

The Administrative Tribunal,

Considering the complaint filed by Mr Thomas Paul Christian Meyer against the European Patent Organisation (EPO) on 24 September 1999 and corrected on 14 April 2000, the EPO's reply of 14 July, the complainant's rejoinder of 31 October 2000 and the Organisation's surrejoinder of 22 February 2001;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, who is of German nationality and was born in 1964, joined the European Patent Office, the EPO's secretariat, in 1991 as an assistant examiner at grade A1 in Directorate-General 2 (DG2). In April 1993 he was promoted to grade A2. At the material time he was a substantive examiner in directorate 2.3.12.

On 4 February 1997 the Director of that directorate met with the complainant to discuss his performance. He mentioned specific shortcomings in the complainant's work and warned him that, if there was no improvement, he could expect a rating of "less than good" in his staff report for 1996-1997. After the meeting, he summarised their discussion in a document entitled "Job Performance Review 1996". Under the heading "Future Action" the Director set out two courses of action which would be adopted initially for a period of six months. The first required the complainant, in the event of disagreement between him and the chairman of an examining division, to express his view in writing so that, if necessary, the question could be decided at a division meeting. As a second measure, the Director would not allocate any "oppositions" (to the granting of patents) to the complainant as "first member" of an examining division; those he had started would be reallocated. On 22 April 1997 the complainant appealed to the President of the Office asking that these measures be rescinded; he asked for the job performance review to be "invalidated" and removed from his personal file. The President informed the complainant on 28 May 1997 that he could not allow his request. It was referred to the Appeals Committee and registered as appeal No. 49/97.

At his own request, the complainant changed to a different directorate within DG2 on 1 January 1998. He signed his staff report for 1996-1997 on 22 July 1998.

In its report of 16 June 1999 the Appeals Committee unanimously recommended rejecting his appeal. The President of the Office endorsed their view and the complainant was so informed in a letter from the Director of Personnel Development on 23 June 1999. That is the impugned decision.

B. The complainant pleads that the job performance review was "illegal" and triggered a "slander campaign" against him; it contained "empty assertions". His director has not put forward any convincing evidence for his alleged serious weaknesses.

He argues that, in accordance with Article 24(2) of the Service Regulations, it was his duty to contest any order from a superior which he thought was "defective". He considered some orders he received to be "impracticable". The corrective measures instituted by his director ran counter to the provision on examining divisions in the European Patent Convention; certain patent application cases were reallocated to other examiners and "hidden" from him. The staff report, to which the review ultimately led, "contained contradictory box markings". If those ratings had been more favourable he would have been promoted to grade A3 in 1999.

The complainant argues that the "Job Performance Review 1996" infringed the General Guidelines on Reporting inasmuch as these stipulate that the staff member should be notified of any weakness "as early as possible". Since

the weaknesses identified therein were allegedly so serious, the measures mentioned in the review should have been taken earlier to prevent a decline or "stagnation" in his performance. His director should also have provided adequate training.

The complainant takes issue with the fact that, although the Service Regulations state that a complainant may claim the assistance of the translation department when filing a complaint with the Tribunal, he was denied such assistance and had to use an outside translation service at his own expense.

He asks the Tribunal to: (1) declare the job performance review "invalid" on the grounds that there was no factual basis for the shortcomings referred to therein; (2) declare it "invalid" because the measures contained in it were taken too late; (3) declare the measures "invalid" since they were not suited to remedying his alleged weaknesses, and indeed were withdrawn in December 1999; (4) declare his staff report for 1996-1997 "invalid"; (5) order the EPO to produce a new report with all ratings raised to "good"; (6) order the EPO to promote him retroactively from 1 April 1999; (7) award him moral damages at least equal in amount to his expenses - he suggests the sum of 100,000 German marks; and (8) grant him any benefit arising from "any possible legal aspect".

C. In its reply the Organisation observes that the complainant does not explicitly ask for the quashing of the impugned decision. It assumes, however, that the complainant is mainly seeking the setting aside of that decision and subsidiarily the redress he claims.

It contends that the complaint is in part irreceivable. The complainant filed his appeal on 22 April 1997 and, on 27 May 1999, put forward five supplementary claims in submissions filed in reply to the position paper of the Administration. He repeats them in the first five claims brought before the Tribunal in this complaint, but they are out of time since they were made more than two years after the complainant received the challenged job performance review. They were irreceivable in the context of his internal appeal and are irreceivable now in his complaint to the Tribunal. Moreover, his claims relating to his staff report for 1996-1997 are irreceivable for failure to exhaust the internal means of redress, because he has challenged the report in two further appeals which have yet to be taken up by the Appeals Committee. They are also outside the ambit of appeal 49/97 on which the present complaint is based. So too are his claims to promotion and to damages.

On the merits, the EPO says it gives no credence to the complainant's assertions that he was the victim of a slander campaign. As was recognised by the Appeals Committee, a director is allowed discretion in assessing a staff member's performance and has to ensure the smooth running of a department. The complainant was simply unwilling to comply with his director's instructions.

The job performance review in question was drawn up in line with the General Guidelines on Reporting which provide that a warning should be given in cases where a staff member is at risk of getting a rating of less than "good" in a staff report. He received adequate warning about the shortcomings in question. Even in 1996, the complainant's director commented orally whenever he came across a problem in a file processed by the complainant. The complainant was therefore not unaware that his performance was lacking. Furthermore, the document at issue was drawn up after discussing the matter with the complainant and was sufficiently motivated.

