

**H. (No. 4)**

**v.**

**EPO**

**139th Session**

**Judgment No. 4979**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr A. H. against the European Patent Organisation (EPO) on 28 September 2018 and corrected on 22 November 2018, the EPO's reply of 25 February 2019, the complainant's rejoinder of 4 June 2019 and the EPO's surrejoinder of 11 September 2019;

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 2012-2013.

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.

The complainant has been a permanent employee of the Office since 2001. He works as a patent examiner. In 2004, he started suffering from severe medical problems which resulted in various absences on sick leave. As from 2005, the EPO Occupational Health Service (OHS) recommended a reduced productivity capacity without a reduction in working time. His health condition stabilized in 2007, but from 2008 onwards it deteriorated again, leading to a gradual reduction of his weekly working hours. For the period from 1 April 2012 to 31 January 2013, the OHS drew up a reintegration plan for him in which it recommended that he worked full time with a reduction of his productivity at 70 per cent. The plan was later extended until 31 December 2013.

On 2 October 2012, following the intermediate review meeting held on 7 September 2012, the reporting officer issued a “[n]otification of poor performance and opportunity to improve” letter, informing the complainant that his performance did not meet the expectations and was likely to be evaluated with a marking of “unsatisfactory” or “less than good”. A new notification letter was issued by the reporting officer on 2 July 2013, following the intermediate review meeting held on 13 June 2013 during which the “manifest lack of improvement in [the complainant’s] performance” was discussed.

A prior interview was held between the complainant and the reporting officer on 7 March 2014. On 24 and 27 March, the staff report for the period from 1 April 2012 to 31 December 2013 was signed by the reporting officer and the countersigning officer respectively. The complainant’s productivity, aptitude and the overall rating were rated as “unsatisfactory”, whereas his quality and attitude to work and dealings with others were rated as “less than good”. On 14 April 2014, the complainant attached his written comments to the report – with which he disagreed – arguing, among other things, that his medical condition had not been duly taken into account and requesting an overall rating of “less than good”. On 17 April, the reporting officer informed him that the report would remain unchanged.

On 21 April 2014, after the complainant had submitted a new medical certificate from his treating physician dated 9 December 2013, a meeting was held between him, his line manager and the OHS. The latter deemed that the complainant's productivity be increased from 70 per cent to 80 per cent as from 1 January 2014. On 23 April, the countersigning officer confirmed that the complainant's overall performance warranted a marking of "unsatisfactory".

On 5 May 2014, the complainant requested the application of the conciliation procedure set out in Section D of Circular No. 246. Before the conciliation meeting, he provided a medical certificate, dated 7 August 2014, from his treating physician in which it was indicated that his underperformance could be explained by his medical condition.

A conciliation meeting took place on 9 September 2014, but no agreement could be reached. The mediator drew up a report on 15 October 2014 and sent it to the Vice-President of Directorate-General 1 (DG1) for a decision.

The final staff report was endorsed without amendment by the Vice-President of DG1 on 31 October 2014. The complainant signed it on 25 November 2014. On 22 December 2014, he lodged an internal appeal, which was forwarded to the Appeals Committee.

On 14 June 2018, the Appeals Committee issued its opinion in which it unanimously recommended rejecting the appeal as unfounded and awarding the complainant 200 euros in moral damages for the length of the internal appeal procedure.

By a letter dated 5 July 2018, the complainant was informed that the President of the Office had decided to follow the Appeals Committee's recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that a new staff report be issued "taking full account of [his] [i]nability to perform [his duties] like a reference examiner due to his disability and [setting] objectives under consideration [of] his medical condition". He also seeks the award of moral damages, in an amount of at least 10,000 euros, plus at least 6,000 euros for the length of the internal appeal procedure, and costs.

The EPO notes that the complainant's claim on the issuance of a new staff report is irreceivable as it amounts to an injunction which the Tribunal is not competent to order. It requests that the complaint be dismissed as partially irreceivable and unfounded in its entirety.

### CONSIDERATIONS

1. In his staff report for the period from 1 April 2012 to 31 December 2013, the complainant was awarded the markings of "less than good" for the quality of his work and the attitude to work and dealings with others and "unsatisfactory" for his productivity, aptitude and for the overall performance. In his comments attached to that staff report, as well as in his internal appeal, the complainant expressed his disagreement with the markings he was awarded for productivity and aptitude, as well as for his overall performance. He has requested that they all be amended to "less than good". In its opinion to the President of the Office, the Appeals Committee unanimously recommended that the internal appeal be rejected as unfounded, but to award the complainant 200 euros in moral damages for the length of the internal appeal procedure.

2. In this complaint, the complainant requests the Tribunal to set aside the impugned decision, dated 5 July 2018, in which he was informed that, for the reasons set out by the Appeals Committee's opinion of 14 June 2018, the President had decided to fully endorse the Committee's unanimous recommendations to reject as unfounded his internal appeal contesting the markings he was awarded for productivity, aptitude and for his overall performance in the contested staff report, but to award him 200 euros "for the legal uncertainty created by the length of the [internal] appeal procedure". In addition to seeking an order to set aside the impugned decision, the complainant asks the Tribunal to order the EPO to issue a new staff report for the period from 1 April 2012 to 31 December 2013, "taking full account of [his] [i]nability to perform [his duties] like a reference examiner due to his disability and [setting] objectives under consideration [of] his medical

condition". He also seeks at least 10,000 euros in moral damages "for the physical and mental injury suffered", as well as 6,000 euros for the delay in the procedure before the Appeals Committee and the reimbursement of costs incurred in the present proceedings.

3. As the complainant challenges the impugned decision on substantive grounds, the Tribunal refers to its consistent case law which it recalls in consideration 2 of Judgment 4977, also delivered in public this day.

4. In light of the limited scope of the review the Tribunal exercises over staff reports the Tribunal may, if appropriate, set aside the contested staff report at the same time as the impugned decision and remit the matter to the EPO for review.

5. As in the comments he made in the contested staff report and in his internal appeal, in the present complaint, the complainant centrally challenges the contested staff report primarily on the basis that his medical condition was not adequately considered in assessing his performance and in awarding the contested markings. The submissions he proffers in challenging the impugned decision may be summarized as follows:

- (1) The Appeals Committee erred by not finding that his reporting officer's comments in the box markings and the overall performance rating breached the fair performance evaluation provisions of Circular No. 246, and that, in evaluating his performance, his reporting officer did not take into account his medical condition and the reduced productivity targets set for the period, thereby issuing a flawed staff report.
- (2) The Appeals Committee erred in that it did not find that the EPO Occupational Health Service (OHS) had wrongly evaluated his medical condition by not taking into account his doctors' medical certificates issued in 2014 and failed to recommend appropriate working conditions for him, thereby disregarding essential facts and failing to review the whole case in an appropriate way.

- (3) The Appeals Committee erred in that it did not consider whether the OHS had properly evaluated his medical condition in light of new medical certificates and reports that were available at the time it heard his internal appeal in 2018 and that there was a breach of the duty of care as the OHS had failed to recommend appropriate working conditions for him.
- (4) The Appeals Committee erred by failing to find that the contested staff report was arbitrary and discriminatory because it disregarded his state of health by comparing his performance with that of a healthy staff member.

6. In its opinion, the Appeals Committee correctly appreciated that its scope of review of a staff appraisal was wider than that of the Tribunal. This was by reference to the case law stated in consideration 5 of Judgment 3318, considerations 5 to 8 of Judgment 3161 and consideration 6 of Judgment 3703 to the effect that it would commit an error of law if it restricts its review by reference to the scope of the Tribunal's power of review. The Committee noted, in particular, that the case law required it to scrutinize the performance evaluation much more closely to determine whether the reporting officer had exercised her or his discretion lawfully and that its power of review extended to the overall re-examination of all matters submitted to it concerning the contested staff report. This was except to the extent that the internal rules which governs it (the Committee) provides otherwise, its role being to determine whether the decision appealed is correct on the facts or whether some other decision should be made.

7. The Tribunal is satisfied that the Appeals Committee properly exercised its power of review. The Committee noted that, based on the medical certificates the complainant had provided during the reporting period, the complainant had benefitted from a 70 per cent reduction in his required work productivity. This was on the recommendation of the OHS, whose role was to assess a staff member's working capacity, by way of the complainant's reintegration plan. That reduction was reflected in his work objectives for the reporting period. Regarding the complainant's submissions that the medical certificates which he

provided for 2014 should also have been taken into account, and essentially inviting it to reconsider the contested staff report in light of those certificates, the Appeals Committee relevantly stated the following:

“In 2014, at a time when the conciliation procedure had not yet been concluded, the [complainant] submitted two further medical certificates [...]. In the certificate dated 7 August 2014 [...], the [complainant] [...] certified a further [illness], which according to the physician negatively influenced [his] productivity in the past. The [complainant] confirmed in the hearing that regular meetings between [the] OHS and himself had taken place during the reporting period. The Appeals Committee itself is not competent to assess the medical condition of the [complainant] at the relevant time. If [he] believes that the reduction of his working time – or any other OHS[’s] recommendation – did not sufficiently take his medical condition at the time into account, [he] should request [the] OHS to reassess the matter.

[...]

[T]he Appeals Committee discerns no material ground in the present case which would lead to the conclusion that the reporting officer did not exercise his discretion lawfully or that the contested staff report was unjustified. More specifically, the Appeals Committee cannot review the staff report on the basis of facts which were unknown at the relevant time. Otherwise, the Appeals Committee would retrospectively interfere with the tasks assigned to the management of the [complainant]. Consequently, the [Appeals Committee] unanimously recommends [rejecting] the appeal as unfounded.”

8. The foregoing statements bear out that the Appeals Committee properly exercised its power of review and correctly concluded that the reporting officer made no error in establishing the contested staff report. Contrary to the complainant’s submissions, there is no legal basis that permitted either his reporting officer or the Appeals Committee to review his medical certificates to determine the degree of his working incapacity. It was for him to contest the recommendation the OHS made to reduce his work productivity to 70 per cent for the reporting period, but he did not. In any event, it was not within the purview of either his reporting officer or the Appeals Committee to question the OHS’s recommendation or to make some other evaluation of the complainant’s incapacity. It is notable that, whilst the complainant insists in effect that, based on the medical certificates he provided in 2014, and, apparently, until 2018 when the Appeals Committee considered his internal appeal, he should have benefitted from a reduced productivity capacity of more

than 70 per cent, for the 2014 reporting period, the OHS revised the complainant's productivity upwards to 80 per cent and noted that there was "no medical indication for special working hours so these can be done in normal EPO core time scheme". Moreover, contrary to the complainant's submission, by adhering to the OHS's recommendation, his reporting officer did in fact take his medical condition into account in establishing the contested staff report.

9. It follows from the foregoing that the Appeals Committee did not err by failing to find that the contested staff report was arbitrary and discriminatory because it disregarded the complainant's state of health by comparing his performance with that of a healthy staff member, as the complainant submits. Accordingly, his submissions summarized in consideration 5 of this judgment, as well as his ancillary claim for moral damages "for the physical and mental injury suffered" are unfounded.

10. Regarding the complainant's claim for compensation for the inordinate delay in the internal appeal procedure, the Tribunal notes that, in accordance with the unanimous recommendation of the Appeals Committee, the EPO has already paid the sum of 200 euros to him for this. As the complainant has not put forward any argument to justify the award of the additional amount he seeks under this head, the claim is rejected.

11. As the complainant has not prevailed either in the internal appeal procedure or in this complaint, there is no basis for awarding him the costs he seeks.

12. The preceding reasons entail a detailed and comprehensive consideration of all arguments advanced by the complainant. It cannot be assumed that in the future reasons of this character will be given and that the matter will not be dealt with in a much more summary way.

13. In the foregoing premises, the complaint will be dismissed in its entirety.



DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER