competencies” and “contributes significantly” to the performance and functioning of the Board. Conversely, an overall “Grade 1” is awarded when a Board member performs “at the required level for all competencies, and above it for some of them,” and “contributes greatly” to the performance and functioning of the Board.

In the present case, both the chairman’s opinion and the President’s decision concluded that the complainant had performed “above the required level” (“surpasses the requirements”) for six competencies and “at the required level” (“fulfils the requirements”) for three competencies. This ranking is consistent with the Communiqué’s requirements for an overall “Grade 1”.

The President’s decision to award the complainant an overall “Grade 2” rather than “Grade 1” is grounded on the reason that the complainant gave a “significant, but not yet great contribution” to the performance and functioning of the Board of Appeal 3.5.02, which is, according to the provisions of Communiqué 2/17, in line with the description of “Grade 2”, in which, as said before, it is required that the Board member contributes “significantly” to the performance and functioning of the Board, whilst “Grade 1” is awarded when the member “greatly” contributes to the performance and functioning of the Board. The President’s reference to “significant, but not yet great contribution” is arguably based on the explanation given in his assessment of the competency “c) Organisational skills and ability to deal with the workload” as quoted above. However, as the complainant correctly points out, the President relied on a criterion, that is the number of settled cases, which was not included in the objectives assigned to him, which were framed in terms of number of cases to be started working on (“Start working on 5 to 7 new cases as rapporteur

per quarter during the evaluation period”), and not in terms of number of cases to be finalized.

Consequently, the President of the Boards of Appeal committed an error of law and fact, as he misinterpreted the clear objectives assigned to the complainant and, in so doing, relied upon a criterion that was never, at any point, incorporated into the agreed objectives.

The impugned decision is, therefore, affected by errors of fact and law, which fall within the limited scope of the Tribunal’s power of review, as defined in consideration 4 above. In light of the foregoing, the impugned decision will be set aside.

8. The complainant asks that the overall “Grade 2” in part 3 of his PER for 2018 be declared arbitrary and that the President of the Boards of Appeal be ordered to amend part 3, “in particular by following the Board [c]hairman’s written opinion and giving an overall grade of ‘Grade 1’”.

As already stated in Judgment 4795, consideration 14, it is not for the Tribunal, whose role is not to supplant the administrative bodies responsible for staff appraisals within an international organization, to determine the rating to be given to an employee in a PER. However, it is appropriate to order the EPO to invite the President of the Boards of Appeal to draw up a new PER for the complainant for 2018, taking due account of the outcome of the present judgment.

9. The complainant requests that the EPO be ordered to pay him damages in the amount of not less than 10,000 euros “for the distress caused by the arbitrary treatment”. The Tribunal recalls that, with regard to damages, complainants bear the burden of proof and must provide evidence of the injury suffered, of the alleged unlawful act adversely affecting them, and of the causal link between the unlawful act and the injury (see, for example, Judgments 4637, consideration 19, 4158, consideration 7, 4157, consideration 9, and 4156, considerations 5 and 6). In the present case, the complainant’s claim for moral injury is unsupported by any argument or evidence. Consequently, the request for moral damages will be dismissed.

DECISION

For the above reasons,

1. The decision of the President of the Boards of Appeal of the EPO dated 19 December 2019 is set aside, as is the complainant's performance evaluation report for 2018.
2. The EPO shall draw up a new performance evaluation report for 2018, as indicated in consideration 8, above.
3. All other claims are dismissed.

In witness of this judgment, adopted on 23 October 2025, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 10 February 2026 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

RENÉ M. VARGAS M.