D. In his rejoinder the complainant notes that the Organisation has not produced any written evidence of the alleged serious deficiencies in his performance. He takes up the matter of the "campaign" against him, referring to an instance when he was "insulted and physically approached by a colleague".

Although he does not ask for the repayment of translation costs, he says that these were a consequence of the campaign mounted against him. He would like any sum awarded as moral damages to cover those translation costs. He suggests a lower sum (5,800 German marks) than that claimed as indicated under B - which could possibly be "split between different complaints".

E. In its surrejoinder the Organisation maintains the submissions made in its reply. In its view it was ultimately the complainant's attitude which led to the failure of the various measures taken by his director. It points out that the Appeals Committee found no fault with the measures set in place. On the subject of the alleged physical assault the EPO produces two documents describing the incident, rebutting the complainant's allegation, and showing that it was rather other officials who had to bear the brunt of verbal attacks made by the complainant.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Office on 1 April 1991 as an assistant examiner, at grade A1, assigned to Directorate-General 2. On 1 April 1993 he was promoted to the grade of A2. On 1 January 1996 the complainant was transferred to directorate 2.3.12.
2. On 4 February 1997 the Director of directorate 2.3.12 drafted a "Job Performance Review 1996" in which he outlined the complainant's shortcomings and the measures he thought were necessary to remedy the situation. On 14 February 1997 the complainant wrote to the Director objecting to the assessment and measures and asking that the measures be rescinded. The request was not met.
3. On 22 April 1997 the complainant appealed to the President of the Office requesting that the "Job Performance Review 1996" be considered devoid of substance and removed from his personal file and that the measures taken by the Director be rescinded. In support of this request, the complainant argued that the review violated the principle of equal treatment, as well as his right to "unbiased and objective evaluation and treatment".
4. By a letter dated 28 May 1997 the President informed the complainant that he could not allow his request. It was referred to the Appeals Committee, which recommended that the appeal be rejected on the basis that it lacked foundation. The President endorsed the Committee's unanimous recommendation on 23 June 1999. That is the impugned decision.
5. The complainant's staff report for 1996-1997 was handed to him on 19 March 1998; in it his performance was generally assessed as "unsatisfactory". The complainant filed an internal appeal against that report which was referred to the Appeals Committee.
6. The complainant makes a number of claims which are set out under B above. Claims (4) and (5) relate to his staff report for 1996-1997. The internal appeal that the complainant lodged against it was, at the material time, still pending. The Appeals Committee was asked to consider the legality of this report in the present case but declined to do so, stating: "The question of whether this assessment for 1996/97 is legally disputable is to be examined in [other appeals - Nos. 39/99 and 40/99]". The complaint is, therefore, irreceivable with regard to those two claims.
7. In his sixth claim the complainant asks to be promoted. This relief was not claimed before the Appeals Committee. The claim is irreceivable for failure to exhaust the internal means of redress.
8. The complainant argues, basically, that the Organisation presented no evidence of his purported shortcomings and that the measures were not appropriate.
9. As can be ascertained from reading the disputed job performance review, that document was the result of the repeated negative oral feedback about the complainant's work and conduct received by his director. The latter stated therein that the complainant's shortcomings amounted to "a consistent pattern which [he could] not ignore as it [was] creating a disruptive atmosphere within the Directorate" and it was not possible for him to sort out the problem on a case by case basis; he had no other choice than to take the measures described in the job performance review. Contrary to the complainant's allegations, that document is neither "insulting" nor can it be said to be "disregarding objectivity". It clearly points out the complainant's shortcomings and even underlines the positive quantitative aspects of the complainant's work. The Director was fulfilling his duty to warn the complainant that his job performance fell short of what could be expected and that he would have to improve, otherwise his ratings would be affected.
10. The complainant finds fault with the Organisation for not having filed any specific evidence of his shortcomings. He misapprehends the nature of the burden which falls upon him. It is for him to demonstrate, by evidence, that there are proper grounds for interfering with his superior's reasoned evaluation of his work, an exercise which is quintessentially one of judgment and discretion. He has signally failed to do so.
11. The complainant has not, contrary to his assertions, provided "explicit counterevidence" to support his own views. He submitted letters from patent attorneys thanking the examiner who had processed a particular application (the complainant in that case). This does nothing to advance his claim. In the absence of any evidence on the part of the complainant demonstrating any reviewable error, the defendant Organisation does not have anything to rebut.

12. The complainant has also invoked Article 24(2) of the Service Regulations in order to justify his behaviour. Article 24(2) reads as follows:

"Should an order received by a permanent employee appear to him irregular, or should its execution seem to him likely to have undesirable consequences of a serious nature, he shall convey his opinion to his immediate superior, in writing if necessary. If the latter confirms the order in writing the employee shall carry it out, unless its execution would constitute an act contrary to the criminal law in force in the country of which the employee is a national or in the country in which the order is to be executed."

13. This text has no application whatever to the facts of the present case and the complainant's reference to this article to justify his repeated reluctance to correct files in accordance with his director's instructions is unacceptable. This provision cannot serve as justification for lengthy discussions each time the complainant's director asks him to correct a file. In any event, the complainant has not filed any specific evidence where illegal or "impracticable" orders were given to him. His mere assertions are not sufficient.

14. The complaint should therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2001.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet